Kirui v Ramadhan (Civil Appeal E422 of 2020)
[2025] KECA 1158 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1158 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E422 OF 2020

FA OCHIENG, LA ACHODE & JM NGUGI, JJA

JUNE 20, 2025

BETWEEN

REGINA WAITHERA KIRUI ..... APPELLANT

AND

REHEMA WAIRIMU RAMADHAN ..... RESPONDENT

(Being an Appeal from the Ruling and Order of the High Court of Kenya at Nairobi, (Muchelule, J.) dated 27th July, 2020inHC Succ. Cause No. 1828 of 2010)

JUDGMENT

1. The background of this appeal is that Mary Njoki Zacharia [the deceased], died intestate on 15th October, 2009. She had seven children; three sons and four daughters namely: Samuel Gathuna Kirui, Peter Kamau Kirui, Simon Kirui Gathuna, Regina Wathira Kirui [appellant], Rehema Wairimu Ramadhan [respondent], Esther Nyokabi, Milka Kamiri Kirui, and Mary Wanjiru Kiru. Mary Wanjiru Kirui, died on 22nd November, 1999, and was survived by her children namely: Maria Njoki Wanjiru, Winnie Waithera Wanjiru, Anne Wangare and Margaret Wangui Wanjiru.

2. Following a consent by the majority of the surviving children of the deceased dated 16th September, 2010, [Simon Kirui Gathuna did not so consent], the appellant and respondent herein, together with their brother, Peter Kamau, made an application for a joint grant of letters of administration.

3. Thereafter, an objection dated 24th February, 2011, was lodged by Simon Kirui Gathuna [deceased's son], Maria Njoki Wanjiru [deceased's granddaughter], and Winnie Waithera Wanjiru [deceased's granddaughter]. However, when the matter came up for hearing on 13th July, 2011, they discovered that the joint grant of letters of administration by the appellant, respondent and Peter Kamau had already been confirmed and issued on 17th June, 2011. Consequently, they withdrew the objection and in the alternative, filed a Summons dated 2nd August, 2011, to revoke or annul the same. Esther Nyokabi [deceased's daughter] also filed a similar application to revoke or annul the joint grant of

letters of administration. The grounds for their applications were, among others, that: the application for joint grant of letters of administration was done without their knowledge and involvement; their names [and those of other beneficiaries] were not included in the list of beneficiaries; and they had reasonable apprehension that they would be disinherited.

4. The matter came up before the High Court on 12th November, 2013 when the trial court [Kimaru, J., as he then was] made an order that distribution of the estate of the deceased would be done in court on 13th November, 2013. The learned Judge also ordered all the beneficiaries to be present in court for the distribution. On 13th November, 2013, the following appears on the court record, immediately after coram – which included the names of the beneficiaries indicating, after each, whether they were present in court:

> " Order: By consent, the list of beneficiaries is as follows:
>
> i. Mary Wanjiru [deceased]
>
> a. Ann Wangare
>
> b. Maria Njoki
>
> c. Margaret Wangui
>
> d. Winnie Waithera
>
> ii. Simon Kirui Gathuna
>
> iii. Samuel Gathuna
>
> iv. Regina Waithera
>
> a. Son – Adam Muthoira
>
> v. Esther Nyokabi
>
> vi. Rehema Wairimu
>
> vii. Milcah Kamiri
>
> viii. Peter Kamau
>
> The list of properties are as follows:
>
> i. Dagoretti/Riruta/5221 – O.2 ha
>
> ii. Dagoretti/Riruta/3452 – 0.1 ha
>
> iii. Dagoretti/Riruta/3453 – 0.1 ha
>
> iv. Dagoretti/Riruta/3454 – 0.1 ha
>
> v. Dagoretti/Riruta/3455 – 0.1 ha
>
> vi. Dagoretti/Riruta/3456 – 0.1 ha
>
> vii. Dagoretti/Riruta/3474 – 0.1 ha
>
> viii. Plot 175 Mikindani – Mombasa [Residential House_

ix. Motor Vehicle Reg. No. KAH 483T – Accident scrap metal sold for Kshs. 20,000/=

The properties shall be distributed as follows:

i. Dagoretti/Riruta/3452 – 0.1 ha to be inherited by Milcah Kamiri.

ii. Dagoretti/Riruta/3741 – 0.1 ha to be inherited by Margaret Wangui.

iii. The Plot No. 175 Mikindani should be shared equally among the 8 children. The deceased daughter to be represented by her three daughters.

iv. Dagoretti/Riruta/3453 – 0.1 ha shall be inherited by the children of Margaret Wanjiku.

v. Dagoretti/Riruta/3456 – 0.1 ha shall be inherited in equal shares by Peter Kamau and Samuel Gathuna.

vi. Dagoretti/Riruta/3454 – 0.1 ha shall be inherited by Regina Waithera and Adam Muthiora.

vii. Dagoretti/Riruta/5221 – 0.2 ha shall be inherited by Rahab Wairimu and Esther Nyokabi.

viii. Dagoretti/Riruta/3455 – 0.1 ha shall be inherited by Rehema Wairimu.

ix. The proceeds from the sale of the motor vehicle shall be distributed equally between all the beneficiaries of the deceased.

This court is not distributing any parcels to Simon Kirui Gathuna because he inherited a bigger portion of land measuring about 6 [six] acres from his grandfather. The parcel[s] of land that are being distributed by the Court today comprise part of the and belonging to the late Zacharia in this case. The proceeds of the of the motor vehicle shall be distributed equally among all the beneficiaries of the deceased. The legal fees of the advocates shall be paid from the estate of the deceased."

5. Afterwards, a Certificate of Confirmation of grant dated 13th November, 2013, was issued. None of the beneficiaries appealed against the court order or otherwise challenged the Certificate of Confirmation of Grant.

6. On 10th January, 2014 the administrators of the deceased's estate [who include the appellant], jointly filed an application to rectify the grant issued on 13th November, 2013. In particular, they sought that land parcel Dagoretti/Riruta/5221 be subdivided into two equal portions between the respondent and Esther Nyokabi due to constant wrangles between the two, which made it untenable for them to co-exist. All three administrators swore a joint affidavit in support of the said application to rectify the grant issued on 13th November, 2013. Subsequently, upon hearing the matter, the court ordered for the equal subdivision of land parcel

Dagoretti/Riruta/5221 between the respondent and Esther Nyokabi. The order for the subdivision was dated 3rd February, 2014 and it read as follows:

" It Is Hereby Ordered: -

1. That the confirmed Grant issued on 13th November 2013 to the said Regina Waithera, Rehema Wairimu Ramadhan and Peter Kamau be rectified in the following respects: -

a. The property namely Title No. Dagoretti/Riruta/5221 be subdivided into two equal portions between Rehema Rahab Wairimu and Esther Nyokabi in accordance with the proposed subdivision plan prepared by P.M Kinyua and marked as annexure RRP-2.

b. That all the developments in the respective portions shall remain in site.

c. That plot A be granted to Esther Nyokabi while plot B be granted to Rehema Rahab Ramadhan.

d. That the costs of subdivision be shared equally between the two [2] parties."

7. There was a lull in the succession cause until more than five years later. On 4th February, 2019, the appellant filed an application of even date seeking, among others: the revocation of the Certificate of Confirmation of Grant issued on 13th November, 2013 on the ground that it had caused land parcel Dagoretti/Riruta/5221 to be inherited by Rahab Wairimu Ramadhan [the respondent], who according to the appellant, was not a beneficiary of the deceased; and, the vacation of the order dated 3rd February, 2014, as it was, in the appellant's opinion, obtained illegally, unlawfully and through fraudulent means because the consent of other beneficiaries was not sought.

8. The application was opposed by the respondent who stated, among other things, that she was named "Rahab Wairimu" at birth but after she got married to her husband Ramadhan Mohammed Mutua, she adopted the name "Rehema Wairimu Ramadhan"; and it was common knowledge within their circle of relatives that "Rahab Wairimu" or "Rehema Rahab Wairimu" or "Rehema Rahab Ramadhan" or "Rehema Rahab Wairimu Ramadhan" or "Rahab Wairimu Ramadhan" or "Rehema Wairimu Ramadhan" is one and the same person , namely, the respondent.

9. In its ruling dated 14th October, 2019, the trial court dismissed the appellant's application and held as follows:

"6. My considered view is that this application has no merits and cannot succeed. The applicant and the respondent are sisters. They and their brother Peter Kamau petitioned the court to be appointed as administrators. They were children of the deceased. The applicant cannot now claim that the respondent is a stranger, and not a beneficiary of the estate of the deceased. They were together before the court when there was agreement on the sharing of Dagoretti/Riruta/5221. They came to court through a joint application to effect that sharing. The application dated 10th January 2014 and the order of 3rd February 2014 constituted, in my view, a consent from which the applicant cannot be allowed to resile. The consent was intended to effect that which had been sanctioned in the certificate of confirmation.

7. Secondly, the alleged beneficiaries whose consent was not sought in the application dated 10th February 2014, or the order of 3rd February 2014, have not sworn any affidavits to support the appellant's claims. She did not plead that her application had been brought on their behalf. There was no indication that she had consulted, or obtained the consent of Peter Kamau who was the

third administrator, and who participated in the confirmation of the grant and the subsequent rectification.

8. If the applicant had a problem with the identity of the respondent and was certain that the names of Rahab Wairimu, Rehema Wairimu, Rahab Wairimu Ramadhan etc, did not refer to her, she needed to move under Order 37 rule 1 of the Civil Procedure Rules and rule 41[3] of the Probate and Administration Rules to determine the question as to the identity of the person, and such question ought to have been brought before the estate was distributed. [Re Estate of Julius Ndubi Javan [deceased] [2018] eKLR].

9. It should be pointed that the transfer of land is a process that leaves documents of identification at the lands registry. Such documents would include the transferees' identity card. The applicant needed to peruse the documents to establish that the person to whom Dagoretti/Riruta/6690 went was not the respondent. This is because the respondent's case was that she is the one to whom the property went, following the certificate of confirmation and rectification of the grant.

10. Lastly, the applicant did not explain why it took over 5 years to return to court with this application to challenge the orders to which she was a party."

10. The appellant did not appeal against this ruling dated 14th October, 2019. Instead, she filed an application dated 28th October, 2019, against the respondent seeking review of the Certificate of Confirmation of Grant issued on 13th November, 2013. Her lead argument was that the respondent was individually allocated Dagoretti/Riruta/3455 measuring 0.1 Ha under the name of Rehema Wairimu; and she was also allocated Dagoretti/Riruta/5221 measuring 0.2 Ha under the name Rahab Wairimu, to equally share with her sister Esther Nyokabi. As such, she sought for a redistribution of Dagoretti/Riruta/3455, to the effect that it be shared equally between herself [the appellant] and the respondent.

11. Unlike in her previous application dated 4th February, 2019, wherein she had argued that the respondent was a stranger and not a beneficiary, in the application dated 28th October, 2019, she acknowledged that the names "Rehema Wairimu", "Rahab Wairimu Ramadhan" and "Rahab Wairimu", all refer to the respondent; but she complained that the respondent had been solely allocated Dagoretti/Riruta/3455 and then, in addition, allocated Dagoretti/Riruta/5221 to co-share with Elizabeth Nyokabi. The appellant thought that the allocation was unfair and needed to be reviewed.

12. The appellant also filed another application dated 26th November, 2019, seeking review of the ruling of the court dated 14th October, 2019, to correct errors apparent therein, which she listed as follows: that distribution of the deceased's estate was not by consent but by a court order; that Dagoretti/Riruta/5221 was ordered to be shared between the respondent and Esther Nyokabi; that the application dated 10th January, 2014 was filed jointly by the respondent and Peter Kamau only; that on 3rd February, 2014, she [appellant was not present in court]; and Dagoretti/Riruta/3455 was not shared by agreement but by a court decree.

13. After hearing the parties, the learned Judge [Muchelule, J., as he then was], gave a consolidated ruling to both applications. It is dated 27th July, 2020. It is the subject of the present appeal. The court held that the distribution of the deceased's estate which was done on 13th November, 2013, was by consent of all the beneficiaries of the deceased's estate and the appellant was present during the said distribution.

As such, the court could not interfere with its orders except in circumstances that would afford a good ground for varying or rescinding a contract between parties; and the grounds for review should include fraud, mistake, misrepresentation, collusion, an agreement to public policy or absence of sufficient materials or with the concurrence of all the beneficiaries.

14. The learned judge also held that the appellant did not show that there was any new or important matter or evidence that she had discovered, or point to any error or mistake apparent on the face of the record or any sufficient reason; as provided for under section 80 of the *Civil Procedure Act* and Order 45, Rule 1[b] of the Civil Procedure Rules.

15. Additionally, the learned judge held that the appellant filed her application six years after the confirmation of grant issued on 13th November, 2013, and she had not offered any reasons or explanation for the delay.

16. The learned judge also disallowed the application for the reason that the beneficiaries of the estate had already taken steps to comply with the distribution decisions which had been made way back in 2013; and that, therefore, it would materially prejudice such beneficiaries to review the distribution of the estate at that late stage.

17. Further, as regards the appellant's application dated 26th November, 2019, the learned judge agreed with the respondent that the matter was res judicata since the appellant had filed a previous application dated 4th February, 2019, seeking to revoke the confirmation of grant dated 13th November, 2013, based on the same grounds as those she had outlined in her application dated 28th October, 2019.

18. Aggrieved by the decision of the High Court, the appellant filed a Notice of Appeal dated 29th July, 2020, and a Memorandum of Appeal dated 30th October, 2020, in which she raised the following grounds of appeal:

    1. That the Learned Hon. Judge erred in law and fact in rendering a ruling without taking into account the appellant's applications, supporting affidavits, further affidavits, submissions and list of authorities and thus made an erroneous finding.

    2. The Learned Hon. Judge erred in law and fact in making a finding that the distribution of the estate of the deceased, Mary Njoki Zakaria, was done by consent and/or agreement of all the beneficiaries.

    3. The Learned Hon. Judge erred in law and fact in finding that the appellant's applications dated 28th October, 2019, and 26th November, 2019, had not met the threshold of section 80 of the *Civil Procedure Act* and Order 45 Rule 1[b] of the Civil Procedure Rules.

    4. The Learned Hon. Judge erred in law and fact in finding that the beneficiaries had not agreed to review the distribution of the estate of the deceased, Mary Njoki Zacharia.

    5. The learned Hon. Judge erred in law and fact in finding that appellant had not sufficiently explained the delay in filing the application for review dated 28th October, 2019.

    6. The Learned Hon. Judge erred in law and fact in finding that any review would materially affect the prevailing positions of the parties on the basis of the distribution and on the basis of the certificate of confirmation without taking into accounts the weight of the evidence in the application dated 28th October 2019, and 26th November, 2019, the supporting affidavit and further affidavits and submissions thereto.

7. The Learned Ho. Judge erred in law and fact in finding that the application for review dated 28th October, 2019, was res judicata.

8. The Learned Hon. Judge erred in law and fact in holding that the application dated 26th November, 2019, was predicated on the success or otherwise of the application dated 28th October, 2019.

9. The Learned Hon. Judge erred in law and fact in dismissing the applications dated 28th October, 2019 and 26th November, 2019, without addressing the salient issues raised in the said applications.

10. The Learned Hon. Judge erred in law and fact in exercising his discretion injudiciously and arbitrarily by dismissing the appellant's application dated 28th October, 2019, and 26th November, 2019.

11. The Learned Hon. Judge erred in law and fact in exercising his discretion injudiciously and arbitrarily so as to deny the appellant her day in court.

19. Consequently, the appellant prayed for orders that this appeal be allowed with costs; the ruling of the superior court dated 27th July, 2020, and consequential orders be set aside with costs to the appellant; and, Dagoretti/Riruta/3455 be redistributed as prayed in the application dated 28th October, 2020, or as this Honourable Court would deem fit.

20. During the virtual hearing of the appeal, learned counsel, Mr. Onsombi appeared for the appellant, whereas there was no appearance for the respondent, even though her counsel had been served. Both parties filed written submissions.

21. This is a first appeal in which we are required to review issues of both facts and law afresh and come to our own independent conclusions. [See Selle v Associated Motor Boat Co. Limited [1968] EA 123]. In addition, this Court must be cognizant of the fact that it should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. [See Jabane v Olenja [1968] KLR 661].

22. We have carefully considered the appeal, the rival submissions of the parties in support and opposing positions. The appeal presents only two questions for determination: whether the learned Judge erred in declining the appellant's applications to review the Certificate of Confirmation of Grant issued and dated 13th November, 2013; and the judge's own ruling dated 14th October, 2019.

23. Though argued in a rather confusing and prolix manner, the appellant's arguments come down to the basic position that the order given by Kimaru, J. on 13th November, 2013 distributing the estate of the deceased was not by consent of the beneficiaries but by the court. It was, therefore, an error for the learned Judge, in both his ruling of 14th October, 2019 and the impugned ruling under appeal, to refer to the distribution of the estate of the deceased as a product of a consent judgment. This error, the appellant argues, infects both rulings and should be corrected.

24. In essence, the appellant argues that if the learned Judge had not committed this error, he would have justifiably reviewed the Certificate of Confirmation of Grant dated 13th November, 2013. He would have done so because, in her view, there was sufficient material to show that there was an error in allocating the parcel known as Dagoretti/Riruta/3455 solely to the respondent. Instead, the parcel should be shared equally between the appellant and the respondent.

25. The appellant submitted that the delay in seeking review of the confirmed certificate of grant dated 13th November, 2013, was occasioned by an out of court settlement which dragged on for quite some time. She argued that upon noting the error in the confirmed certificate of grant, all beneficiaries agreed that Dagoretti/Riruta/3455 would be shared equally between the appellant and the respondent;

    which resulted in the same being divided into two portions known as Dagoretti/Riruta/6691 [in which the appellant has built rental houses] and Dagoretti/Riruta/6692. However, the respondent has since refused to transfer Dagoretti/Riruta/6691 to her [appellant].

26. She argued that whereas the review of distribution of a deceased's estate requires consent of all the administrators and beneficiaries, there are times when the same may not be practical where some administrators or beneficiaries have vested interests in the subject properties to be reviewed, which would result in one being held hostage if he/she does not secure consent from all the concerned parties. As such, what is required should be service of the application for review to the parties. However, it was her case that in her application dated 28th October, 2019, she secured the consent of majority of the beneficiaries [Milka Kamiri, Mary Njoki, Adam Kirui, Margaret Wangu and Simon Kirui] who she claimed even attended court. The appellant also submitted that she has been collecting rent from the houses in Dagoretti/Riruta/6691 since 2013.

27. The appellant, therefore, insists that the proposed redistribution, in fact, reflects the position on the ground; and that it took her long to bring the application for review and/or revocation because the beneficiaries had worked out the details on the ground in such a way that she was, in fact, collecting rents from half the portion of the parcel in question. All along, the appellant says, there was some hope that the issue would be resolved out of court but ultimately it became clear that the respondent was never going to acquiesce hence her applications in court.

28. The appellant further insists that the learned Judge was wrong in declining to review his ruling of 14th October, 2019 because there was an error on the face, to wit, that she had not been privy to bringing the application for rectification of the Certificate of Confirmation dated 10th January, 2014 which resulted in the order dated 3rd February, 2014. That application for rectification dated 10th January, 2014, the appellant argues, was filed by the other two administrators without her consent or participation. The other error on the face of the ruling dated 14th October, 2019, according to the respondent is that the learned Judge erroneously held that the distribution of the estate of the deceased was a product of consent; yet the same had been decided by the court.

29. Finally, the appellant argues that it was an error for the learned Judge to have found that the application dated 28th October, 2019 was res judicata her application dated 4th February, 2019 which was determined vide the learned Judge's ruling dated 14th October, 2019. The appellant argues that whereas the latter was primarily based on the identity of the respondent, the former application was based on substantive grounds of error discovered in the Certificate of Confirmation dated 13th November, 2013.

30. The respondent vehemently opposes the appeal. Her lead argument is that there has been an inordinate delay in bringing the application for review of the Certificate of Confirmation; and that the delay disentitles the appellant from any relief. More substantively, she insists that there is no error in either the Certificate of Confirmation dated 13th November, 2013 or the ruling dated 14th October, 2014 that warrants a review.

31. The respondent defends the two rulings by the learned Judge on all scores – first, arguing that the learned Judge was correct in finding that the application for rectification of the grant dated 10th January, 2014 had been filed by all the three administrators – including the appellant. She further argues that

the learned Judge was correct to dismiss the application dated 28th October, 2019 as being res judicata her own application dated 4th February, 2019.

32. The comprehensive history of the controversy herein which we rehashed at the beginning of this judgment was necessary because it straightforwardly suggests the resolution of this appeal. It is not disputed that the probate court summoned the beneficiaries to appear before it for distribution of the estate on 13th November, 2013. When the beneficiaries so appeared, they all – including the appellant and respondent - consented as to the list and identities of the beneficiaries of the estate. This is clearly recorded in the transcript on the record of appeal. Fromthe record, there is less certainty as to whether the beneficiaries consented on the list of assets of the deceased– but, thankfully, no dispute has arisen about the extent of the estate. However, what is clear from the court record is that the actual distribution of the estate to the beneficiaries was not done with the consent of all the beneficiaries. Instead, the learned Judge [Kimaru, J.] made the determinations of the allocations to the different beneficiaries based on the totality of knowledge that the court had based on all the material filed in the case.

33. The learned Judge makes it crystal clear that the distribution is by the court in the final part of his orders of 13th November, 2013:

> " This court is not distributing any parcels to Simon Kirui Gathuna because he inherited a bigger portion of land measuring about 6 [six] acres from his grandfather. The parcel[s] of land that are being distributed by the Court today comprise part of the estate and belonging to the late Zacharia in this case. The proceeds of the of the motor vehicle shall be distributed equally among all the beneficiaries of the deceased. The legal fees of the advocates shall be paid from the estate of the deceased."

34. It is clear from this direction that it is the court that had reached decisions on what each beneficiary should get from the estate. Indeed, the only part of the record of 13thNovember, 2013 which is associated with the word "consent" is the first part about the identification of the beneficiaries.

35. Given this, it is clear to us that the learned Judge, in his rulings of 14th October, 2019 and that of 27th July, 2020, was in error for making a finding that the distribution of the estate of the deceased had been done by the consent of the beneficiaries and was, therefore, not subject to either revocation or review solely on that ground.

36. Unfortunately for the appellant, this does not end matters. It is a fact that distribution was done by the learned Judge on 13th November, 2013 – and that this distribution was immortalized in the Certificate of Confirmation of Grant issued in the succession cause. There was no appeal against the court orders of 13th November, 2013. In fact, the next action in the cause, is the Summons for Rectification of the Certificate of Confirmation of Grant which is dated 10th January, 2014. That Summons for Rectification is purportedly brought by all the three administrators – including the appellant. It resulted in the orders of 3rd February, 2014 rectifying the Certificate of Confirmation of Grant.

37. The appellant claims that she was not privy to the Summons for Rectification. That argument is unavailing to her. The orders in that application were given on 3rd February, 2014 but she does not register her protest until she filed her Summons for Revocation dated 4th February, 2019 – about five years later. There is no explanation for this inaction. Besides, other than a rather bald denial that her signature is forged, the claim is implausible. She has not taken any action whatsoever to pursue her rights – including filing a criminal complaint - if that was, indeed, a forgery. It is noteworthy that when

the appellant filed her Summons for Revocation, in her supporting affidavit sworn on 29th January, 2019, she does not make the claim that her signature was forged in the Affidavit sworn in support of the Summons for Rectification. Instead, she based her application on the argument that not all beneficiaries had consented to the Summons for Rectification. It is only in her later applications – the ones dated 28th November, 2019 and 26th November, 2019 that she makes the outright claim that her signature was forged.

38. The position, then, is that there is, on record, a Certificate of Confirmation of Grant which was issued on 13th November, 2013 in the presence of the appellant, which was rectified pursuant to an application to which she is a co- applicant that announces the distribution of the estate of the deceased by the probate court. As at 3rd February, 2014, this was the scheme of distribution of the estate which the administrators were to execute. As aforesaid, there was no appeal against either the orders of 13th November, 2013 or those of 3rd February, 2014. In these circumstances, it was simply not open for the appellant to seek to alter the substantive distribution to the beneficiaries by way of review. This is so for two reasons.

39. First, there is simply no error on the face of the record warranting review by the court. What is present, if anything, is a grievance by a beneficiary – the appellant – who is persuaded that the court got it wrong in distributing the property known as Dagoretti/Riruta/5221 as it did. If the appellant was aggrieved by that decision by the probate court, the recourse for her would have been to appeal it; not to seek its review. The review jurisdiction is not one that can be utilized to review perceived errors in the exercise of discretion or fact-finding by a judge. As this is precisely what the appellant claims in the present case, her recourse could not be on review but on appeal. There is simply no "error" in the sense comprehended by section 80 of the *Civil Procedure Act* or Order 45 of the Civil Procedure Rules that is capable of review.

40. Second, even if there was an error capable of review by the same court, the delay in bringing the application coupled with the intervening factors would justify the refusal by the learned Judge to exercise his review jurisdiction. As the learned Judge pointed out, there was a delay of more than six years since the impugned order had been given. The explanation that the parties had reached an "out of court settlement" is not satisfactory to explain such a long delay in seeking relief.

41. In addition, the fact that in the intervening period the appellant and her co-appellant had sought rectification of the Certification of Confirmation of Grant operates as a bar against the plea of error in the face of the record regarding the orders of 13th November, 2013. If, in fact, there was such an error, it would have come to the attention of the parties and, at least the appellant when the Summons for Rectification was filed barely two months after the orders of 13th November, 2013.

42. Finally, also in the intervening period, the appellant had attempted to un-do the orders of 13th November, 2013 through a Summons of Revocation. If, indeed, the orders of 13th November, 2013 contained an error on its face rather than reflecting the appellant's dissatisfaction with how the court distributed the estate of the deceased, then a review would have been sought at that stage.

43. What our analysis demonstrates is that although the learned Judge committed a harmless error of concluding that all the orders given by the court on 13th November, 2013 were obtained by the consent of all the beneficiaries, the learned Judge was correct in dismissing the appellant's application for review of the court's orders of 13th November, 2013 and the court's own ruling dated 14th October, 2019.

44. The result is that the appeal herein has no merit and we hereby dismiss it in its entirety. In a bid to give the parties to this torturous family dispute an opportunity to getting to a possible outcome, we direct that each party bears its own costs.

45. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025.

F. A. OCHIENG

JUDGE OF APPEAL

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L. ACHODE

JUDGE OF APPEAL

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JOEL NGUGI

UDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR