In re Estate of Thomas Kamuyu Thuo (Deceased) (Succession Cause 730 of 1995) [2024] KEHC 15504 (KLR) (Family) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 15504 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 730 OF 1995

EKO OGOLA, J

JUNE 27, 2024

IN THE MATTER OF THE ESTATE OF THOMAS KAMUYU THUO (DECEASED)

BETWEEN

GRACE NJERI THUO .... 1ST APPLICANT

FAITH MWERU THUO .... 2ND APPLICANT

CHARITY WAMUGO THUO .... 3RD APPLICANT

AND

EDWARD KIRUMBA KAMUYU .... 1ST RESPONDENT

JOHNSTONE KIMANI KAMUYU .... 2ND RESPONDENT

RULING

1. The Summons before this court is dated 13th May 2021. The applicants pray for the following orders:-

   a. This honorable court reviews andor set aside the judgment delivered by Justice K.H. Rawal on 21st November 2008 and more specifically that property known as LR No. DagorettiWaithaka322 was being held by the late Samuel Kamuyu Thuo (deceased) in trust for his mother's family.

   b. The costs of this application be in the cause.

2. To put matters into context, the deceased died intestate in 1990. He was survived by three houses. The third house comprised Samuel Thuo Kamuyu, Edward Kimba Kamuyu, Johnstone Kimani Kamuyu, David Gitau Kamuyu, Daniel Chege Kamuyu,Rueben Kamau Kamuyu, Margaret Wambui Kamuyu. Tabitha Wanjira Kariuki, and Gladys Wanjiku Kamuyu.

3. The applicants herein are daughters of the late Samuel Kamuyu Thuo.

4. The deceased estate comprised two properties: DagorettiWaithaka336 and 322. From the record, before the deceased death, he had apportioned each house 11 acres from the two properties.

5. From the testimonies in court by the administrators, Peter Karanja and Paul Thuo Kamuyu, plot 322 which was placed aside for the 3rd house was registered in the name of the firstborn son from the 3rd house.

6. As per the 2nd respondent's affidavit dated 23rd September 2002 and 17th December 2004, he deposed that Samuel Kamuyu Thuo who died in March 2008 held plot 322 in trust for the dependents and beneficiaries of the 3rd house.

7. One of the issues that the court was to determine was whether the intervivos registration of property No. 322 in the names of the eldest son of the 3rd house was in trust for all the children of the said house. The court held that the 3rd house has acquired overriding interest on 11 acres of plot 322. Furthermore, the court stated that: "The facts on record do unhesitantly point that the registered proprietor of property No. 322 held that same in trust for his mother's family."

8. According to the applicants herein, Samuel Kamuyu Thuo died 8 months before the court delivered its Ruling. They added that the court would have waited until the personal representative of the estate of Samuel Thuo had been appointed and enjoined in the suit. The applicants stated that the court was also not informed of the death of Samuel Thuo and that he had filed suit Environment and Land Case No. 869 of 2007 (previously High Court Case No. 1726 of 2002) with regard to plot 322. Therefore, the provisions of the *Limitation of Actions Act* could not apply.

9. The applicants further deposed that the impugned Ruling was in respect of the Petition for letters of administration of the deceased estate and plot 322 did not form the deceased estate. Hence, the issue of whether plot 322 was held in trust on behalf of the 3rd house was not to be determined by this court.

10. The applicant deposed that the 13-year delay in filing this application is explainable owing to the circumstances surrounding this case. The applicants stated that all the subsequent Rulings and Judgments with regard to plot 322 have relied on the impugned Ruling.

11. In response, the 1st respondent deposed that the applicants did not take any legal step as a recourse after the Ruling was rendered. He added that the Ruling was not appealed nor set aside. The 1st respondent averred that plot 322 has been subject to litigation but all courts have upheld the Ruling of this court. He added that the reasons for the delay are fictitious and substantially diverge from the truth.

12. The 1st respondent deposed that there is no new evidence that was not in the applicant's knowledge at the time the petition was being heard. Furthermore, Samuel Thuo had an opportunity to participate in the proceedings before his death since he was represented by counsel. The 1st respondent deposed that the applicants were aware of the suit filed by Samuel Thuo and they had opportunities to inform the court but failed to do so.

13. The court directed parties to canvass the application by way of written submissions. This was complied with.

Determination

14. I have considered the Summons, affidavits, submissions and the entire record of the court. The issue for determination is whether the applicants have met the threshold of orders of review.

15. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which provides as follows: -

    63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

        (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

        (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules."

16. In John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another [2016] eKLR, the court cited Rule 63 of the Probate and Administration Rules, and then stated as follows:

> "As stated above, the only provisions of the Civil Procedure Rules imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. 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 Order 45 of the Civil Procedure Rules."

17. It is, therefore, clear that any party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 of the Civil Procedure Rules. The substantive provisions of Order 45, state 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."

18. Order 45 provides for three circumstances under which an order for review can be made. To be successful, the applicant must demonstrate to the court that 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. A party may successfully

apply for review, secondly, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.

19. The applicants herein ground their application on 'any sufficient reason'. The applicants deposed that the court delivered its Ruling 8 months after the death of Samuel Thuo and that there was an existing suit where plot 322 was the subject matter.

20. It must be noted that the impugned Ruling was subject of Summons for Confirmation of Grant dated 25th February 2001. Therefore, Samuel Thuo had an opportunity to participate in the proceedings and he was represented by counsel who was aware of these proceedings. Furthermore, the Environment and Land case that the applicants are referring to was instituted in the year 2002. Samuel Thuo intentionally and negligently concealed this fact from the court. Therefore, the applicants cannot come later and accuse the court of not considering a fact that was unbeknownst to it.

21. The court's decision on plot 322 was based on viva voce evidence and affidavit evidence that Samuel Thuo held the property in trust for the 3rd house. The beneficiaries of the 3rd house who participated in the proceedings did not oppose this allegation. The applicants are grandchildren of the 3rd house. Therefore, it baffles me why the applicants are coming to court 13 years later to litigate on issues already determined. The beneficiaries of the 3rd house were not aggrieved with the said decision. If they were, they would have appealed or set it aside immediately after the Ruling was delivered.

22. Furthermore, the applicants averred that plot 322 has been subject to litigation in other courts and the other courts have based their decision on the impugned Ruling. This application therefore is the textbook definition of 'forum shopping'.

23. In the case of Republic vs. Cabinet Secretary for Interior and Co-ordination of National Government Ex Parte Abullahi Said Sald [2019] eKLR, the court observed, with respect to any other sufficient reason:

> " A court can review a judgment for any other sufficient reason. In the case of Sadar Mohamed vs Charan Singh and Another [19] it was held that any other sufficient reason 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. Mulla in the Code of Civil Procedure [20] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. 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.
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> 31. I also find useful guidance in Tokesi Mambili and others vs Simion Litsanga [22] where they held as follows: -
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> i. ...
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> ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion."

24. It should also be noted that the application herein was made thirteen years after the impugned orders were made. It is trite law that an application for review should be made without unreasonable delay. The applicants herein have advanced no reason for the thirteen-year delay before the filing of the application.

25. With regard to the delay in seeking review, the court, in Stephen Gathua Kimani vs. Nancy Wanjira Waruingi ta 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.
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> 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."

26. The applicants, in their submissions and the affidavit in support of the application, stated that the delay was caused by the nature of the cause. This is neither a valid nor a satisfying explanation. The delay is, therefore, not explained. It is my view that a delay of thirteen years is gross and unreasonable, and, therefore, the orders sought in the instant application cannot be available for the granting.

27. The upshot is that the Summons dated 13th May 2021 is dismissed for lack of merit. Costs be in the cause.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 27th day of June 2024

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E.K. OGOLA

JUDGE

In the presence of:

Ms. Mutinda for the Applicants

Ms. Odhiambo for the 1st respondents

Ms. Njoki for the 2nd respondent

Gisiele Muthoni Court Assistant