



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 350 OF 2007**

**IN THE MATTER OF ESTATE OF JOSEPH MAGURU KANYUGUTI (DECEASED)**

JOSEPH NJIRU KANYUGUTI.....1<sup>ST</sup> APPLICANT

SICILLY GICUKU.....2<sup>ND</sup> APPLICANT

MERCY WANJAGI NYAGA.....3<sup>RD</sup> APPLICANT

**VERSUS**

ISAAC NJAGI NJERU.....1<sup>ST</sup> RESPONDENT

APHIJA IGOKI NJERU.....2<sup>ND</sup> RESPONDENT

**RULING**

1. Before me is an application brought under certificate of urgency and wherein the applicant seeks the orders;

1) ...spent

2) That the orders issued on 11<sup>th</sup> April 2007 in Succession No. 42 of 1986 which allowed distribution of Kyeni/Mufu/ 1964 equally amongst the three houses of the deceased be reviewed or set aside.

3) That the subsequent orders dated 18<sup>th</sup> June 2009 in Succession Cause No. 350 of 2007 to wit; that the 2<sup>nd</sup> respondent be at liberty to excise her share of 3.40 acres from land parcel number Kyeni/Mufu/1964 be and are hereby set aside.

4) That all the subdivisions on the land parcel number Kyeni/ Mufu/1964 be cancelled and the title do revert back to the original number in the name of Joseph Maguru Kanyuguti - deceased.

5) .....spent

6) That the costs of this application be provided for.

2. The application is premised on the grounds on the face of the application and further supported by the affidavits sworn by the 1<sup>st</sup> and 3<sup>rd</sup> applicants. In a nutshell, the applicants' case is that they are beneficiaries of the estate of the deceased herein who died in 1980 but that they have never participated in the succession proceedings. Further that the respondents failed to disclose to the court that the deceased had four (4) wives and caused the estate to be distributed amongst three houses pursuant to the orders made by the court in Succession No. 42 of 1986 as a result of an application dated 27.02.1997 and where after the 2<sup>nd</sup> respondent sought to have 3.40 acres of suit land excised in her favour vide an application in Succession Cause No. 350 of 2007 and which application was allowed on 28.06.2008.

3. That pursuant to the said orders, the 2<sup>nd</sup> respondent sub-divided the suit land into land parcel number Kyeni/Mufu/7710 and Kyeni/Mufu/7711 and Kyeni/Mufu/ 7711 was further sub-divided into Kyeni/Mufu/10377, 10378 and 10379 and registered in her name. That as a result of the above, the 3<sup>rd</sup> applicant stands to be disinherited by the 2<sup>nd</sup> respondent who intends to dispose off the land parcels Kyeni/Mufu/10377, 10378 and 10379.

4. The 1<sup>st</sup> respondent filed his replying affidavit and wherein he deposed that he is the administrator of the estate herein and that the deceased had four wives and that he filed for grant in Embu CM'S Succession Cause No. 42 of 1986 but the grant could not be confirmed

since the 1<sup>st</sup> respondent filed a protest. He further deposed that he did not involve the applicants since the 1<sup>st</sup> applicant was away at work in Namanga and the 2<sup>nd</sup> and 3<sup>rd</sup> applicants were married and that the 2<sup>nd</sup> respondent was a wife to his brother who had been allocated land parcel number Kyeni/Kigumo/1121 by Gicuku clan and thus he was not supposed to benefit from the deceased's estate herein. He further deposed that this court ought to intervene and help the family resolve the dispute involving their father's estate and which is yet to be resolved and further that the estate ought to be distributed amongst the children of the deceased.

5. The 2<sup>nd</sup> respondent opposed the application by way of a replying affidavit and wherein she deposed that the applicants are her brother and sisters in law respectively and being brother and sisters of her deceased husband Njeru Maguru. Further that the deceased died in 1980 and was survived by three wives being Zippora Wambogo, Margery Ciamwithi and Miriam Wamugo. That her deceased husband pre-deceased the deceased herein and left her and her seven children in the land subject of this succession cause and which cause was filed by the 1<sup>st</sup> respondent as succession cause No. 42 of 1986 at Embu Principal Magistrate's Court and the 1<sup>st</sup> respondent kept the applicants abreast of what was happening in the succession cause.

6. Further that the suit land herein was distributed by the court based on her application filed in court on 27.02.1997 and the estate was distributed as follows;- Margery Ciamwithi Joseph got 3.40 Acres; Miriam Wamugo Joseph to get 3.40 acres and Aphija Igoki Njeru to get 3.40 acres. That the 1<sup>st</sup> applicant is a child of the 3<sup>rd</sup> wife - Margery Ciamwithi while the 2<sup>nd</sup> applicant is the daughter of the last wife - Miriam Wamugo and that her late husband was the only son of Zippora Wambogo - the other wife of the deceased.

7. Further that the 3<sup>rd</sup> applicant is the sister to her deceased husband but has never been interested in the matter herein despite her being aware of the proceedings herein as she has been living on her husband's land. Further that the estate was distributed equally among the three houses and the 2<sup>nd</sup> respondent given the share of her mother in law as she was deceased at the time. Further that the issues raised in the application have been dealt with by the Honourable Court in the past through similar applications filed by the 1<sup>st</sup> respondent herein and also an application filed by one Julia Gicuku Kathii and Margaret Rwamba Muriithi who are sisters of the applicant and 1<sup>st</sup> respondent.

8. The application was canvassed by way of written submissions and wherein the parties submitted in favour of their positions.

9. The 1<sup>st</sup>-3<sup>rd</sup> applicants after giving the synopsis of the dispute herein proceeded to submit that the court ought to apply provisions of the Law of Succession Act and since the deceased was polygamous, Section 40 ought to have been applied in the distribution of the said estate amongst the children and which would be fair as opposed to distributing the estate equally amongst the three houses. Further that the application by the 2<sup>nd</sup> respondent which sought excision of 3.40 acres out of the suit land was misleading and aimed at disinheriting other beneficiaries of the estate and the same was never served upon the applicants and if they had been served, they would have opposed it. It was further submitted that the 2<sup>nd</sup> respondent did not disclose to the applicants that he had filed the instant succession cause in respect of their father's estate.

10. It was further submitted that the 2<sup>nd</sup> respondent ought not to benefit from the estate as her deceased husband had earlier benefited having been allocated LR Kyeni/Kigumo/1121 by the clan. Further that there has been no inordinate delay in filing the instant application as Section 76 of the Act does not impose time limit within which an application for revocation ought to be filed. Reliance was made on the case of re estate of **Charles Ngotho Gachunga (deceased) (2015) eKLR**. That the application herein being one for setting aside of the orders distributing the estate of the deceased herein, the same is akin to an application for revocation of grant and as such, there ought to be no time limit for filing of the same. That if the said orders are not reviewed or set aside, the dispute between the beneficiaries will persist, yet, the beneficiaries were never involved in the succession proceedings.

11. The 1<sup>st</sup> respondent on his part adopted the contents of his replying affidavit and further submitted that he was not opposed to the application.

12. The 2<sup>nd</sup> respondent on her part relied on her replying affidavit and submitted that the applicants have all along been involved in the succession cause and the 1<sup>st</sup> respondent was using them to file an appeal through the backdoor against the various orders issued by this court. Further that the estate was properly distributed amongst the three houses as per the law since the deceased died before the commencement of the Law of Succession Act. She reiterated that there had been similar previous applications which have been determined by this court.

13. I have considered the application herein, the response by the parties and the rival submissions. The application basically seeks for orders for review/setting aside of the orders issued on 11<sup>th</sup> April 2007 in Succession No. 42 of 1986 which allowed distribution of Kyeni/Mufu/1964 equally amongst the three houses of the deceased and further for the review or setting aside of the subsequent orders dated 18<sup>th</sup> June 2009 in Succession Cause No. 350 of 2007 to wit that the 2<sup>nd</sup> respondent be at liberty to excise her share of 3.40 acres from land parcel number Kyeni/Mufu/1964. She further prayed for cancellation of all the subdivisions on the land parcel number Kyeni/Mufu/1964 and the title do revert back to the original number in the name of Joseph Maguru Kanyuguti - deceased.

14. However, at the onset, I note that the 1<sup>st</sup> respondent raised an issue to the effect that this court has dealt with the issues sought herein in previous applications. In my view the 1<sup>st</sup> respondent raised the doctrine of *res judicata*. This doctrine is provided for under Section 7 of the Civil Procedure Act (and which in my view is applicable to this court as it is a civil court). The said section provides that: -

***“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.”***

15. In the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR**, the Court of

Appeal held that in order for the defense of res judicata to be applicable, there must be a previous suit in which the matter was in issue; the parties were the same or litigating under the same title; a competent court heard the matter in issue; and the issue has been raised once again in a fresh suit.

16. In order to determine whether the application herein is res judicata, it is important to summarize the record herein. From the perusal of the same, it is clear that the grant of letters of administration was granted to the 1<sup>st</sup> respondent on 22.06.1987 in Embu PM's Succession Cause No. 42 of 1986. The 1<sup>st</sup> respondent proceeded to file summons for confirmation of grant dated 7.12.1987. However, the 2<sup>nd</sup> respondent filed an affidavit of protest to the confirmation of grant and wherein she protested the proposed mode of distribution in the summons for confirmation of grant. The record indicate that the matter came up in court severally but the same was stood over generally for the reasons that the parties had not agreed on the mode of distribution.

17. The 2<sup>nd</sup> respondent then filed an application on 27.02.1997 and wherein she sought orders that the application for confirmation of grant filed by the 1<sup>st</sup> respondent herein be set aside and the grant be confirmed in the manner stated therein (equally amongst the three wives with her representing one of the wives who was already deceased) and that the grant issued to the 1<sup>st</sup> respondent be struck out for failing to prosecute the application for confirmation of grant. The said application was allowed vide the orders of 11.04.1997 having been heard ex-parte. The record indicates that a Mr. Njue appeared for the objector (2<sup>nd</sup> respondent herein) and wherein the learned advocate informed the trial court that the respondent (1<sup>st</sup> respondent) was served and he has been served severally but did not attend court.

18. The 1<sup>st</sup> respondent proceeded to file an application dated 28.04.1997 seeking to set aside the orders of 11.04.1997 and that the application filed on 27.02.1997 be heard on merits (amongst other orders). The application was premised on the grounds that the 2<sup>nd</sup> respondent misrepresented to the court as to the right beneficiaries and further that the 1<sup>st</sup> respondent (applicant therein) was in court but did not hear his name being called out. The said application was dismissed vide the orders of 22.08.1997. This was after the 1<sup>st</sup> respondent's counsel raised an objection on the jurisdiction of the court (lower court) to hear the application. As such, the application was not determined on merit but was dismissed for want of jurisdiction.

19. Pursuant to these orders, the file was transferred to this court and allocated the current case number. What appears from the record is that the 2<sup>nd</sup> respondent proceeded to file an application dated 24.04.2008 and wherein she sought for orders that she be allowed to excise and/or carve out her share of 3.40 Acres from the suit land and that the Deputy Registrar of the Court do execute the necessary documents. The grounds in support of the application were that the administrator/other beneficiaries were uncooperative in having her get her share. The 1<sup>st</sup> respondent (who was the respondent in the said application) filed a replying affidavit in opposition to this application on 10.06.2008. The said application was nonetheless allowed by W. Karanja J (as she then was) vide the orders of 18.06.2009.

20. The 1<sup>st</sup> respondent proceeded to file an application dated 11.10.2012 and which application basically sought for stay of the orders of 18.06.2009 and further for review and setting aside of the orders of 11.04.1997 and the grounds in support of the said application were that the lower court did not have jurisdiction to revoke the grant and further that the estate could not be distributed without a confirmed grant and a certificate of confirmation of grant and the distribution of the estate amounted to distributing the estate of the deceased's estate without following the correct procedure and following the law.

21. The 2<sup>nd</sup> respondent herein opposed the application by way of a replying affidavit filed in court on 17.12.2013. The parties proceeded to file written submissions and vide the ruling delivered by J.M. Bwononga J on 22.06.2016, the said application was dismissed. The Learned Judge, in dismissing the application noted that there had been unreasonable delay in bringing the application and additionally that to allow the application would defeat the primary objectives of Section 1A and 1B of the Civil Procedure Act.

22. The record further clearly shows that the 2<sup>nd</sup> respondent herein filed another application dated 3.12.2012 seeking removal of caution placed on the suit land and which application was allowed in the ruling delivered on 10.10.2016.

23. There followed another application by one Julia Gichuku Kathii and Margaret Rwamba Muriithi dated 10.10.2016 and amended on 18.10.2016 with the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein as the respondents. They sought orders of stay of execution of the orders of 28.06.2008; review and/or setting aside of the orders of 28.06.2008; the application dated 24.04.2008 be dismissed and further that the grant of letters of administration (if any) be revoked. The case by the applicants was that they were beneficiaries of the estate herein but they were never party to any application for confirmation of grant and neither were they aware of any proceedings that led to the orders for sub-division of the suit land. The 2<sup>nd</sup> respondent herein opposed the application vide a replying affidavit sworn on 13.02.2017. The said application was dismissed by this court (Hon. F. Muchemi J) vide the ruling delivered on 25.09.2019.

24. What followed is the instant application and which the 2<sup>nd</sup> respondent deposed it seeks similar orders with other decided applications.

25. From that analysis, it is clear that the instant application seeks similar orders with previous applications. For instance, Order 2 is similar to the orders sought in the application dated 28.04.1997 by the [1<sup>st</sup> respondent herein (setting aside of the orders of 11.04.1997)]. The said prayer 2 is similar also to a prayer in the application dated 11.10.2012. It is my view therefore that it is this prayer only which has ever been heard and determined. As for the other prayers, the same are new before this court and thus cannot be said to be res judicata. Further, even for the prayer that had been heard earlier, the same cannot be said to be res judicata as the parties in the earlier applications are not the same with the parties herein. As such, the application is properly on record.

26. Having decided on the preliminary issue, I proceed to determine the merits of the application.

27. The said application is brought under the provisions of section 76 of the Law of Succession Act and Rules 73 and 49 of the Probate and Administration Rules. Section 76 deals with revocation of grant. The application herein does not seek revocation of grant and thus the said section is not applicable.

28. The applicants essentially seek review or setting aside of the orders issued on 11<sup>th</sup> April 2007 in Succession No. 42 of 1986 which allowed distribution of Kyeni/Mufu/1964 equally amongst the three houses of the deceased and further setting aside of the subsequent orders dated 18<sup>th</sup> June 2009 in Succession Cause No. 350 of 2007 to wit; that the 2<sup>nd</sup> respondent be at liberty to excise her share of 3.40 acres from land parcel No. Kyeni/Mufu/1964. The Law of Succession Act does not provide for how a party ought to approach the court while seeking review of its orders or orders of another court.

29. However, by virtue of Rule 49 and which is one of the Rules upon which the application is premised, a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit. What is before me being a summons, I will endeavour to determine the same. This is further bearing in mind the inherent powers bestowed upon this court by virtue of section 73 of the Act.

30. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which imports Order 45 of the Civil Procedure Rules in probate matters. 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 the said Order 45 of the Civil Procedure Rules (See **John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another [2016] eKLR.**)

31. The requirements under Order 45 are to the effects that, to be successful, the applicant must demonstrate to the court that:-

- i. *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*
- ii. *That there has been some mistake or error apparent on the face of the record; or*
- iii. *That there is any other sufficient reason.*

32. In the instant case, the applicants did not demonstrate as to there being 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. There was no deposition in that respect.

33. From the reading of the application, the applicants seem to ground the application on the basis that the 2<sup>nd</sup> respondent proceeded to apply that parcel number Kyeni/Mufu/1964 be sub-divided into three equal shares and further that her share of the estate be excised from the estate without involving the applicants. They further deposed that she did not disclose to the court that there were other beneficiaries of the deceased's estate and further failed to disclose to the court that there were other children in the second house being 3<sup>rd</sup> applicant and one Fides Gicuku and thus the sub-division of LR. Kyeni/ Mufu/1771 and transferring the same was prejudicial to the 3<sup>rd</sup> applicant and one Fides Gicuku.

34. The applicants further deposed that they were aggrieved by the manner in which the said estate was distributed owing to the uneven number of members in each house and thus the division was unequal. That the said distribution being of a polygamous marriage should consider the number of children in each house taking into account any previous benefits made to the beneficiaries. Further that the 2<sup>nd</sup> respondent did not disclose that the deceased herein had four wives (Mbutu Maguru, Zipporah Wambogo, Mergery Ciamwithi Joseph and Milliam Wamugo Joseph) and thus the ruling distributing the estate amongst the three houses was unfair as it disinherited the fourth house and that the ruling was unfair as it failed to consider that the 2<sup>nd</sup> respondent's husband had been allocated another land parcel being LR. Kyeni/ Mufu/1121 by the clan and which was their father's share.

35. It is now trite that where a person challenges the process leading to distribution of the estate post-issuance of the grant, the right process should be through a review application as opposed to revocation. **In re Estate of Juma Shitseswa Linani (Deceased) [2021] eKLR**, Musyoka J held that; -

***“12. The ideal situation, where a person is unhappy with the process of confirmation of grant, for it would appear that that is what the applicant herein is aggrieved about, is not to move the court under section 76 for revocation of grant, for the reasons that I have discussed in the foregoing paragraphs. 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. The grant herein was confirmed on 24<sup>th</sup> June 2009, and this court became functus officio so far as confirmation of the grant was concerned. The applicant ought to have appealed against the orders that confirmed the grant, if he was not satisfied with the distribution that the court ordered. Alternatively, the applicant should have mounted an application for review of those orders, if he had the competence to file such an application, and if he had grounds upon which he could urge review. .”***

36. The question therefore is whether these assertions can fall under ground of “some mistake or error apparent on the face of the record” and/or “any other sufficient reason”? Do the applicants have grounds upon which they can argue the review and which are provided under Order 45 of the Civil Procedure Rules?

37. As to whether there was an error apparent on the face of the record, in **Muyodi vs. Industrial and Commercial Development Corporation & Another (2006) 1 EA 243**, the Court of Appeal considered what constitutes a mistake or error apparent on the face of the

record, and stated 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.”***

38. In **Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR** Mativo J while determining an application for review and which had been filed in the ordinary civil suit (and which decision I agree with) held that; -

***“36. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out...”***

***37. 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.***

***38. 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. In the instant case therefore, I find and hold that there is no error apparent on the face of the record.***

***39. Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review...”***

39. The law is clear that where a person died before the commencement of the Law of Succession Act and which fact is not disputed in this case, the applicable law in the distribution of the estate is not governed by the Law of Succession Act but by written laws and customs applying at the time of the death of the deceased (see section 2(2)) of the Law of Succession Act). The deceased was an Embian and thus Kiambu customary law was applicable in the distribution of the estate. Under kiambu inheritance customary law just like Kikuyu inheritance customary law and which is documented in **Eugene Cotran's Restatement of African law, Kenya Volume 2: The Law of Succession 1969 (London, Sweet & Maxwell)**, inheritance is patrilineal. The pattern of inheritance is based on the equal distribution of man's property among his sons, subject to the proviso that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried. (See **In Re the Estate of Mugo Wandia (Deceased) [2009] eKLR**). Further where the deceased was polygamous, the estate would be distributed in equal shares between the wives.

40. The applicants further deposed that they were aggrieved by the manner in which the said estate was distributed owing to the uneven number of members in each house and thus the division was unequal. That the said distribution being of a polygamous marriage should consider the number of children in each house taking into account any previous benefits made to the beneficiaries. They invoked the provisions of Section 40(1) of the Act. However, it is my view that the same is not applicable by virtue of Section 2(2) of the said Act. Therefore, it cannot be said that there was an error on the face of record in that respect.

41. The other ground is that the 2<sup>nd</sup> respondent did not disclose to the court that there were other beneficiaries of the deceased's estate and further failed to disclose to the court that there were other children in the second house being 3<sup>rd</sup> applicant and one Fides Gicuku. As I have stated, in a polygamous set up and where the husband died before the commencement of the Law of Succession Act, the customary law was to the effect that the estate would be distributed equally between the houses forming the home. Each of the houses would then distribute the estate amongst the children in that house and in doing so, women would be excluded. Both the impugned orders were made pre- Constitution of Kenya 2010 and that was the law. The customary law applicable excluded married women from inheriting the estate of their father's estate. The fact that the 3<sup>rd</sup> applicant (being a child of the same house with the 1<sup>st</sup> respondent) was married was not disputed. As such, there cannot be said that there is an error on the face of record in that respect.

42. The applicants further deposed and submitted that the 2<sup>nd</sup> respondent did not disclose that the deceased herein had four wives (Mbutu Maguru, Zipporah Wambogo, Mergery Ciamwithi Joseph and Milliam Wamugo Joseph) and thus the ruling distributing the estate amongst the three houses was unfair as it disinherited the fourth house. However, I have perused the entire court record and I note that all along, the position has been that the deceased had three wives. The 1<sup>st</sup> respondent (who is the administrator of the estate herein) has not deposed as to the deceased having four wives. The applicants did not attach any evidence as to the existence of a fourth wife. In my view, the said averments are just an afterthought and cannot qualify to be an error apparent on the face of record.

43. The applicants also deposed that the court failed to consider that the 2<sup>nd</sup> respondent's husband had been allocated another land parcel

being LR. Kyeni/Mufu/1121 by the clan and which was their father's share. I have indeed perused the copy of the green card in relation to LR. Kyeni/Mufu/1121 and I note that indeed the same was registered in the names of Njeru Maguru (the 2<sup>nd</sup> respondent's husband) on 9.08.1961. The applicants did not prove or rather link the said land to the estate of the deceased herein. It is not clear as to how the said Njeru Maguru can be said to have benefitted from the deceased herein by virtue of him having been registered as the proprietor of LR. Kyeni/Mufu/1121. There is no evidence which was tendered to prove that the said land parcel was the deceased's share as the applicants alleged.

44. It's my view that from the analysis of all the issues arising from the application before me, what the applicants presents before this court as the grounds for the above application does not amount to errors apparent on the face of the record. As the Court of Appeal held in **National Bank Of Kenya Limited –vs- Ndungu Njau [1997] eKLR**: -

*".....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 of 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 the law cannot be a ground for review...."*

45. The applicants seem to be arguing an appeal against the previous rulings (impugned) but disguised to be a review. The grounds can only be argued under an appeal and which is not the case herein and not under the review.

46. As to whether the grounds amount to any sufficient cause, the Learned Judge in **Paul Mwaniki –vs- National Hospital Insurance Fund Board of Management (supra)**, while quoting with approval previous decisions and legal texts held that "any other sufficient reasons" for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Further that any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.

47. In my view, the said grounds do not constitute "any other sufficient reasons" warranting review of the orders in question. They cannot be analogous to the other two conditions.

48. To sum it all, it is clear that the grounds proffered by the applicants cannot be grounds for review of the orders subject to the instant application under the circumstances of the case. This is because the deceased herein died before the commencement of the Act and wherein the customary law applicable did not contemplate involvement of married women in the succession proceedings (more so confirmation proceedings) as they were not beneficiaries of the same. In my view, the outcome would have been different if the deceased died post - Law of Succession Act and whereby their involvement and/or consents to the mode of distribution were required.

49. As such, there having been no discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants' knowledge or could not be produced by them at the time when the decree was passed (as the same was not demonstrated) and the grounds proffered herein not amounting to mistake or error apparent on the face of the record and the said grounds being not analogous to these two grounds so as to constitute "any other sufficient reasons", prayers 2 and 3 ought to fail. Further prayer 2 having failed it means that the sub-divisions on LR. Kyeni/ Mufu/1964 cannot be cancelled as per prayer 3 of the application. There were no sufficient grounds proffered to justify the granting of the said orders.

50. Considering all the above therefore it is my view that the application dated 1.09.2020 has no merit and it is hereby dismissed.

51. This being a succession cause, each party shall bear his or her own costs.

52. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF SEPTEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicants

.....for the Respondents