



**In re Estate of Martim Tuwei Samitui (Deceased) (Succession Cause 81 of 1998) [2023] KEHC 23647 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23647 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 81 OF 1998  
RN NYAKUNDI, J  
OCTOBER 17, 2023**

**BETWEEN**

**TABORUSEI CHESANG KETER ..... PETITIONER**

**AND**

**BENJAMIN KIRWA KARONEI ..... 1<sup>ST</sup> OBJECTOR**

**MARY CHESANG ..... 2<sup>ND</sup> OBJECTOR**

**RULING**

1. There are two Applications pending before this court. The first Application pending before this court is the Chamber summons dated 21<sup>st</sup> August 2023 where the Applicants seek the following orders;
  1. Spent
  2. Spent
  3. That this Honourable court be pleased to grant the Applicant leave to Review out of time against the judgment delivered by justice H.A. Omondi (Judge) on the 4<sup>th</sup> July, 2019.
  4. That this Honourable Court be pleased to order a stay of further execution of the judgement/ Decree issued by this Honourable Court in respect to this suit issued on 4<sup>th</sup> July, 2019 at Eldoret and all the consequential orders arising there from pending the hearing and final determination of this Application inter-partes.
  5. That this honourable court be pleased to review/vary and or set aside the decree issued by this Honourable Court in respect to this suit issued on 4<sup>th</sup> July, 2019 at Eldoret and to issue a fresh Decree in conformity with the law of succession.
  6. That the costs of this Application be borne by the Petitioner/Respondent.



7. That this honourable court be pleased to issue such further orders as shall be necessary for the ends of justice to be met.
2. There is a second Application dated 23<sup>rd</sup> September 2023 filed by the Wilson Kositany Maritim, a beneficiary of the estate, seeking the following orders;
  - a. Spent
  - b. This Honourable Court be pleased to summon the 2<sup>nd</sup> Petitioner/Respondent to give reasons for failing to execute the transfer instruments in favour of the Applicants.
  - c. The 2<sup>nd</sup> Petitioner/Respondent be compelled to execute the transfer instruments as per the Certificate of Confirmation of Grant.
  - d. In the alternative to (c) above the Honourable Court do order that the Deputy Registrar executes the relevant transmission forms in favour of the Applicants.
  - e. Costs of this Application.
3. The Application is premised on the grounds set out therein and the contents of the affidavit sworn by the Applicant.
4. It is my considered view that this second Application rests on the outcome of the initial Application dated 21<sup>st</sup> August 2023.

#### **Application dated 21<sup>st</sup> August 2023**

5. The Application is premised on the grounds set out therein and the averments in the supporting affidavit sworn by Benjamin Kirwa Karonei, the 1<sup>st</sup> Applicant.
6. The Applicant contends that the decree issued by this Honourable court on 4<sup>th</sup> July, 2019 has some mistake or error apparent on the face of the record by leaving out the 3<sup>rd</sup> widow of the deceased. Further, that the 3<sup>rd</sup> widow is a bonafide beneficiary who was inadvertently left out yet she is still alive and is not disputed.
7. The Applicant deponed that the trial court erred by giving a smaller share to the 1<sup>st</sup> objector/Applicant of 2 Acres than the other beneficiaries who were given 4.7 Acres each yet he is a bonafide beneficiary from the third house. That the same was in violation of section 38 of the [Law of Succession Act](#) to accord equal distributions to all the children of the deceased hence discriminatory. The Applicant further stated that the decree is erroneous on the face of the record regarding distribution of the deceased's estate since the trial court ought to have proceeded and distributed the estate between the deceased's two houses in units including the 3<sup>rd</sup> widow and the Applicant according to section 40 of the [Law of Succession Act](#).
8. The Applicant deponed that the share and mode of distribution indicated in this Honourable court's decree issued on 4<sup>th</sup> July, 2019 is discriminatory, irregular, unlawful and unsupported by any fact and contrary to section 40 of the [Law of Succession Act](#). He stated that it should also be noted that the Application herein was made three years after the impugned orders were made. The inordinate delay was caused due to the loss of the file in the registry despite the long search which has resurfaced recently after the annual audit and hence the Applicant was not indolent and has been trying to trace it in vain. The Applicant urged that the decree used to extract the certificate of Grant against the objectors/Applicants is fatally defective and void ab initio hence warrants a review. Further, that if the



Application is not granted, the Plaintiff/Respondent shall continue with the execution process to the detriment of the Objectors/Applicants.

9. The Application was opposed vide a replying affidavit dated 25<sup>th</sup> September 2023, sworn by Wilson Kositany Maritim, a son of the deceased who produced a consent to swear the affidavit on behalf of the other beneficiaries. He opposed the Application on the grounds that it was made in bad faith and as a ploy to frustrate the enjoyment of the fruits of the judgment. Further, that the Application is incurably defective as the Application is disguised as one for review when in essence it is an Appeal against the Judgment delivered on 4<sup>th</sup> July, 2019.
10. The Respondent urged that the court delivered Judgment on 4<sup>th</sup> July, 2019 distributing the estate amongst the 10 beneficiaries and a Certificate of confirmation of Grant was issued. Further, that the late Taborusei Chesang Keter petitioned for Grant of letters of Administration over their father's Estate, Maritim Tuwei Samitui which was Amended to include the Applicant; the 2<sup>nd</sup> Petitioner. Upon the demise of Taborusei Chesang Keter, their brother Kibiego Busienei Tuwei was appointed in her place and became the 1<sup>st</sup> Petitioner while the Applicant became the 2<sup>nd</sup> Petitioner. Despite receiving the said letter, the Respondent's Advocate failed to respond prompting their Advocates to do a reminder, vide the letter dated 30<sup>th</sup> March, 2023 which letter was received on 31<sup>st</sup> March, 2023 as per the Respondent's Advocates stamp on said reminder. The Respondent's Advocate then responded vide his letter dated 4<sup>th</sup> May, 2023 indicating that he would not sign the forms as he was pursuing an Appeal against the Judgment. The Respondent refused/neglect and/or ignored to sign the forms despite numerous pleas.
11. The Respondent informed the court that this cause was filed in 1998 by their late mother and the Applicant and his mother filed objection proceedings on 17<sup>th</sup> May 2003. Ever since the determination of the objection, the Applicant has never been interested in having the cause determined and the estate wound up. To date, there is no appeal four years after the Applicant expressed his intention to file one. He urged the court to intervene and compel the Respondent to execute the forms and enable the parties conclude the transmission process.

### **Analysis & Determination**

12. Upon considering the Application and the response thereto, the following issues arise for determination;
  - a. Whether the court should review the judgement delivered on 4<sup>th</sup> July 2019

### **Whether the court should review the judgement delivered on 4<sup>th</sup> July 2019**

13. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which provides as follows: -

Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

- (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.



- (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.

14. Therefore, any party seeking review of orders in a probate and succession matter, is bound by the provisions of Order 45 of the [Civil Procedure Rules](#).

The substantive provisions of Order 45, state as follows:

- (1) Any person considering himself aggrieved—
  - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) ...”

15. The Applicant must therefore demonstrate to the court that; There has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed. There has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an Application for review can be made for any other sufficient reason.

16. In [Paul Mwaniki vs. National Hospital Insurance Fund Board of Management](#) [2020] eKLR, it was said:

... a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

17. Upon consideration of the pleadings, it emerges that the Application is premised on the grounds that there is an error apparent on the face of the record.

18. The Court of Appeal in [Muyodi vs. Industrial and Commercial Development Corporation & Another](#) (2006) 1 EA 243 considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:

In [Nyamogo & Nyamogo vs Kogo](#) (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on



the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.”

### **Whether there is an error apparent on the face of the record**

19. The Applicant has set out the alleged error on the face of the record as being that the 2<sup>nd</sup> objector was left out of the distribution of the estate. Further, that the 1<sup>st</sup> objector was given a smaller share of the estate than the rest of the beneficiaries which was in contravention of section 38 of the *Law of Succession Act*. He further stated that the mode of distribution indicated in the impugned decision is discriminatory, irregular and unlawful, unsupported by any fact and contrary to section 40 of the *Law of Succession Act*.
20. I have perused the impugned judgement and it is clear that the learned judge included the objectors as beneficiaries to the estate at paragraph 20 of the decision. Therefore, the claim that they were excluded as beneficiaries is unfounded and untrue.
21. As pertains the issue of equality in the distribution, the same does not meet the threshold to be considered an error apparent on the face of the record. Whereas the objectors may feel aggrieved by the portions allocated to them, and that the court erred in not awarding them an equal portion, the same is a point of law and in reaching her decision, the learned judge considered the evidence that was presented before the court. In order for this part of the decision to be set aside, the same would have to be vide an appeal.
22. The Applicants have not demonstrated to the court that there are errors apparent on the face of the record that would warrant the setting aside of the decision delivered on 4<sup>th</sup> July 2019.
23. I take note that the Application was filed four years after the decision was delivered, which delay is attributed to the file having gone missing. Further, there is also a notice of appeal filed by the Applicants. However, the Applicant has not annexed any evidence that they attempted to locate the file other than correspondence that was filed on 5<sup>th</sup> January 2023. Hence this court by virtue of Section 80 of the CPA and order 45 (1) of the CPR has discretionary powers to exercise review jurisdiction within certain parameters as stipulated in the Act but this cannot be undertaken ad-indefinitum. The statutory anchorage on timelines for an aggrieved party to file an Appeal or on the alternative to invoke the review jurisdiction cannot operate on a blanket locus standi to approach the court at any time as he or she wishes to do so. A satisfactory basis must be laid down on the reasons for the delay and why it took such a party along period of time to exercise his or her right to access to court for remedies under Section 80 of the CPA and Order 45(1) of the CPR. To borrow the principles in *Paul Wanjobi Mathege v Duncan Gichane Mathege* (2013) eKLR . There is significance relevance to answer the question as to why the review application was not filed within a reasonable time “ The discretion under rule 4 is unfettered but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decision of this court including but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”



24. It is trite law that justice in succession matters is for each of the beneficiaries to the estate as positively defined under Section 29 of the Act. It is good law and practice that any beneficiary of objector in probate litigation from the start of the intestate or testate litigation be mindful of the other party's ardent need for a remedy or a share of the estate. Inordinate delay to prosecute Succession matters has proved hazardous to the justice system of Kenya. It is disproportionately large and excessive which can be described as injustice everywhere reckoning the facts surrounding each case in relation to the time taken to resolve succession matters. Arguably the concept of inordinate delay in succession matters from initiation to disposition has resulted in the violation of the right to speed trials and to due process for innocent beneficiaries. It is also true that a beneficiary's right to a fair hearing in the determination of property rights under the intestate and testate litigation is also enshrined in Article 50 of the Constitution on fair trial rights. These are rights not exclusively in the domain of the criminal justice system. Such rights should not be delayed on the ground of another party's whim, caprice, vexation or disinterest in the litigation. It is interesting or practically in succession matters some beneficiaries make it a habit to delay their own case on distribution of the estate without merit. This can be exemplified from the application for review which has taken more than 4 years since the last step of the court to agitate for a re-opening of the decree in an action which constitutes an abuse of process. The other beneficiaries have been prejudiced by the delay. In particular to facilitate the transmission of the estate between the parties as provided for in the Succession Act. The explanation of the missing file as the reasons for inactivity is neither heard nor there to justify the events and decisions more notably to seek for remedies under review jurisdiction. On paper the threshold on such grounds for review as crafted by the applicant fall below the criterion for the best interest of justice.
25. It is my considered view that the Application is an attempt to delay the conclusion of this cause which has been pending since 1998. The Application is made in bad faith and therefore, I find no merit in the same. It is dismissed in its entirety. The consequence of this determination is that the orders sought in the Application filed on 26<sup>th</sup> September 2023 are granted in the following terms. The Respondent therein; Benjamin Karonei Kirwa is compelled to execute the transfer instruments as per the certificate of confirmation of grant. All of the said disputes and legal proceedings on this protracted litigation can be majorly attributable to the administrator Benjamin Karonei for not complying with Section 83 of the Succession Act. It is unjust and inequitable for the administrator to hold the other beneficiaries at ransom in terms of the Succession Act. There are serious contraventions of his ethical and legal responsibilities as an administrator which if not remedied deserve removal taking into account the interest of justice of the matter in question. The delay is inexcusable. In exercising my discretion in terms of Section 1(A) 1(B) & 3(A) of the Civil Procedure Act and Rule 73(1) of the Probate and Administration Rules this court draws from the inherent powers in circumstances where there has been a clear abuse of the process of the court by and Administrator by means of obstructing conveyance or transmission of the estate to the known legal beneficiaries of the deceased. In applying the above statutory provisions, I hereby in respect of the distribution of the estate the Deputy Registrar of the High Court at Eldoret be and is hereby directed to exercise jurisdiction of an administrator to sign the necessary instruments of transmitting the various immovable and movable assets of the deceased to the relevant beneficiaries. Orders accordingly. I make no orders as to costs.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 17<sup>TH</sup> DAY OF OCTOBER 2023**

In the presence of

M/s Koech Advocate

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**R. NYAKUNDI**



**JUDGE**

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