Maina (Suing as the administrator of the Estate Of James Kinyuru Muongi - Deceased) v Attorney General & 7 others (Environment & Land Case 486 of 2017) [2024] KEELC 1052 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1052 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE 486 OF 2017

BM EBOSO, J

FEBRUARY 23, 2024

BETWEEN

BEATRICE WAMBUI MAINA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JAMES KINYURU MUONGI - DECEASED) ..... PLAINTIFF

AND

THE ATTORNEY GENERAL ..... 1ST DEFENDANT

DISTRICT COUNTY SURVEYOR KIAMBU ..... 2ND DEFENDANT

THE DISTRICT LAND REGISTRAR ..... 3RD DEFENDANT

SAMUEL WAIRIRE KINYURU ..... 4TH DEFENDANT

MIRIAM WAITHERA ..... 5TH DEFENDANT

ANDREW NJENGA ..... 6TH DEFENDANT

BENSON WAWERU KINYURU ..... 7TH DEFENDANT

PAULINE NENDAYA NAITIPTIP ..... 8TH DEFENDANT

RULING

1. Falling for determination in this ruling is the notice of motion dated 28/4/2023, brought by Beatrice Wambui Maina [referred to in this ruling as "the applicant"]. Through the motion, the applicant seeks an order of review or variation of the ruling of this Court [Gacheru J], rendered on 17/5/2019. The application is premised on the grounds outlined in the motion; in the applicant's supporting affidavit sworn on 28/4/2023; and in the applicant's supplementary affidavit sworn on 18/9/2023. It was canvassed through written submissions dated 15/11/2023, filed by M/s M.W. Kimani & Company Advocates.

2. The case of the applicant is that she filed this suit in her capacity as a co-administrator of the estate of the late James Kinyuru Muongi (referred to in this ruling as "the deceased"). The suit was, however, dismissed vide a ruling of this Court [Gacheru J] rendered on 17/5/2019 on the ground that it was res judicata. The applicant contends that she filed the suit in order to protect and safeguard the estate, adding that the subdivision of the suit property, land parcel number Muguga/Gitaru/799 [hereinafter referred to in this ruling as "the suit property"] which was the only asset of the estate, had not been done according to the Certificate of Confirmation of Grant issued on 16/2/2017. The applicant faults the merits of the decision of the Court, contending that the Court rendered the impugned ruling without addressing the above issue.

3. The applicant further faults the Court for awarding costs of the suit to the defendants without considering the fact that the same is to be recovered from the deceased's estate. She adds that she filed the suit for the purpose of safeguarding the estate and for the benefit of all the beneficiaries of the estate. The applicant contends that the 7th and 8th defendants who are also beneficiaries of the deceased's estate are claiming costs amounting to Kshs 19,506,573.88 based on false and unsubstantiated claims that the suit property is worth Kshs 400,000,000.

4. The applicant adds that she became aware of the impugned ruling almost a year after it had been delivered and that her advocates were not served with a notice of delivery of the impugned ruling. It is her case that she brought this application in good faith to safeguard the estate.

5. The application is opposed by the 7th and 8th respondents through a replying affidavit sworn on 2/5/2023 by Benson Kinyuru Muongi and written submissions dated 3/7/2023, filed by M/s Waithaka & Partners Advocates. Their case is that the application is an afterthought and an attempt to delay and scuttle them from enjoying the fruits of the preceding succession orders. They add that the applicant has neither explained the unreasonable delay of four years nor reasonably demonstrated exceptional circumstances to justify the delay, having admitted that she became aware of the ruling one year after it had been rendered. The 7th and 8th defendants contend add that there is no demonstration of an error apparent on the face of the ruling requiring intervention of the Court through review. They further contend that the applicant has not demonstrated discovery of new and important matter of evidence that was not within her knowledge or could not be produced at the time the impugned ruling was rendered. The 7th and 8th defendants add that the applicant seeks to re-open the suit to re-litigate issues of distribution of the suit property through the present application, disguised as seeking clarity on the issue of costs which was already adjudicated upon.

6. They add that the applicant is inviting the Court to sit on appeal against its own ruling and re-apportion costs. The 7th and 8th defendants contend that the suit property is a two-and-a-half acre property situated approximately 200 meters from Waiyaki Way and that, its value is not exaggerated. The two respondents argue that the application is meant to scuttle the Honourable Deputy Registrar from assessing costs payable to the respondents. They add that there must be an end to litigation and that the applicant ought to be sanctioned by costs for relitigating issues that were long settled herein.

7. I have considered the application, the response to the application and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The single question to be determined in the application is whether the applicant has satisfied the criteria upon which this Court exercises jurisdiction to review its own rulings or judgments.

8. This court's jurisdiction to review its rulings and judgments is conferred by the framework in Section 80 of the *Civil Procedure Act* which provides 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."

9. The jurisdiction is regulated by the framework in Order 45 rule 1 of the *Civil Procedure Rules*, 2010 which provides as follows:

> " 1.
>
> (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. The Court of Appeal in *Daniel Macharia Karagacha v Monicah Watithi Mwangi*, Civil Appeal No. 159 of 2000 rendered itself on the criteria upon which a court exercises jurisdiction to review its own judgment or ruling as follows:

> " Review is only available where there is an error of law apparent on the face of the record or there is a discovery of new and important matter of evidence which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application."

11. The applicant has advanced two substantive grounds upon which she wants this court to exercise jurisdiction to review its ruling rendered on 17/5/2019. The first ground is that this court failed to address the fact that the subdivision of the suit property was not carried out in tandem with the Certificate of Confirmation of Grant issued on 16/2/2017. Does the above ground constitute a proper ground for review of the court's own ruling under Order 45 rule 1 of the *Civil Procedure Rules,*

2010? Clearly, the applicant contends that this Court misapprehended the facts, misdirected itself, and arrived at a wrong finding as a consequence of the misapprehension and misdirection. This is without doubt a challenge against the merits of the impugned ruling. It is purely a ground of appeal to the appellate court. It is not a ground upon which a court can review its own ruling. Were this Court to exercise review jurisdiction on the above ground, it would be exercising merit review jurisdiction over its own ruling – a jurisdiction which our laws do not contemplate. Put differently, this Court has no jurisdiction to revisit the merits of the decision rendered by Gacheru J on 17/5/2019.

12. The second ground upon which the applicant invites the Court to review the ruling is that this Court failed to consider and take into account the fact that she filed this suit in her capacity as the co-administrator of the estate of the deceased, suing for the benefit of all the beneficiaries of the estate. Again, this is an allegation of misapprehension of the facts and the law. It is also an allegation of misdirection on part of the Court. This is, without doubt, a challenge against the merits of the finding of the Court on the issue of costs. It is purely a ground of appeal; it is not a ground upon which a Court can properly exercise review jurisdiction under Order 45 rule 1 of the Civil Procedure Rules.

13. For the above reasons, I do not think the applicant has satisfied the criteria upon which this Court exercises jurisdiction to review its own rulings and judgments under Order 45 rule 1 of the Civil Procedure Rules. That said, I will make one observation focusing on one of the grounds upon which the application was opposed. This relates to the inordinate delay in bringing the application for review.

14. The impugned ruling was rendered on 17/5/2019. The explanation advanced by the applicant for the delay in filing the present application is that she became aware of the existence of the ruling one year after it had been delivered, adding that her advocates on record at the time were not served with a notice for delivery of the ruling.

15. Was the inordinate delay properly explained? Even if it is true that, indeed, the applicant became aware of the ruling one year after it had been delivered, no proper explanation has been tendered to explain why the applicant did not bring the present application immediately she became aware of the ruling. The applicant waited for almost three years before bringing the present application. I find that there was inordinate and unexplained delay in bringing this application. That is, however, not the key reason why the application is unmerited.

16. In the end, I do not find merit in the application dated 28/4/2023 seeking a review of the ruling rendered by this Court [Gacheru J] on 17/5/2019. The said application is dismissed for lack of merit. The applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF FEBRUARY 2024

B M EBOSO

JUDGE

In the presence of-

Ms Kimani for the Plaintiff

Mr. Waithaka for the 7th & 8th Defendants and h/b for Mr. Njogu for the 5th Defendant

Court Assistant: Hinga