Mathenge v Mathenge & another (Succession Cause 139 of 1999)
[2025] KEHC 4244 (KLR) (26 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4244 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE 139 OF 1999

DKN MAGARE, J

MARCH 26, 2025

BETWEEN

DUNCAN GICHANE MATHENGE ..... PETITIONER

AND

PAUL WANJOHI MATHENGE ..... OBJECTOR

AND

GEORGINA WANGARI GICHANE ..... APPLICANT

RULING

1. This matter had been in court since 1999, a period of 26 years ago. the deceased's estate has never known peace. whatever problems they are facing a result of subterfuge and skullduggery. some of the beneficiaries appear to have be enlightened earlier than others. as a results events have taken place in this file, that will ashame and inspire envy in the devil. he never anticipated some actions that were done in his name.

2. The deceased left two widows, that is, Agnes Nduta Mathenge and Nyambura Mathenge. The former was the mother to the Petitioner, whereas the latter was the mother to the Objector. Duncan and Paul are step-brothers. By the time their deceased father died, the properties registered in his name were:

    a. Gatarakwa/Gatarakwa/Block III/785 and,

    b. Thegenge/Karia/645.

3. The latter property, according to the evidence of Duncan, was subdivided by Paul into two parcels, namely parcels No. 1693 and 1694. That subdivision was after the death of their father. In this matter, a grant was issued in the joint names of Duncan Gichane Mathenge and Paul Wanjohi Mathenge. The latter, Paul Wanjohi Mathenge, filed an application for confirmation of grant dated 13th June 2005 and sought to distribute to himself parcel No. Thegenge/Karia/1693. He did not indicate how the

deceased's other property was to be distributed, including Thegenge/Karia/1694. Duncan Gichane Mathenge filed a protest against that distribution.

4. The protest was heard by way of viva voce evidence. Paul Wanjohi Mathenge, in evidence, stated that property 645, which was subdivided into 1693 and 1694, was given to him by his late father. He said Duncan Gichane Mathenge took the property. He prayed that the court would get it back for him.

5. Paul Wanjohi Mathenge produced in court the original titles of parcel Nos. 1693 and 1694. On being cross-examined, he accepted that the subdivision of 645 took place after the death of the registered owner. He exhibited a letter of consent from the land control board related to parcel No. 1693. He accepted that by 1992 parcel number 1693 did not exist. He accepted that he was arrested over the issue of the subdivision of parcel No. 645. He admitted that his brother Muthee Mathenge occupies property Thegenge/Kihora/292. he stated that the property is registered in Muthee's name.

6. Paul Wanjohi Mathenge stated that his other brother, whom he did not name, allegedly occupied Gatarakwa/Gatarakwa/Block III/785. He did not accept that the portions occupied by Muthee and his other brother were those given to their house by their late father.

7. Duncan Gichane Mathenge, in evidence, stated that it was his mother who began the succession cause. At that time, land parcel Thegenge/Karia/645 had not been subdivided. Later he discovered that Paul was holding two titles in respect of that parcel number. He reported the matter to the police, and Paul was arrested and released within a week. He said that Paul does not cultivate on land parcel number Thegenge/Karia/645. upon hearing parties, Lady Justice Mary Kasango 21st April 2008, issued a judgment on 21.04.2008, where she issued the following orders:

    a. That the property Thegenge/Karia/1693 and 1694 to go to Duncan Gichane Mathenge.

    b. Gatarakwa/Gatarakwa/Block III/785 to go to Paul Wanjogu Mathenge.

    c. That there shall be no order as to costs.

8. There had been a lull in activities until 2021 when the applicants filed an application for determination dated 15.07.2021. The same was brought under Articles 47 and 48 of *the Constitution* of Kenya 2010, Orders 45 Rule 1 and 51 Rule 1 of the Civil Procedure Rules, and Sections lA, lB, and 3A of the *Civil Procedure Act* seeking for the orders of review of the orders made on 21.04.2008.

9. The Respondent filed a Replying Affidavit dated 6th December 2021 in opposition of the application.

10. It is the applicant's case that on 21st April 2008, the court distributed the estate of the deceased as follows:-

    a. LR. Thegenge/ Karia/1693 and 1694 allocated to Duncan Gichane Mathenge

    b. LR. Gatarakwa/Gatarakwa/Block III/785 allocated to Paul Wanjogu Mathenge.

11. The applicant contends that there is an outright error on the face of the record in the judgment as LR Gatarakwa/Gatarakwa/Block III/785 was not available for distribution in the instant succession cause as it was registered in the name of Philip Wanjogu Mathenge. The applicant further contends that the said Philip Wanjogu Mathenge was gifted the land by his father, the deceased, and a title was issued to him on 27.10.1995. The objector produced and filed a green card to support this contention. However, the applicant contends that the honourable judge failed to note the same despite the green card forming part of the court record in delivering her judgment. As such, the applicant avers that it has been practically been impossible to execute the judgment as there was a valid title existing in the name of Philip Wanjogu Mathenge.

12. The applicant further contends that the Honourable Judge inadvertently failed to note that the objector filed a letter of consent dated 21.01.1992 in which the deceased gifted to the objector LR Thegenge/Karia/1693, absolutely. The applicant urges the court to review the judgment dated 21.04.2008 by directing that LR Gatarakwa/Gatarakwa/Block III/785 did not form part of the estate of the deceased. They argued that the said parcel was not available for distribution.

13. They sought that the court allocates LR Thegenge/Karia/1693 absolutely to the objector. The applicant further states that LR Thegenge/Karia/1693 is still unoccupied as everyone knows that it belongs to the objector. Moreover, the applicant contends that all the beneficiaries of the estate have been provided for and are comfortable in their allocations and as such, no person shall be prejudiced if the court reviews the said Judgment.

14. The applicant states that her family has been cultivating on the said LR. Thegenge/Karia/1693 since the case's inception but stopped when the petitioner fenced off the parcel of land. The applicant is thus apprehensive that he shall sell it off to a third party. Moreover, the applicant states that this is a case of review and not an appeal as there is nothing to appeal from. As such, she prays that the application be allowed as prayed.

15. It is the Respondent's case that the instant application is an abuse of the court process as the application has been filed thirteen (13) years after the judgment was delivered. They argued that the delay is unreasonable and has not been satisfactorily explained. The Respondent states that the applicant is the daughter of Paul Wanjohi Mathenge, the objector in the succession proceedings. The Respondent further avers that LR. Thegenge/Karia/1693 & 1694 were transmitted to his name and were later consolidated and further subdivided into LR. Thegenge/Karia/5693 and Thegenge/ Karia/5694.

16. The Respondent further contends that judgment in the cause was delivered on 21.04.2008 after the cause was fully heard. it emerged that the applicant's father had, through fraudulent means, intermeddled with the deceased's estate by subdividing and transferring land parcels after the deceased's death. After judgment was rendered, the Respondent states that the applicant's father filed Civil Application No. 50 of 2010 at the Court of Appeal seeking for extension of time to lodge a Notice of Appeal and the appeal which was allowed.

17. The Objector filed a Notice of Appeal therein after. The Respondent, however, contends that he does not know the status of the appeal and status that it may have been abandoned upon the objector realizing that it had up chances of success.

18. The Respondent further argued that no error is apparent on the face of the record as it was clear in the court's mind that LR. Thegenge/Karia 645 in the deceased's name was fraudulently subdivided and transferred by the applicant's father after the deceased's death to form LR. Thegenge/ Karia/1693 & 1694. further that the court found that LR. Gatarakwa/Gatarakwa Block III/785 was transferred after the deceased died and the Respondent contends that is why the court found the parcels of land formed part of the estate. The Respondent further contends that neither the applicant nor her siblings occupy any of the resultant sub-divisions of the consolidated parcel of land. As such, the Respondent prays that the application be dismissed with costs.

Submissions

19. The applicant reiterates what she deponed in her affidavit and submits that LR. Gatarakwa/Gatarakwa Block III/785 is owned and occupied by the objector's brother, Philip Wanjogu Mathenge. The applicant contends that the court ought not to have awarded the objector property owned and occupied by a third party.

20. The applicant further submits that the circumstances under which Philip Wanjogu Mathenge was gifted LR 785 were not in contention. Further, there were no records to suggest that there was any form of intermeddling to give credence to the petitioner. The applicant thus submits that since the said property was not part of the estate to be inherited, the court inadvertently left out the objector, thus disinheriting him. The applicant, therefore, prays that the court allocates to her LR Thegenge/ Karia/1693, which is available for transmission.

21. The Respondent relied on Order 45 Rule 1 of the Civil Procedure Rules and the case of In Re Estate of Simoto Omwenje Isaka (Deceased) [2020] eKLR and submits that from the hearing, it emerged that the objector had through fraudulent means intermeddled with the deceased's estate. The Respondent further submits that the applicant is attempting to re-litigate the case, which she ought to appeal and not seek a review.

22. The Respondent further states that the objector had already sought an extension of time to lodge a notice of appeal, which was lodged after the application was prosecuted. Thus, the applicant ought to have pursued the appeal and not filed the instant application for review. The Respondent submitted that there is no error on the face of the record and that the applicant has not shown sufficient cause to have the judgment reviewed.

23. The Respondent further relies on the case of Re Estate of Simoto Omwenje Isaka (Deceased) [2020] eKLR and submits that the instant application was made 13 years after the judgment was delivered. The Respondent submits that the applicant has not explained why she waited 13 years before filing the instant application. As such, the Respondent submits that the application lacks merit and ought to be dismissed with costs.

Analysis

24. The main issue for determination is whether the applicant has met the threshold for the grant of orders of setting aside and review.

25. order 45 of the civil procedure rules is applicable by dint of Rule 68 of the probate and administrative rule. Review is provided by dint of 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
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> (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".
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> Section 63 (e) of the *Civil Procedure Act* states that:
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> "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

26. Order 45 of the Civil Procedure Code sets out the parameters for an application for review as follows:

Rule 1 (1) Any person considering himself aggrieved:

a. by a decree or order from which an appeal is allowed, but from which up 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 order made 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 which he applies for the review.

27. It follows that Order 45 provides for the circumstances under which an order for review can be made. The applicant must demonstrate to the court that:

a. there has been a 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 when the decree was passed.

b. Secondly, the applicant must demonstrate to the court that some mistake or error is apparent on the face of the record.

c. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

28. In the instant application, the applicant prays for the setting aside of the orders made on 21/4/2008 on the grounds that there is an error apparent on the face of the record.

29. The applicant must demonstrate that there is an error on the face of the record. the error must not only exist but also apparent. an error of law is not an error apparent. the error must not be found after undue elaborate analysis. This principle was enunciated by the Court of Appeal in National Bank of Kenva Ltd v Ndungu Njau Civil Appeal No. 211 of 1996 (UR) where it was held:

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."

30. A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. in the case of Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR the court stated:

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. 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 for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.

31. The court went on to say:-

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 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 purposes 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. 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.

32. The errors the applicant alludes to are not errors on the face of the record. The errors are not self-evident but would require an elaborate argument to be established. Evidently, from the above, it is clear that the error ought to be so glaring that there can be no debate about it. An error that has to be established by a long-drawn out 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. The applicant ought to have filed an appeal instead of the instant application.

33. The applicant seeks to have the court re-distribute the deceased's estate in the name of seeking orders of review. The applicant's contentions that there is an error on the face of the record cannot fall into the category of the submissions she has made. It is evident that the appropriate course the applicant ought to have taken is to appeal against the decision of this court delivered on 21.01.2008.

34. Even what they call an error apparent is not an error. The father fraudulently transferred land to himself and his son, Paul Wanjohi, before the estate was distributed. The court gave the land parcel number Gatarakwa/Gatarakwa/Block III/785 to the person who transferred it. The transfer to the objector's brother was gratuitous. The Applicant should be comforted by the Supreme Court decision in the case of Kiebia *v M'lintari & another (Civil Case 10 of 2015*) [2018] KESC 22 (KLR) (5 October 2018) (Judgment), where they stated as doth:

> " 58. What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered *Land Act*, have now been subsumed in the "customary trusts" under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land."

35. In the circumstances, the application for revocation is unmerited and is consequently dismissed. Given that there are no respondents, there shall be no order as to costs.

36. The applicant also took a whole 13 years to file an application for review. This is an unreasonable period to seek review. In the case of Sultan Omar Hudhefa v Brian Muthii Warui [2022] eKLR, Githinji J, posited as follows:

> " I have carefully perused the Applicant's previous application dated 21st July 2021 and the impugned ruling herein. I note that the above issue was expressly denied by this court. While the Applicant is well within his rights to apply for a review, he has not raised a good ground for review. I say so because in an application for review, an applicant has to show that there has been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be availed at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay."

37. I associate myself with the reasoning of Kuloba J (as he then was) in Lakesteel Supplies v 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."

38. While addressing a question of delay in succession proceedings for three years, Justice W Musyoka posited as follows in the case of In re Estate of Simoto Omwenje Isaka (Deceased) [2020] eKLR:

16. With regard to delay in seeking review, the court, in Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR, stated:

> " One thing is clear in this application. The delay of one year has not been explained. Perhaps, it's important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads "... may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."
>
> The logical question that follows is, was the present application made without unreasonable delay? Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal

circumstances it should not take an applicant one year to file an application in court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay.

Such a long delay must be sufficiently explained."

17. The applicant, in his submissions and the affidavit in support of the application, has not addressed the delay in filing the application for review, let alone the reasons for it. The delay is, therefore, not explained. It is my view that a delay of three years is gross and unreasonable, and, therefore, the orders sought in the instant application cannot be available for granting.

39. In the circumstances, I have said enough to show that the application lacks merit and has not met the threshold to warrant her review of the judgment dated 21.04.2008. The same is accordingly dismissed.

Determination

23. The upshot of the foregoing is that I make the following orders: -

a. This Application dated 15.07.2021 is unmeritorious and is consequently dismissed.

b. The Respondent shall have costs of Ksh 20,000/= payable within 30 days; in default, execution do issue.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF MARCH, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

Mr. Kiminda for the Respondent

Ms. Nanjala for the Applicant

Court Assistant – Jedidah

M.D. KIZITO, J.