



**In re Njeru Morris (Miscellaneous Application E007 of 2022)
[2023] KEHC 23846 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION E007 OF 2022
LM NJUGUNA, J
OCTOBER 17, 2023
IN THE MATTER OF PRESUMPTION OF DEATH OF NJERU MORRIS**

BETWEEN

SILVESTER NJERU MORRIS NYAGA APPLICANT

AND

JOSEPHINE NJURA NJUE RESPONDENT

RULING

1. The applicant filed the notice of motion dated 04th May 2023 based on the grounds set out on its face and in the supporting affidavit, seeking orders that:
 - a. Spent;
 - b. This honourable court be pleased to review and set aside orders given on the 07th June 2022 and issued on 08th June 2022 presuming and declaring Njeru Morris dead and that a certificate be issued;
 - c. This honourable court be pleased to make a finding that the proper statutory procedure for declaration of a presumption of death was not followed and the same amounts to an error of law;
 - d. This honourable court be pleased to make a finding that the respondent's application dated 03rd June 2022 is fatally defective;
 - e. This honourable court be pleased to declare any consequential action in as far as the orders issued on 08th June 2022 are concerned, null and void;
 - f. This honourable court be pleased to issue any further orders and relief it may deem just to grant in the interest of justice; and



- g. The costs of this application be provided for.
2. It is the applicant's case that the respondent filed an application dated 03rd June 2022, seeking orders that the applicant herein be presumed dead. On 08th June the court issued an order granting this prayer. That the procedure for declaration of presumption as provided for under sections 386,387 and 388 of the *Criminal Procedure Code* was not followed and that this was an error on the court's record. That the respondent's amended notice of motion was supported by an unsigned and undated supporting affidavit, and that the same should be expunged from the record alongside all the annexures thereto. He stated that there is newly discovered evidence that was not available initially and so this court should review its orders.
 3. That the person whom the respondent sought to be presumed dead was not properly identified using a nation identification card but just the name Njeru Morris which is a common name. He averred that following the court's order on 08th June 2022, the respondent has proceeded to seek registration of the applicant's death with the Civil Registration Services, applied for grant ad litem and then filed an ELC case against the applicant herein. He stated that the applicant will suffer irreparable harm because the respondent is in the process of procuring a certificate of death.
 4. The applicant produced evidence that he acquired his additional names through baptism and that Njeru Morris and Silvester Njeru Morris Nyaga refer to one and the same person. That the respondent is only interested in the applicant's property title number Kyeni/Kigumo/1442. He stated that the respondent is his step-sister and that it is one of her own biological brothers named Protasio Karioko who went missing in the 1970's and has never been found. He produced copies of his identification documents as issued by the government. The application was also supported by the affidavit sworn by Lawrence Morris Njue Gachovia, Lucy Gatavi Ndwiga and James Namu Nyaga who confirmed the deposition by the applicant.
 5. The present application was opposed through a notice of preliminary objection on the ground that the application is *res judicata*. The respondent also filed grounds of opposition stating that the application does not meet the threshold for review under order 45(1) of the *Civil Procedure Rules*. Further, in her replying affidavit the respondent stated that the applicant was indeed her biological brother and not a step-brother as their polygamous father named two sons from the two different houses with the same name that is Nyaga Morris. That the names Protasio Karioko were not the official names used by her missing brother who disappeared over 50 years ago and that the other brother by the same name changed his name to Silvester Njeru Morris and that he fraudulently acquired title number Kyeni/Kigumo/1442 belonging to the missing brother on the advantage of the similar name. She stated that if the applicant's arguments are anything to go by, then it means that he procured the property when he was 9 years old which is disputed because the land laws in 1961 forbade ownership of land by minors. That a search of the title shows that the land was transferred to the applicant in 1978, 6 years after disappearance of the respondent's brother. She otherwise denied the averments made by the applicant in his application.
 6. The applicant filed an affidavit in response to the respondent's preliminary objection, grounds of opposition and replying affidavit. He stated that he was the only son of his father who was named Njeru Morris and that there was none other in the polygamous family. He produced evidence that the baptismal card produced by the respondent was a forgery. That he acquired the property Kyeni/Kigumo/1442 through adjudication from the clan, and that the impugned orders of the court were made relating to Njeru Morris who was the proprietor of the said land. That no evidence has been produced to support the identity of the brother of the respondent who went missing. That the respondent forged the evidence and signatures of their sister Lucia Iruki in support of her case seeking



- orders presuming the applicant dead. He added that the OB produced lacked information on what was reported to the police and that the supporting affidavit to the application was fatally defective.
7. The application was canvassed by way of written submissions and both parties filed their submissions.
 8. The applicant submitted that on the respondent's argument that the application was *res judicata*, the applicant had not participated in prosecuting the application that culminated into the impugned orders. That the orders can be reviewed based on the evidence adduced by the applicant. That the succession and ELC cases have no bearing on the application herein. That the procedure for presumption of death is found under sections 386, 387 and 388 of the [Criminal Procedure Code](#) and Section 118 of the [Evidence Act](#) and that the same was not followed in granting the orders. For this argument he cited the cases of [In re the matter of Pius Mukono Murage \(Presumed DCD\)](#) (2019) eKLR and [In re application for presumption of death of Julius Mutui Kimweli](#) (2016) eKLR.
 9. He decried the court's reliance on a fatally defective affidavit to grant its orders, citing Order 2 Rule 6 of the [Civil Procedure Rules](#) and section 5 of the [Oaths and Statutory Declarations Act](#). Reliance was placed on the cases of [Rajput v Barclays Bank of Kenya & 3 Others](#) (2004) 2 KLR 393 and [Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others](#) (2018) eKLR. It was his argument that the respondent failed to prove that there existed another person with similar names as him and that he has since produced records to show that the missing brother of the respondent went by the names Protasio Karioko and not Njeru Morris. He stated that he had been wrongly presumed dead and that the court should review its findings to that effect.
 10. The respondent submitted that the applicant had stolen the identity of her long-lost brother and taken over his property in disregard of the entitlement of the rest of the siblings to the property. That vide application dated 02nd August 2022, the applicant brought a similar application and the same was heard interpartes and settled. She cited the case of [Njangu v Wambugu & Another](#) Nairobi HCCC No. 2340 of 1991 (unreported). On the argument that the application does not meet the threshold for review, she cited Order 45(1) of the [Civil Procedure Rules](#) and the case of [Evans Bwire v Andrew Aginda](#) Civil Appel No. 147 of 2006. That the long-lost brother's story has to be told alongside the applicant's story for this court to determine the issues before it. She stated that to grant the orders sought would be prejudicial to the respondent and the rest of the siblings. She stated that the correct procedure was followed in light of section 118A of the [Evidence Act](#) in presuming the applicant dead.
 11. From the foregoing, in my view, the issues for determination are as follows:
 - a. Whether the application is *res judicata*;
 - b. Whether the application dated 03rd June 2022 was fatally defective in light of the unsigned and undated supporting affidavit; and
 - c. Whether the application meets the threshold for granting orders for review.
 12. On the first issue, the applicant indeed filed an application dated 02nd August 2022 seeking orders similar to the ones sought herein. The same was admitted by the court and at the interparties hearing, the applicant stated that he wished to withdraw the application. The court marked the matter as closed. *Res Judicata* is provided for under section 7 of the [Civil Procedure Act](#) as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.” (emphasis mine)

13. The issues raised in the application dated 02nd August 2022 were not determined with finality by the court. As a result, I do not think the application herein is *res judicata* on account of the fact that the previous application was not heard, neither did the court make its determination. Order 25 Rule 1 provides:

“At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”

14. When faced with a similar question and in circumstances such as the ones before me, the court in the case of *Rose Juma Ogola & 2 others v Paustina Anyango & another* (2020) eKLR stated thus:

“... Thus any withdrawal of a suit does not bar any party from filing a fresh suit. Order 25 makes it self-explanatory that a withdrawn suit cannot make a fresh suit *res-judicata*. In light of the analysis of the status of each of the suits relied on by the defendants/applicants none of them can render the current suit *res-judicata*. I find this line of objection as lacking in merit.”

15. On the second issue of whether the application dated 03rd June 2022 was fatally defective, I am guided by section 8 of the Oaths and Statutory Declarations Act which states:

“A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.” (emphasis mine)

16. The supporting affidavit to the said application was intended to be deposed by the ex-parte applicant who is the respondent herein. After the averments made therein, the said affidavit indeed was not signed or dated by the deponent. However, it is surprising that the same was commissioned by one Byaruhanga McRonald being an Advocate and Commissioner for Oaths without the signature of the deponent who “signed” before the commissioner for oaths. This indeed is a flaw, which renders the affidavit fatally defective. Unfortunately for the deponent thereof, the affidavit was used to produce 3 annexures in support of the application, but the affidavit itself was fatally defective. This means that if the affidavit is to be disregarded, then the evidence produced by it is also to be disregarded. In the case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* (2018) eKLR (*supra*) the court held that:

“We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.”



17. As to whether the orders of the court should be reviewed, I am guided by Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 and 3 of the *Civil Procedure Rules* provide for review as follows:

Section 80: Review

Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1

(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.

Order 45 Rule 3

3. When court may grant or reject application

- (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.

18. For the court to review its findings and orders, it must be satisfied that any of these three requirements have been met by the applicant:
- 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.
19. In the present case, I am convinced that there was truly an error on the face of the record, an error which was occasioned when the ex-parte applicant misled the court through an incompetent application. 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 v 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.”

20. 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)

21. In the end, I shall allow the application as it has merit. The following orders to issue:
- The orders given on the 07th June 2022 and issued on 08th June 2022 presuming and declaring Njeru Morris dead, are hereby reviewed and set aside;
 - It is hereby declared any consequential action in as far as the orders issued on 08th June 2022 are concerned are null and void;
 - Each party to bear its own costs.



22. It is so ordered.

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

L. NJUGUNA

JUDGE

..... for the Applicant

..... for the Respondent

