

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL NO. E015 OF 2022

IN THE MATTER OF THE ESTATE OF MUMENYA NJOGU
(DECEASED)

PETER MAINA KANYUA.....

APPELLANT

VERSUS

ELIZABETH WAMUYU KABURU..... 1ST

RESPONDENT

ESTHER WAMAITHA MUTHUO..... 2ND

RESPONDENT

MAINA GITHINJI GATURUKU..... 3RD

RESPONDENT

MARGARET MUTHONI KARURIA 4TH

RESPONDENT

AGATHA WAMUYU GATUKU..... 5TH

RESPONDENT

JUDGMENT

1. This judgment arises from the ruling and order of Hon. V. Kosgei, SRM dated 18.10.2022.
2. The Ruling arose from the application dated 10.8.2021 by which the Appellant sought the following reliefs:

- a. The Honourable court be pleased to review the judgment of this court delivered on 10.8.2021.
 - b. The honorable court be pleased to vary or set aside the certificate of confirmation of grant pursuant to the said judgment.
 - c. An order be issued granting the Applicant two acres out of land parcel No. Iriani/Kiaguthu/645.
3. The application was supported by the affidavit of the Appellant of the same date and was premised on the following grounds:
- a) The judgment of Makhandia J dated 7.8.2008 was set aside by the Judgment of Sergon J dated 11.6.2010.
 - b) The Court allowed the Applicant to file his protest dated 7.12.2020.
 - c) The Applicant testified and gave evidence, but the court unfortunately gave a negative verdict.
 - d) The Applicant stands to suffer injustice.
4. The Respondents opposed the application by the Replying Affidavit sworn by Elizabeth Wamuyu Kaburu on 10.1.2023 by which it was deposed in material that the application did not meet the threshold of review and was not merited.
5. It was further deposed that the application was an attempt to appeal against the judgment of the court to the same court but concealed as a review application.

Submissions

6. The parties do not appear to have filed submissions as none are in the Case Tracking System platform.

Analysis

7. The Appellant's Chamber Summons application dated 21.2.2022 sought to review the judgment of court delivered on 10.8.2021. The court dismissed the application and the appellant, aggrieved, preferred this appeal. The jurisdiction of this Court to grant review is well set out in the law. Section 80 of the Civil Procedure Act states that:

“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

8. Order 45 of the Civil Procedure Rules provides for review and it states as follows:

“(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”

9. The rationale for the discretionary power of review is to find whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. This power inheres in every court of plenary jurisdiction and is premised on

preventing miscarriage of justice or an injustice. I associate myself with the reasoning of Kuloba J (as he then was) in **Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994** where he opined 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."

10. The Appellant sought to review the judgment and set aside the certificate of confirmation of Grant so that he could get 2 acres out of LR No. Iriani/Kiaguthu/645. The Court of Appeal in **Mahinda vs. 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."

11. The impugned order of the lower court dismissed the application on the ground that it did not meet the threshold for review. I have scrupulously perused the record and noted that the Appellant did not lay any ground upon which a review may be granted. Whereas the application stated review as the ground, it did not emerge from the grounds any basis upon which he sought review. In fact he ended up laying a basis for

appeal against the judgment. In the case of **Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party) [2019] eKLR** it was therefore held that: -

“In this regard, for a Court to review its own orders, it must be demonstrated that there is discovery of new and important matter or evidence. It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. 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.”

12. The gist of the Appellant’s application was that the judgment be set aside and certificate of conformation of grant varied to give him two acres. *The Code of Civil Procedure*, Volume III Pages 3652-3653 by **Sir Dinshaw Fardunji Mulla** states:

... 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.”

13. I am consequently unable to fault the finding of the lower court. The application was clearly a disguised appeal and the court could not properly exercise its discretion in allowing such an application. Therefore, the lower court exercised its unfettered discretion within the bounds of the law to usurp an injustice that was clear. Otherwise it would be capricious and whimsical and defeat the very purpose of serving justice that the law is set to achieve. In the case of **Ramakant Rai vs. Madan Rai, Cr LJ 2004 SC 36**, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

“Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.

He is not a yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains".

14. The Appellant could not revoke the grant through the back door. A review under Order 45 of the Civil Procedure Rules could be sought upon discovery of new and important matter or on account of some mistake or error apparent on the face of the record, or for any sufficient reason which the Appellant did not disclose. In the Matter of the **Estate of Geoffrey Kinuthia Nyamwinga (Deceased) [2013] eKLR:-**, the court stated that:

"Where a proposed amendment of a grant cannot be dealt with under the provisions of Section 74 of the Law of Succession Act, the applicant ought to approach the court under Order 44 of the Civil Procedure Rules. A review under Order 45 of the Civil Procedure Rules may be sought upon discovery of new and important matter or on account of some mistake or error apparent on the face of the record, or for any sufficient reason. The applicant in this case should have moved the court under this provision-Order 45 of the Civil Procedure Rules on account of some mistake or error apparent on the face of the record and on the ground that there exists a sufficient reason for

review of the certificate of the confirmation of the grant.”

15. There is nothing disclosed in this matter warranting review.
16. As to costs, 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.

17. In the circumstances of this case, costs follow the event. The respondents shall have costs of Ksh. 65,000/= for the appeal.

18. The net effect is that I dismiss the appeal for lack of merit with costs of Ksh. 65,000/=.

Determination

19. In the upshot, I make the following orders:

(a) The appeal lacks merit and is dismissed.

(b) Costs of Ksh. 65,000/= to the Respondents.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **16th** day of **December, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Appellant present

No appearance for the Respondents

Court Assistant - Michael

ORIGINAL