



**In re Estate of Pharis Muigai Mwangi (Deceased) (Succession Cause  
2319 of 2009) [2024] KEHC 13736 (KLR) (Family) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13736 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 2319 OF 2009  
PM NYAUNDI, J  
NOVEMBER 8, 2024  
IN THE MATTER OF THE ESTATE OF PHARIS MUIGAI MWANGI (DECEASED)**

**RULING**

1. This ruling relates to two Applications dated 15<sup>th</sup> May 2023 and 10<sup>th</sup> August 2023. The Applicant in Application dated 10<sup>th</sup> August 2023 has also filed a preliminary objection dated 20<sup>th</sup> March 2024 against application dated 15<sup>th</sup> May 2023
2. The Preliminary Objection is framed as follows-
  - a. As provided for under Section 76(c), the Grant in this cause has become useless and inoperative through subsequent circumstances. The same cannot be amended but should be revoked and a new one issued.  
  
Reasons wherefore the Respondent prays that the Honourable court
    - i. Dismisses or strikes out the application dated 15<sup>th</sup> May 2024
    - ii. Being a family matter, each party to bear its own cost.
3. In submissions dated 20<sup>th</sup> May 2024, the Respondent in application dated 15<sup>th</sup> May 2023 correctly points out that given that the grant has become inoperative the proper prayer is for revocation of the grant and not amendment as pleaded by the Applicant.
4. It is not disputed that Irene Nyakairu Mwangi is dead. To allow the estate to be administered the grant with the deceased administrator will have to be revoked. In exercise of the mandate of the Court as provided under Section 47 and Section 76 of the Law of Succession Court and rule 73 of the Probate and Administration Rules, this court may proceed to revoke a grant on its own motion. This is an appropriate case to do so.
5. The Applicant in application dated 15<sup>th</sup> May 2023 also seeks the removal of the Ruth Njoki Mwangi as an Administrator, as she states that she is not being cooperative and has therefore frustrated the



transmission of the Estate as per certificate of confirmation of Grant. The Applicant seeks further to dispense with the production of original title deed and documentation in respect of estate properties namely; Loc. 3/ Githumu/153, Loc 3/ Mungaria/364, Loc16Ndungu Chege/ 194, Loc. 3/ Githumu/ 565/ 10A/ Loc 3/ Githumu/ 565/68 A, Loc.3/ Githumu/ 565/ 68 B, Plot A Githumu, Plot 658 A as the same cannot be traced.

6. That Application to remove Ruth Njoki Mwangi is opposed by the respondent explaining that she was initially minded to appeal the decision of 4<sup>th</sup> June 2019 but on consultation she has opted to apply for rectification / review of the certificate on account of the errors on the face of the record. She is of the view that justice will be served if her shares are consolidated and not have assets that are allocated to her spread far apart.
7. In addition to her reply, she has filed an application dated 10<sup>th</sup> August 2023, in which she seeks rectification of the grant. The Application is presented under Sections 1A, 1B, 3A 63(e) and 80 of the Civil Procedure Rules and Rule 45 of the Civil Procedure Rules. She seeks to rectify what she refers to an error on the face of the record.
8. The Respondent herein opposes the Application and has sworn a replying affidavit in opposition on 22<sup>nd</sup> September 2024. Both parties complied with directions issued to canvass the Applications by written submissions.
9. Grace Wairimu Karobia's submissions are dated 2<sup>nd</sup> May 2024. She identifies 2 issues for determination;
  - a. Whether there are sufficient grounds to revoke the Grant of Letters of Administration issued to Irene Nyakairu Mwangi, Grace Wairimu Karobia and Ruth Njoki Mwangi on 10<sup>th</sup> April 2017 and confirmed on 4<sup>th</sup> June 2017(sic)?
  - b. Whether the Applicant is entitled to the reliefs sought?
10. The Applicant submits that she has met the threshold for revocation of grant as stipulated under Section 76 and relies on the decisions in Re Estate Prisca Ong'ayo Nande (Deceased) [2020]eKLR; Estate of Simon Ngugi Nganga (Deceased) [2013] eKLR; Estate of Wainaina Icharia ( Deceased) (MiscApplicationE214 of 2022)[ 2023 [KEHC 24357 (KLR) and Estate of David Mbai Nthusi ( Deceased)[2015] eKLR.
11. It is further submitted that the grant in respect of Ruth Njoki Mwangi should be revoked as she has failed in her duties as an Administrator as provided under Section 83 of the *Law of Succession Act*. It is alleged that her actions have frustrated the transmission of the Estate. It is submitted that in the absence of any stay of execution of the judgment delivered on 4th June 2019, the Respondent is obligated to comply with the decision of the Court.
12. Reference is made to the decision in Estate of Marete Kiunga (Deceased) [2021] eKLR and Estate of George Gikundi(Deceased) [2021] eKLR.
13. It is submitted that the Applicant is entitled to the orders sought and reference (made to the decisions on Estate of Wilfred Munene (Deceased) [2020] eKLR and Estate of Simon Kiprop Cheruiyot (Deceased) [2021] eKLR Section 76 of the *Law of Succession Act*.
14. The Submissions of Ruth Njoki Mwangi are dated 20<sup>th</sup> May 2024 and she reiterates the averment in her replying affidavit and her preliminary objection. Reference is made to the decision on In the Matter of Edward Kanyiri Kunyiha (Deceased) [2013] eKLR that held once an administrator dies the grant is inoperative and it should be revoked and a fresh one issue.



## Analysis And Determination

15. Having considered the pleadings and rival submissions I discern the following to be the issues for determination-
- a. Whether the grant herein ought to be revoked; and if in the affirmative what should be the consequential orders?
  - b. Whether orders of 4<sup>th</sup> June 2019 should be reviewed and grant rectified?
  - c. Who should pay costs?
16. On the 1<sup>st</sup> issue I had earlier that one of the Administrators having died and in exercise of the inherent powers of the Court donated by Section 47 and 76 of the Law of Succession and rule 73 of the Probate and Administration rules, I will proceed to revoke the grant issued on 12<sup>th</sup> April 2017, on account of the death of a Co Administrator Irene Nyakairu Mwangi.
17. The related prayer is the removal of Ruth Njoki Mwangi as it is contended that she has not been cooperative. The mind of Ruth Njoki Mwangi is evident in her application dated 10<sup>th</sup> August 2023. Clearly, she is not ready to execute the transmission documents until the grant is rectified as proposed. She therefore wishes to review the orders so as –
- i. Capture that the 2 acres in Loc 3/ Githumu/153 are inclusive of the homestead
  - ii. Review the distribution of the properties by way of consolidating the total acreage of 3.09 acres given to the Applicant so that the same are excised from LOC 3/ Githumu/ 153 and allocate the 1.09 acres in Loc.16/ Ndungu Chege/194 to any other beneficiary.
18. Review is provided for Under section 80 of the [Civil Procedure Act](#) and order 45 of the Civil Procedure Rules. It states as follows;

### Section 80:

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:

- (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.

19. Courts have the discretion to allow review on three grounds; where there is discovery of new and important matter of evidence, where there is an apparent error on the face of the record and where there is sufficient reason to do so. The application for review must be made without undue delay.

20. In *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record 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 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. This laid down principle of law is indeed applicable in the matter before us.

21. The supreme court of Uganda in *Edison Kanyabwera v Pastori Tumwebaze* (2005) UGSC 1, defined what constitutes an error apparent on the face of the record as follows;

It is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law.

21. From the above quoted decisions, it is clear that the courts agree that the error or omission must be self-evident without there being a need for additional arguments.

22. In the current application the grounds for review are that;

1. The Grant as issued does not indicate that the 2 acres in Loc 3. / Githumu/153 are inclusive of the Homestead
2. Her contribution towards offsetting the loan at Agricultural Finance Corporation was not factored during the distribution
3. That her total share acreage of the land should be consolidated so that she gets 3.09 acres at LOC 3. Githumu/153. She is prepared to surrender the 1.09 acres at LOC 16/ Ndungu Chege/194
4. That she has invested heavily at LOC 3/ Githumu/ 153 by planting tea bushes and paying off a loan and this should be considered in distribution



5. The distribution is not equitable as the other developed plots that fetch rental income have been distributed to the other beneficiaries and this can only be balanced by consolidating her share at LOC 3. Githumu/153 where she has planted tea bushes which she survives on.
24. I have looked at the ruling delivered on 4<sup>th</sup> June 2019 and especially paragraphs 15-17. The issues raised in the current application for review were considered in that decision. It is evident that the Applicant is attempting to re-litigate her case. She is challenging the merits of that decision. Leading to the conclusion that she has employed the wrong forum and should therefore have filed an appeal and not an application for review.
24. In re Estate of Ngai Muranga (Deceased) (Civil Appeal E044 of 2023) [2024] KEHC 3649 (KLR) (17 April 2024) (Judgment)
- [15]..... What such a person should do instead, is to file an appeal against the orders made by the court on distribution. The court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review.
24. Having found that; (1) there is no error apparent on the face of the record; and (2) there is also no any sufficient reason to review the judgment. I find that the Application dated 10<sup>th</sup> August 2023 has no merit and dismiss the same in its entirety
25. Having so determined the question is whether the grant earlier issued should be revoked to remove her as an administrator. Mwita J in Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000 where he stated: -
- Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.
24. Guided by that reasoning I am prepared to grant her the benefit of doubt. She will remain an administrator, the interest of the beneficiaries is that the estate be transmitted at the earliest. This can be addressed by giving timelines to the applicants within which they should finalise the transmission of the Estate.
19. On the 3<sup>rd</sup> issue the applicant in application dated 15<sup>th</sup> May 2023 seeks an order directing the Land Registrar to dispense with the production of the original title deed and documentation in respect of estate properties namely; Loc. 3/ Githumu/153, Loc 3/ MUNGARIA/364, Loc16 Ndungu Chege/ 194, Loc. 3/ Githumu/ 565/ 10A/ Loc 3/ Githumu/ 565/68 A, Loc.3/ Githumu/ 565/ 68 B, Plot A Githumu, Plot 658 A as the same cannot be traced.
24. Section 31 of *Land Registration Act* provides as follows;
- (1) If a certificate of title or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate of title or the certificate of lease shows all subsisting entries in the register, a note of the registration shall be made on the certificate of title or the certificate of lease
  - (2) Where the disposition is a transfer, the certificate shall, when produced, be cancelled, and in that case a new certificate may be issued to the new proprietor.



24. Evidently by virtue of the above provision it is the Land Registrar who has the power to dispense with the production of the original title. That power does not require a court order. It is only when the Registrar declines to dispense with the production that the affected individual has the option to challenge that decision under the relevant writ under Administrative law. I will therefore not issue the order sought.
25. Owing to the relationship between the parties, each party will bear their own costs
26. In light of the foregoing, these will be the final orders
- a. The Grant issued on 12<sup>th</sup> April 2017 is revoked, a fresh grant to issue to Grace Wairimu Karobia and Ruth Njoki Mwangi
  - b. Application dated 10<sup>th</sup> August 2023 is dismissed in its entirety
  - c. The Administrators to complete transmission of the Estate within 120 days.
  - d. Each administrator to execute documents necessary to facilitate transmission within 21 days of delivery. In the event any Administrator fails to execute the documents, the documents to facilitate transmission will be signed by the Deputy Registrar Family Division.
  - e. The Land Registrar to exercise the discretion and power given to them by statute.
  - f. Each party will bear their own costs.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**P M NYAUNDI**

**JUDGE**

In the Presence of

Fardosa Court Assistant

Otieno Advocate for Applicant

