



In re Estate of Onesmus Nyamai Kyengo (Deceased) (Succession Cause 107 of 2009) [2024] KEHC 15858 (KLR) (13 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 107 OF 2009**

G MUTAI, J

DECEMBER 13, 2024

IN THE MATTER OF THE ESTATE OF ONESMUS NYAMAI KYENGO (DECEASED)

BETWEEN

DANIEL KATUMO NYAMAI PETITIONER

AND

ANNA NDINDA NYAMAI 1ST OBJECTOR

JAPHETH MWENDWA NYAMAI 2ND OBJECTOR

RULING

1. The application before me is dated 22nd July 2024. It seeks, among other orders, that there be an injunction restraining the Petitioner from evicting the 1st Objector/Applicant from a house on Plot No 2639/VI/MN, Hamisi Estates Phase II Changamwe, review of the ruling delivered on 12th July 2019 on the ground that there had been discovery or new evidence, for the said ruling to be set aside, the grant issued on 18th October 2021 to be revoked and for the Objectors/Applicants to be enjoined as the beneficiaries of the estate of Onesmus Nyamai Kyengo (deceased).
2. The grounds upon which the application is brought is that the 1st Objector/Applicant had discovered that the will purportedly executed by the deceased was fraudulent, having been made by the Petitioner/Respondent. It was urged that the new evidence wasn't available when the hearing that culminated in the impugned decision of 12th July 2019 took place. This new evidence is the report of the forensic evidence examiner, Emmanuel Kenga, dated 13th June 2024, in which he compared the signature in the impugned will against that in his national identity card and came to a professional opinion that the will was not executed by the same person who signed the national identity card of the deceased.
3. The application was opposed by the Petitioner/Respondent vide a Replying Affidavit sworn on 4th October 2024 in which he deposed that the application was res judicata as the Court had previously



heard and determined a similar application and that what this Court was being invited to do was to sit on an appeal against its own decision.

4. Regarding the report of the document examiner, the Petitioner/Respondent cast doubt on it by producing his own document examiner's report, which arrived at a totally different conclusion that "the writer of the signatures on exhibit B1, B3-B6 cannot be excluded as the source of signatures on exhibit marked A1". The second report was prepared by Martin Papa of Spectral Forensic Services.
5. The matter was canvassed by way of written submissions. The Objector/Applicant submissions are dated 24th September 2024. Vide the said submissions it was urged that the new evidence obtained by the Objector/Applicant shows that the signature on the will does not belong to the deceased. Her counsel submitted that on the basis of the fraudulent will, the Petitioner obtained a grant and threatened to evict the Objector/Applicant from the house she was residing in, identified as Plot No 2639/VI/MN, Hamisi Estate Phase II, Changamwe.
6. The new evidence that the Objector/Applicant sought to introduce was the national identification card of the deceased and the report of the forensic documents examiner.
7. The submissions of the Petitioner/Respondent are dated 6th November 2024. Counsels for the Petitioner/Respondent submitted that the application was res judicata as it seeks an order declaring the Objector/Applicant as a beneficiary of the deceased's estate and for revocation of the grant issued regarding the said deceased's estate. In the ruling of 12th July 2019, the Court found and held that the 1st Objector was not a wife to the deceased and that the will was valid. In a further ruling that this Court delivered on 14th July 2023, I declined to revoke the grant.
8. Counsel urged that the doctrine of res judicata applies to applications as much as to suits. Reliance was placed on *Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 others* [1996]eKLR where the Court expressed itself as follows:-

“... there must be an end to applications of similar nature, that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation.”

9. It was urged that the alleged discovery of new evidence was an afterthought and a mere attempt by the Applicant to have a second bite of the cherry. Counsel relying on the decision of the Court in *Rose Kaiza vs Angelo Mpanjuiza* [2019]eKLR submitted that it hadn't been shown that the new evidence wasn't available even after the exercise of due diligence. The Counsel also relied on the decision of the Court of Appeal in *D J Lowe & Co Ltd vs Banque Indosuez*; Nairobi Civil Application No. 217 of 1998 and also *Anwar Ali another vs Monica Muthoni & another* [2021]eKLR where D. Chepkwony, J held that:-

“...in an application for review based on the discovery of new and important evidence, the Court must exercise caution to prevent a party against whom a decision has been entered from procuring new evidence so as to strengthen or manage the complexion of the case.”

10. Counsel submitted that the new evidence was recently procured. They urged that the Petitioner/Respondent had, however, obtained a document examiner's report which showed that the deceased executed the Will.



11. I was urged not to sit an appeal against the Court's previous decision by determining whether the Court considered the letter dated 30th July 1975.
12. I have considered the application dated 22nd July 2024, the Replying Affidavit sworn on 4th October 2024, and the parties' written submissions. I must now determine whether there are grounds to review Thande J's decision, which was delivered on 12th July 2019. If I find merit in the prayer for review, I will then consider whether the rest of the orders sought ought to be issued.
13. The power to review a decree or order is given to this Court by section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, 2010. Rule 63 of the Probate & Administration Rules provides that Order 45 of the Civil Procedure Rules applies to Probate & Administration proceedings. Under Order 45 Rule 1 of the Civil Procedure Rules a Court may review a decree of Order based on:-
 1. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed of the order made;
 2. On account of some mistake or error apparent on the face of the record; or
 3. On account for any other sufficient reason.
14. Mativo J (as he then was) considered the import of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules in *Republic vs Advocates Disciplinary Tribunal Exparte Apollo Mboya* [2019]eKLR. The said Judge held that:-
 - i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise;
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds;
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80;
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review;
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court;
 - Vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent on the face of the record;
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review also has to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier;



- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record;
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1; and
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 of the *Civil Procedure Act* while the grounds on which review can be sought are enumerated in Order 45 Rule 1.”

15. The Court of Appeal in *Rose Kaiza vs Angelo Mpanguiza* [2009]eKLR held that:-

“An application for review under Order 44 r 1 must be clear and specific on the basis upon which it is made. The motion before the superior court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is

“.....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.....”

The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by Mulla on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726, thus:

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

16. I am further guided by the decision of the Court of Appeal in *D.J. Lowe & Company Ltd v Banque Indosuez* Civil Appl. Nai. 217 of 1998 (unreported) , where the court stated as follows: -

“Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part



and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

17. What is stated to be new evidence is the document examiner’s report. The report is a product of examination by a forensic examiner of the signatures appearing on the national identity Card of the deceased as against that appearing on the impugned will. It has not been alleged that the letter two documents were previously unavailable. They were or could have been made, available with a bit of diligence on the part of the counsel of the Objector/Applicant.
18. I haven’t seen an explanation for the fact that no forensic examination of the will was done prior to the impugned decision. I agree with counsel for the Petitioner/ Respondent that the alleged new evidence was procured so that the Objector/Applicant could have a second bite of the cherry, having twice failed before.
19. In any case, I am not convinced that the document examiner’s report is what may be called a game changer. It was based on a comparison of signatures on photocopies of documents, and not the original documents themselves and compared only one known signature of the deceased against that in the will. I am more inclined to believe the forensic examination report of Mr Martin Papa as he compared the will with a bigger sample of the deceased’s known signatures and came to a different conclusion to that made by Mr Kenga.
20. Regarding the alleged acknowledgement of the objector as the wife of the deceased, which the Objector/Applicant says the Court ignored, I am afraid I cannot sit on appeal against the decision of Thande J. If this were indeed true then the Objector ought to have appealed against the said decision.
21. The ineluctable conclusion I draw is that there are no grounds warranting a review of Thande, J’s decision. That being the case, there is no reason for me to consider the other prayers sought in the application.
22. In the circumstances, I find and hold that the application has no merit. The same is dismissed.
23. Although this is the third time the Objector/Applicant has challenged the grant, I will not exercise my discretion regarding costs against her this time. The parties will bear their own costs.
24. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF DECEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:

Mr Kahindi, holding brief for Mr Mwarandu, for the Objector/Applicant;

Ms Gitari, for the Petitioner/Respondent; and

Arthur - Court Assistant.

