



In re Estate of Elias Njiru Chandi (Deceased) (Succession Cause 108 of 2008) [2023] KEHC 23841 (KLR) (17 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 108 OF 2008**

LM NJUGUNA, J

OCTOBER 17, 2023

IN THE MATTER OF THE ESTATE OF ELIAS NJIRU CHANDI (DECEASED)

ESTHER NJIRO.....1ST APPLICANT

REBECCA NG'ANG'A.....2ND APPLICANT

FAITH NJERU.....3RD APPLICANT

BETWEEN

ESTHER NJIRO 1ST APPLICANT

REBECCA NG'ANG'A 2ND APPLICANT

FAITH NJERU 3RD APPLICANT

DAVID WAHOME MATU 4TH APPLICANT

AND

PETER NDEGWA CHANDI 1ST RESPONDENT

POLYCARP KARIUKI CHANDI 2ND RESPONDENT

AND

SILVUN KAMAU KANGETHE (DECEASED) INTERESTED PARTY

MARGARET WANJIKU KAMAU INTERESTED PARTY

AND

DAVID WAHOME MATU BENEFICIARY



RULING

1. The applicants filed the notice of motion dated 20th February 2023 seeking orders that:
 - a. Spent;
 - b. This honourable court be pleased to review, vary and set aside the ruling and orders of the Hon. Lady Justice Lucy Njuguna delivered on 2nd February 2023 which held that the succession cause had been finalized and that the application for revocation had not been prosecuted;
 - c. This honourable court be pleased to hear the application of the applicants dated 16th November 2021 on its merits and make a just and fair determination.
 - d. The costs of this application be in the cause.
2. The deponent of supporting affidavit to the notice of motion stated that the respondents along with their mother applied for a certificate of confirmation of the grant without the consent of the applicants, and the same was issued on 21st July 2011. That the applicants moved the court for revocation of the certificate of confirmation of grant and orders for re-distribution of the estate. That the matter was screened and referred for court annexed mediation which culminated into a settlement agreement.
3. It is his case that the parties moved the court to set aside the settlement agreement and to this motion, the court directed that parties do file their written submissions. That they all complied, but before the ruling was delivered, the 2nd interested party who is the wife of the 1st interested party filed summons for rectification of the certificate of confirmation of grant, so that the portion vested in the 1st interested party should vest in one David Matu Wahome. That the parties took directions that the application for rectification should be served upon all the parties and be mentioned before the Judge on 07th July 2022 but the court did not sit and the matter was scheduled for further mention on 05th December 2022.
4. He averred that the court again referred the matter to court-annexed mediation in a bid to resolve the application for rectification but this time, the mediation proceedings were unsuccessful and the matter was referred back to court. That on 05th December 2022, Hon. Justice Wendoh noted that an amended grant had been issued on 04th August 2022, a fact that the applicants found questionable. It was his averment that the applicants had not been invited for hearing of the application for rectification of the certificate of confirmation of grant but the rectification had been made as prayed by the 2nd interested party.
5. He stated that the application for revocation of the grant had preceded the application for rectification and therefore, it should have been dispensed with first. He added that the court's ruling indicating that the matter has been finalized, denied the applicants a chance to prosecute the application for revocation which was on course but was interrupted by the court's action referring it for mediation, entertaining the application for setting aside the mediation agreement and the application for rectification of grant. That the court has jurisdiction to review its ruling and set it aside, and so it should.
6. The application dated 20th February 2023 was opposed by the respondents vide grounds of opposition stating that the application is an abuse of court process and should be dismissed. They also stated that the applicants should explore the option of appealing against the impugned ruling and/or orders. On his part, the beneficiary/applicant herein filed a notice of preliminary objection stating that the court had determined the issues and had become functus officio. That the application is bad in law and the



- supporting affidavit has no evidentiary value. He termed the same as “hot air” and a gross abuse of the court process.
7. The applicants responded to the notice of preliminary objection stating that the same is incurably defective, having been filed by a non-party to the suit. That the amended certificate of confirmation of grant issued on 04th August 2022 is the genesis of the error which this application seeks to cure. That the applicants have only deposed on issues already existing on the court record.
 8. In the pendency of all the foregoing, the beneficiary/applicant filed summons general dated 24th May 2023, seeking orders that the Deputy Registrar of the High Court executes all the necessary documents to enable him be registered as the absolute proprietor of the land parcel number Embu/Municipality/1112/75 as per the amended certificate of confirmation of grant dated 04th August 2022. He relied on the ruling of the court dated 02nd February 2023 and stated that after the court’s finding that the matter had been finalized, the administrators of the estate have since refused to transfer the property to him. That they are determined to keep the matter in court and render the proceedings a circus.
 9. The applicants filed grounds of opposition to the summons dated 24th May 2023 stating that the beneficiary/applicant is a stranger to the proceedings and that his application is premature, therefore, the orders sought can only be granted once the application dated 20th February 2023 is determined. They also disputed the fact that the beneficiary/applicant seeks to be registered as proprietor of the whole of property number Embu/Municipality/1112/75 whereas he is only entitled to ½ of it, if at all. The respondents also filed a replying affidavit refuting the prayers sought in the summons dated 24th May 2023, stating that the beneficiary/applicant was only entitled to half of the property number Embu/Municipality/1112/75 and not the whole as per his application.
 10. The court directed that both applications dated 20th February 2023 and 24th May 2023 be canvassed by way of written submissions. All the parties complied, save for the 2nd interested party.
 11. On the applicants’ submissions regarding the summons dated 24th May 2023, on the question of whether the beneficiary/applicant was a stranger to the suit, they relied on Order 1 of the *Civil Procedure Rules*. That the beneficiary/applicant lacked locus standi and for this argument they relied on the cases of *Zephir Holdings Ltd. v Mimoso Plantations Ltd & 2 others* (2014) eKLR, *Kingori v Chege & 3 others* (2002) 2 KLR 243, *Pravin Bowry v John Ward & another* (2015) eKLR, *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* (1999) 1EA 55 and *Martin Kirima Baitambu v Jeremiah Miriti* (2017) eKLR.
 12. On issuance of an amended certificate of confirmation of grant following an error on the face of the court’s record, they relied on section 74 of the *Law of Succession Act* and Rule 43 of the *Probate and Administration Rules* which limits the kind of rectifications that may be made to grants of representation. It was their argument that the 2nd interested party did not have capacity to move the court for such rectification and especially considering that the parties were not served with the application for rectification. That the amended certificate of confirmation was irregularly issued. Regarding division of property number Embu/Municipality/1112/75, they stated that the estate of the deceased herein owns ½ of the property while the estate of the 1st interested party owns the other ½. That the beneficiary/applicant who claims the title in the name of the 1st interested party should claim it under the estate of the deceased 1st interested party.
 13. They stated that the Deputy Registrar cannot execute transfer documents regarding property in the estate of the deceased that has a personal representative in whom all the property of the deceased vests. For this argument, reliance was placed on section 79 of the *Law of Succession Act*, Rule 43 of the Probate



and Administration Rules and the case of in Re Estate of the Late Kubuta Kamara Nguuro alis Pharis Njegegu (2021) eKLR. That the error on the court's record was occasioned by Hon. Justice Wendoh even though it was Hon. Justice Njuguna who had the conduct of the matter and on 12th April 2022, had scheduled the matter for further directions on 05th December 2022.

14. The respondents, in their submissions relating to both applications, relied on their responses to the applications and urged the court to find that both have no merit. That the applicants should file an appeal against the impugned ruling and that the action of the court in issuing the amended certificate of confirmation of grant rendered all the pending applications untenable and therefore the matter was finalized. That the application dated 20th February 2023 does not challenge the amended certificate of confirmation of grant and is therefore incompetent. It was their case that the application does not meet the threshold for review under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. Reliance was placed on the case of Hosea Nyandika Mosagwe & 2 Others v County Government of Nyamira (2022) where the court defined what an error apparent on the face of the record means.
15. They added that the issues raised by the applicants cannot be determined unless the court carries out a detailed examination of the whole court record. That the application was in fact brought in the wrong form as a notice of motion instead of summons as per Rule 59(1) of the *Probate & Administration Rules*. As regards, the application dated 24th May 2023, they stated that the administratrix Ruth Gicuku Chandi died on 08th June 2012 and therefore cannot execute the transfer documents for the beneficiary/applicant. That the beneficiary/applicant has not demonstrated that his efforts to have the transfer documents signed by personal representatives have been frustrated.
16. The beneficiary/applicant termed the application dated 20th February 2023 as a non-starter because the court had already declined to grant the plea on 2nd February 2023 when the matter was in court. For this argument, he relied on Order 45 Rule 6 of the *Civil Procedure Rules*. He termed the application as baseless in law and cannot also find footing under *the constitution* as alleged by the applicants.
17. The issues for determination are as follows:
 - a. Whether the orders sought in the application dated 20th February 2023 can be granted in light of Order 45 of the *Civil Procedure Rules*;
 - b. Whether the orders sought in the application dated 24th May 2023 can be granted.
18. In the application dated 20th February 2023, the applicant seeks that the court reviews its ruling and subsequent orders specifically stating that the matter had been finalized. Order 45 Rule 1 and 3 of the *Civil Procedure Rules* provide for review 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.



3. When court may grant or reject application [Order 45, rule 3.]
 - (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.
 - (2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

19. Further, In the case of *John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another* (2016) eKLR, the court cited Rule 63 of the *Probate and Administration Rules*, and then stated as follows:

“As stated above, the only provisions of the *Civil Procedure Rules* imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the *Probate and Administration Rules*. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the *Civil Procedure Rules*.”

20. For the court to review its findings and orders, it must be satisfied that any of these three requirements have been met:
 - a. 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; or
 - b. There has been some mistake or error apparent on the face of the record; or
 - c. Any other sufficient reason.

21. Of these three, the applicants have cited that there was an error apparent on the face of the record. Now, an error on the face of the record is considered strictly as a “somewhat superficial” mistake which the court or the parties do not need to look too far to find. In other words, considering the facts of the case, an error such as this, does not require that in-depth arguments are made or the court has to resort to the substance of the suit itself to find it. I agree with the sentiments of the court in the case of *Muyodi v Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243 where the court of appeal addressed this issue 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.”

22. Similarly, the court in the case of *Paul Mwaniki v National Hospital Insurance Fund Board of Management* (2020) eKLR, held thus:

“... 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. The term “mistake or error apparent” by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the *Civil Procedure Rules* and Section 80 of the *Act*. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.” (emphasis added)

23. That being said, it is my view that there may well be an error in the ruling delivered on 02nd February 2023, but the same cannot be sufficiently cured through a review. Whatever error alleged by the applicants calls for an in-depth understanding of the issues in the case wholesomely. This may be a perfect case for an appeal because a review may cause this court to sit on appeal in its own decision. On this basis, this court is not able to grant orders sought through the application dated 20th February 2023 the same should fail.
24. Under Order 45, the court may also review its findings where there is “any other sufficient reason” to do so. The parties herein have expressed themselves on the reasons why the court should grant or deny the orders sought through application dated 20th February 2023. I shall explore this discretion by revisiting the activity of this court on 07th July 2022, when the court directed that the matter be brought up on 05th December 2022. However, before this date, an application for rectification of the grant was filed, heard and rectification granted, culminating into an amended certificate of confirmation grant dated 04th August 2022. The applicants stated that they were not served with the application for confirmation of grant and the application for rectification of the confirmation certificate which sought to replace the name of the deceased 1st interested party with David Matu Wahome. There is no proof that the applications were indeed served upon the applicants. It is on this basis that I find sufficient reason to review the ruling dated 02nd February 2023.
25. On the second issue for determination, arising from summons dated 24th May 2023, the beneficiary/ applicant seeks that the court does execute the transfer document to enable him become absolute proprietor of ½ of Embu/Municipality/1112/75 which initially belonged to the deceased 1st interested



party. The Beneficiary/applicant was listed as beneficiary of half of Embu/Municipality/1112/75 in the amended certificate of confirmation of grant. The said amended certificate of confirmation of grant is impugned and may well be the subject of an appeal if the applicants choose to take that route.

26. I take note that the said portion of land was sold to the beneficiary/applicant vide sale agreement dated 16th February 1990. The 1st interested party died on 16th October 2020 but before transferring the property to the beneficiary/applicant. The whole of property Embu/Municipality/1112/75 was initially jointly owned by the deceased herein and the 1st interested party. In my view, this half portion of Embu/Municipality/1112/75 being claimed by the beneficiary/applicant cannot be distributed within the estate of the deceased herein but rather through the estate of the 1st interested party.
27. As it is now, I find that the application dated 20th February 2023 is meritorious and is hereby allowed with orders as follows:
 - a. The ruling and orders of this court dated 02nd February 2023 are hereby reviewed and set aside.
 - b. The Applicant's Application dated 16th November 2021 to be heard and determined; and
 - c. Each party to bear their own costs of the application.
28. As regards summons dated 24th May 2023, I find that the same lacks merit and is hereby dismissed with no orders as to costs.
29. It is so ordered

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF OCTOBER, 2023.

L. NJUGUNA

JUDGE

.....for the Applicants
.....for the Respondents
.....for the Interested Parties
.....for the Beneficiary/Applicant

