In re Estate of the Late Naftaly Murege Muthigani (Deceased) (Succession Cause 529 of 2006) [2024] KEHC 14035 (KLR) (13 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14035 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE 529 OF 2006

DKN MAGARE, J

NOVEMBER 13, 2024

IN THE MATTER OF THE ESTATE OF THE LATE NAFTALY MUREGE MUTHIGANI (DECEASED)

BETWEEN

OBED MUOYA MUREGE ..... PROTESTOR

AND

JOHNSON A MWANGI MUREGE ..... PETITIONER

RULING

1. This is a ruling on the Amended Summons General dated 12/1/2024 and filed by the Protestor seeking the following reliefs:

    a. Spent

    b. Spent

    c. The Honourable court be pleased to review its ruling dated 18/10/2017 declaring that Samuel Maina Naftaly Murege alias Kiige s/o Murege was incapable of acquiring LR Lower Muhito/Mutundu/23 as at 17th September 1959 as he was a minor 12 years old.

    d. In granting (c) above the court do declare that Samuel Maina Naftaly Murege alias Kiige s/o Murege was registered proprietor of LR Lower Muhito/Mutundu/23 to hold in trust for himself and his siblings.

    e. The court do reaffirm the Applicant's hereditary interest and redistribute the property accordingly.

2. The Respondent as Petitioner filed a replying affidavit sworn by one Titus Gachora Mwangi deposing inter alia that the judgment of the Court was not appealed and effectively settled the matters in controversy and that the application was incompetent as there was no mistake or new matters raised.

Submissions

3. The Applicant filed submissions dated 5/8/2024. The Applicant went out of way and described how Samuel Maina Naftaly Murege alias Kiige s/o Murege was the registered proprietor of LR Lower Muhito/Mutundu/23 to hold in trust for himself and his siblings. There was no submission on the grounds upon which review can be established.

4. On his part, the Respondent filed submissions dated 17/7/2024. It was submitted that the application for review was a disguised application to revoke the grant and should be dismissed.

Analysis

5. The issues for my determination are whether the Applicant has met the legal threshold for an order of review of the impugned Ruling.

6. 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. The party must however bring the issue for review within the remit of the law. The grounds for review are applicable to succession matters and should be proved.

7. An application of this nature must meet the substantive requirements of an application brought for review set out in Order 45 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act* as stated in *John Mundia Njoroge v Cecilia Muthoni Njoroge & another* [2016] eKLR, where the court cited Rule 63 of the *Probate and Administration Rules*, and 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*.

8. The civil jurisdiction to review an order, decree or ruling is underpinned in Section 80 of the *Civil Procedure Act* as follows:

> "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".

Section 63 (e) of the *Civil Procedure Act* states that:

> "In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient

9. It is beyond peradventure that the applicant has to demonstrate 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. Review is buttressed in Order 45 Rule 1 of the *Civil Procedure Rules*:

> "(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) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

10. An 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 or the court proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law. In other words, if a court reached a different conclusion based on the same facts, it cannot be a ground for review because this court believes that the court of coordinate jurisdiction was plainly wrong or it reached an erroneous conclusion of law. It could even be true that the court was wrong; but there is no room for correcting another high court judge. In the case of *National Bank of Kenya v Ndungu Njau* (1997) eKLR the court stated as follows:

> 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.

11. Further, even where the review is to the same court, the court cannot simply change the decision because it has not seen darkness or is wiser. The doctrine of finality militates against this. The doctrine of finality enables the court to bring litigation to a close. As stated in the case of *Joshua E A Matimu v Galaxon Kenya Limited & County Government of Vihiga; Ethics and Anti-Corruption Commission (EACC) (Interested Party)* [2022] KEHC 2451 (KLR), Ochieng J, as he then was posited as follows: -

> " *Black's Law Dictionary*", 10th Edition defines Functus Officio as follows;
>
> "Latin – having performed his or her office.
>
> (Of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished. The term is sometimes abbreviated to functus."
>
> 18. Thus when the court had rendered a verdict on issues which had been canvassed before it, the duty or function of the said court had been accomplished.
>
> 19. The court that has already accomplished its duty, (by delivering its Ruling or Judgment) ought to decline the invitation of any of the parties to re-open the issues.
>
> 20. If any party was dissatisfied with the decision of the Court, the said party may lodge an appeal.
>
> 21. In my considered view, the doctrine of finality comes into play once the court had rendered a final decision on the issues before it, regardless of whether or not the principle of res judicata can be invoked. In other words, whilst the doctrine of finality and the principle of res judicata both bar the re-opening of issues that had been adjudicated, the two are not synonymous.

12. In *Telkom Kenya Ltd v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd)* (2014) eKLR the Court of Appeal discussed the principle of functus officio and stated that the principle was meant to prevent the re-opening of a matter before a court that rendered the final decision thereon and posited as doth:

> " The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."

13. The Applicant laments on what he perceives as the reasoning of the court. There is no specific plea of any of the grounds upon which a review could be made. The Applicant ought to understand that the jurisdiction circumscribed by the definitive limits fixed by the language used in Order 45 Rule 1, of the *Civil Procedure Rules* supports what he is alleging to be a form of an appeal in disguise.

14. It is in the same vain that the jurisdiction to determine the question of review does not allow the court to delve into evidence as to reverse the decree or order as by so doing this court will be acting without jurisdiction, and to be sitting in appeal to the same court. As Kuloba J (as he was then) eloquently stated in *Lakesteel Supplies v Dr. Badia and another* Kisumu HCCC No 191 of 1994 that:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or

order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

15. The submissions as to the merits of whether Samuel Murage Naftaly is the same as Kiige s/o Murege are matters that were before the learned Judge and it has not been established how the learned Judge proceeded on an apparent mistake of fact or how any matter that was not in the knowledge of the Applicant on due diligence has now arose, or any sufficient cause. This court cannot accede to the invitation to vary or rescind its own decision. The Court of Appeal in *Mahinda v Kenya Power & Lighting Co. Ltd* [2005] 2 KLR 418 expressed itself as follows:

> " The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

16. Consequently, the alleged review discloses no error or new matter of evidence or sufficient cause and these parameters are also not self-evident. It requires reevaluation of evidence. I cannot entertain it. The Applicant had the opportunity to fill up its case in the pleadings and at trial and not after ruling. In the case of *Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party)* [2019] eKLR it was held that: -

> " ...A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay."

17. The court holds and finds that the mere possibility of two views on the subject as fronted by the Applicant cannot be a ground for review. The *Code of Civil Procedure*, Volume III Pages 3652-3653 by Sir. Dinshaw Fardunji Mulla states:

> " The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code

of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

18. Therefore, I am of the view that the Applicant has not laid any basis for which this court can found review. The application fails in totality.

19. Costs follow the event. Section 27(1) of the *Civil Procedure Act* provides as doth:

> Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:
>
> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

20. The determination of costs payable to the successful party is also a judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

Determination

12. The upshot of the foregoing is that I make the following orders:

    a. The Summons General application dated 3/4/2023 and amended on 12/1/2024 is dismissed.

    b. This being a succession dispute, each party to bear their own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 13TH DAY OF NOVEMBER, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Ombongi for the Protestor/Applicant

Mahalia for the Petitioner/Respondent

Court Assistant – Jedidah