In re Estate of Elijah Mbondo Ntheketha (Deceased) (Succession Cause 3 of 2017) [2022] KEHC 11004 (KLR) (3 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11004 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

SUCCESSION CAUSE 3 OF 2017

GV ODUNGA, J

AUGUST 3, 2022

IN THE MATTER OF THE ESTATE OF ELIJAH MBONDO NTHEKETHA (DECEASED)

BETWEEN

ROSE MUENI MUTUA ..... APPLICANT

AND

SERAH MUTHIO MBONDO ..... 1ST RESPONDENT

MOFFAT MBONDO ..... 2ND RESPONDENT

RACHEAL M MBONDO ..... 3RD RESPONDENT

TALA HOUSING CO-OPERATIVE SOCIETY LIMITED ..... 4TH RESPONDENT

ALICE MWELU MBONDO ..... 5TH RESPONDENT

RULING

1. On January 28, 2022, this court delivered a ruling in this cause in which it expressed itself *inter alia* as hereunder:

> "In this case, I had occasion to listen to Alice Mwelu's answers to questions posed to her and while I appreciate her advanced age, she struck me as a person who is still in command of her senses. In fact, I daresay that her appreciation of her role in these proceedings surpasses that of some of those who may be in the age bracket of her grandchildren. She is aware of the history of this cause and why the matter is still in court as well as the events that have taken place since the time the cause was commenced. She might not know the minute details but she has the general overview of those events. In my view she is comparatively a better person to be retained as an administrator of the estate than some of the younger beneficiaries of the estate. While other parties may find her a little slow in appreciating certain aspects due to her age, which is expected, age is not sickness and it does not necessarily follow that younger

people would appreciate the issues better than her if they were to be appointed in her place. With her knowledge of where she is coming from and where she is going her repository of knowledge may well be an asset in the administration of the estate."

2. By summons for partial review dated February 4, 2022, just a few days after the said ruling, the applicant herein was back before this court seeking the following orders:

    1. That there be review and setting aside of this honourable court's ruling dated January 28, 2022 in the following terms:

    2. That Alice Mwelu Mbondo be substituted with Rose Mueni Mutua Kithuka as the 4th administrator.

    3. That costs of this application be in the cause.

3. That application was supported by an affidavit sworn by the applicant herein in her capacity as a beneficiary of the estate of the deceased from the deceased's 1st house, being a wife of the deceased's son, the late Boniface Musyoki Mbondo. According to the applicant, the said late Boniface Musyoki Mbondo who was an administrator of the deceased's estate by dint of this court's ruling dated September 30, 2005 died on November 29, 2006 (shortly after being appointed administrator). The applicant disclosed that she is his legal representative.

4. According to the applicant, vide its ruling dated January 20, 2017, this court appointed Alice Mwelu Mbondo to be an administrator (in place of the late Boniface Musyoki Mbondo) in addition to Richard Muema Mbondo, Serah Muthio Mbondo and Bernard Ntheketha Mbondo. It was explained that Alice Mwelu Mbondo (who is the applicant's late husband's sister) is the only surviving child of the deceased's 1st house. The applicant averred that by an application dated September 27, 2017 and filed in this court on the September 28, 2017 the applicant sought to have herself appointed as an administrator of the deceased's estate in the place of Alice Mwelu Mbondo, the 5th respondent herein and on the October 16, 2017, this court ordered that the 5th respondent herein who is also the 4th administrator do personally attend court for examination by the court as to her ability to administer the estate of the deceased.

5. It was averred by the applicant that when Alice Mwelu Mbondo presented herself before this court she was only examined on issues regarding her faith and in particular on her knowledge of the bible and whether she goes to church. According to the applicant, at no point was she examined on her competency and ability to regularly participate and co-operate with the other administrators in this estate. According to the applicant, this is a vast estate and the 4th administrator herein has on numerous occasions failed to attend meetings in regard to the estate and is not able to run up and down due to her age.

6. According to the applicant, in declining to remove Alice Mwelu Mbondo as the 4th administrator of the estate of the deceased, the court delved on immaterial grounds to deny the application dated September 27, 2017 since according to the applicant, Alice Mwelu Mbondo is not capable of executing the duties of an administrator due to the complexity of this estate. According to her, the interests of the deceased's 1st house are not being taken care of in the administration of the deceased's estate hence the need to have this court's ruling dated January 28, 2022 reviewed and set aside.

7. On behalf of the applicant it was submitted that whereas the *Law of Succession Act* prescribes general rules as to who ought to administer the estate of a deceased in terms of priority, the applicant relied on the provisions of rule 73 of the Probate and Administration Rules and submitted that this court, sitting as a succession court, has vested in it such wide powers to entertain any application (including

the instant application) and pronounce such decrees and orders as may be just and expedient. She also relied on section 47 of the *Law of Succession Act* and contended that the instant application invites the Court, in exercise of the wide and undeterred jurisdiction conferred upon it to review the ruling dated January 28, 2022 to the extent that the applicant herein be substituted for Alice Mwelu Mbondo as the 4th administrator.

8. According to the applicant, the said Alice Mwelu Mbondo, being of advanced age is not capable of executing the duties of an administrator as by law provided. She avers that the 4th administrator has on numerous occasions, failed to attend crucial meetings regarding the administration of the estate herein and is unable to run up and down owing to the complexity of the estate coupled with her advanced age. The applicant relied on order 45 rule 1 of the *Civil Procedure Rules* and submitted that she had met the threshold for granting the orders sought. We humbly submit that this honourable court is a court of record.

9. Further, the applicant averred that whereas she and the 4th administrator come from the same house of the deceased, the interests of the 1st house are not being taken care of by the 4th administrator in administration of the estate of the deceased herein and reliance was placed on the case of *Paul Rono Pymto & another v Giles Tarpin Lyonnet* [2014] eKLR Succession Cause No 57 of 2010.

10. As such, it was submitted that while the administrator may have appeared relatively coherent and knowledgeable on the matters regarding the estate of the deceased herein, her vast repository of knowledge is better suited in terms of guidance and advice and reliance was placed on the decision of the Court of Appeal in *Wilson Cheboi Yego v Samuel Kipsang* Cheboi [2019] eKLR.

11. We believe the summons dated February 4, 2022 is well merited and pray that the same is allowed as prayed.

12. The application was opposed by the 4th administrator.

13. It was submitted on behalf of the 4th administrator/ respondent on her own behalf and that of the members of the first (1st) house that the applicant's application appears to challenge the ruling of the court of January 28, 2022 which arose from the applicant's application dated September 27, 2017 and which application was prompted by a ruling of Justice Musyoka delivered on January 20, 2017 which appointed the 4th administrator to represent the first (1st) house in this succession cause. It was submitted that upon filing of the applications dated September 27, 2017 and another filed on September 28, 2017, the matter was placed before Justice Nyamweya as then she was and directed on March 23, 2017 that the 4th administrator be examined by the judge to establish whether she was fit to be an administrator in the estate herein.

14. According to the 4th administrator, the purport of the applicant's application herein was to cause to remove the 4th administrator who had just been appointed as an administrator instead of the applicant Rose Mueni Mutua Kithuka who had been longing to be appointed as the administrator instead of Alice Mwelu Mbondo. It was contended that from the ruling of Musyoka, J, the applicant did not have any substance and justification in making the application to be appointed administrator to represent the first (1st) House.

15. According to the 4th administrator:-

    (i) The applicant's application is mischievous, vexatious, misconceived, malicious and an abuse of the court process and devoid of any merit.

    (ii) The applicant's application does not meet the minimal standard required and as established under the law for review of the court standards.

(iii) There are no new grounds or facts that have been stated by the applicant to warrant the review of its ruling in herein in question.

(iv) The ground relied upon by the applicant is that the court only examined the basis of her faith which to us is flimsy and without merit. The court as per the order of Justice Nyamweya, the court was to establish the allegation of senility of the 4th administrator and her ability to effectively administer the estate herein.

16. In the 4th administrator's view, the evidence and the facts before the court do not with a lot of respect meet the threshold of setting aside the well reasoned and made out ruling of this court, in that there are:

(i) No new matters contained in the application before you;

(ii) There is nothing that was omitted by the court in the said examination and ruling;

(iii) There is no error, mistake or misrepresentation in the ruling of the judge as it is clear in the mind of the court that was discretionally and independently expressed in the ruling, therefore, the idea of bringing the 4th administrator is not valid at all.

17. The 4th administrator relied on *National Bank of Kenya v Ndungu Njau*, Civil Appeal No 211 of 1996 at Nairobi, where the court held that the court may grant review whenever it considers it necessary for correct an apparent error or omission on the part of the court. However, if the court makes a conscious decision on the matter and exercises discretion in favour of the respondent, and arrives at a wrong decision then, the best option for the aggrieved party is to prefer an appeal.

18. It was therefore submitted that the applicant failed to establish a cause sufficient enough to warrant the review of the ruling of January 28, 2022 on the grounds:

(i) That there is nothing new or additional grounds that were not there at the time of the hearing which have been brought out in the application as observed in the case of: *National Bank of Kenya v Ndungu Njau*, Civil Appeal No 211 of 1996 at Nairobi.

(ii) The decision being challenged is the discretion exercised by the Judge as per the order of Justice Nyamweya of March 23, 2017 and which the court did fairly and openly, and the only recourse which the applicant had against the decision of the court, was to appeal and which she has not,

(iii) The court was satisfied as to the ability, capability and the competence of the 4th administrator to perform her duties which was clearly stated in the ruling and the grounds in support of the application are just baseless, malicious and fictitious to the extreme with some sole motive of delaying this matter to the detriment of the beneficiaries,

(iv) When we observe these applications by the applicant, they are meant to delay the conclusion of this matter which has been in court for a very long time.

19. The 4th administrator therefore urged the court to dismiss the application with costs.

20. The application was also opposed by Martin Muttisya Muthengi, a third party and contended that the applicant who was represented by counsel did not raise an issue as to the manner in which the 4th administrator was being examined by the court and did not seek to put forward any questions to the 4th administrator. According to him, no new matters have been placed before this court to show that the 4th administrator incapable of conducting her duties responsibly as required of her.

21. It was disclosed that the applicant herein has previously been charged in criminal case Kangundo SRMCC No 125 of 2015 with the offence of obtaining money by false pretences which aspect was taken into account when the Court declined to appoint her as an administrator.

22. It was therefore contended that the threshold for review had not been met.

Determination

23. I have considered the application, the affidavits in support of and in opposition to the application as well as the submissions filed.

24. In order to justify the court in granting an application for review sought by the applicant under the provisions of order 45 rule 1 of the *Civil Procedure Rules*, certain requirements must be met. The said provision states as follows:

> "(1) Any person considering himself aggrieved—
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> 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."

25. The *Code of Civil Procedure*, Volume III pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

> " The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. 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."

26. In *Ahmednasir Abdikadir & Co Advocates v National Bank of Kenya Limited* Nairobi (Milimani) HCCC No 532 of 2004, Okwengu, J (as she then was) expressed herself as hereunder:

> " In this case the court is being invited to review the order on the grounds that there is an error apparent on the face of the record or other sufficient reason the pleadings, in particular, the plaintiff's reply to the amended defence in which the plaintiff is alleged to have conceded that the defendant's fee policy was illegal and *contra* statute which was the basis of the defendant's application for striking out the plaint. It is the defendant's contention that the

> plaintiff is bound by his pleadings and could not therefore depart from the same...It is my considered opinion that the pleadings went beyond the reply to the amended defence and to understand the matters which were in issue one has to look at the plaint vis-à-vis the amended defence and the reply to the amended defence. A careful reading of the ruling however, makes it clear that the court had the pleadings in mind and moreover, there is no basis for the conclusion that the court would have arrived at any different decision. The court was simply interpreting the provisions of section 36 and 45 of the Advocates Act as read with the Advocates Remuneration Order and it was not bound by any position taken by the parties. It may well be that the court was wrong in its interpretation or in the approach it took. However, that is not a matter that can be taken up on review as it is not an error apparent on the face of the record but ought to be subject of an appeal. Moreover to invite the court to set aside the order of dismissal and substitute it with an order striking out the plaint and dismissing the plaintiff's suit in effect is to invite the court to sit on appeal on its own ruling and make a complete turnaround which is not within the purview of order 44 of the Civil Procedure Rules.

27. That was the Court of Appeal's decision in Court of Appeal case of *Anthony Gachara Ayub v Francis Mahinda Thinwa* [2014] eKLR which quoted with approval the judgment of the High Court in *Draft and Develop Engineers Limited v National Water Conservation and Pipeline Corporation*, by stating:

> "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible."

28. With respect to the other issues raised, the Court of Appeal in *Mahinda v 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."

29. The decision whether or not to review a court's decision was well captured by the Court of Appeal in *Mumby's Food Products Limited & 2 others v Co-Operative Merchant Bank Limited* Civil Appeal No 270 of 2002, where it was held that 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 however 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 a ground for review that the court proceeded on an incorrect exposition of the law and reached

an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

30. I have considered the grounds upon which this application is based and it is clear that the applicant contends that when Alice Mwelu Mbondo presented herself before this court she was only examined on issues regarding her faith and in particular on her knowledge of the bible and whether she goes to church. According to the applicant, at no point was Alice examined on her competency and ability to regularly participate and co-operate with the other administrators in this estate.

31. From the short excerpt of the decision produced at the beginning of this ruling, it is clear that the decision was not solely based on the faith of the 4th administrator and her knowledge of the Bible. One of reasons why authorities generally require a party applying for review to avail a copy of the order sought to be reviewed is for the court and the parties to be able to appreciate the terms of the decision sought to be reviewed. In this case, it is clear that the applicant herein in a hurry to challenge the decision in question did not even bother to read the same. Had she done so, she would not have placed before this court such spurious allegations as the basis for seeking orders of review. An application for review ought not to be made on flimsy grounds such as the ones that the applicant relied on in this application. Counsel, as officers of the court, ought to properly advice their clients on the grounds for review and ought not to simply take the role of being their client's mouthpiece even in cases which are clearly frivolous and are simply meant to embarrass and delay the fair trial of the matter.

32. I have considered the application and I cannot see any mistake or error apparent on the face of the record and none has been pointed out to me. Similarly, there is no discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by her at the time when the decree was passed or the order made. The fact of advanced age of the 4th administrator was the very reason that the court was called upon to determine her mental capacity. It is not new at all. In fact, by relying on the same ground, the applicant is mischievously seeking that this court reverses its earlier decision under the guise of review. As regards the alleged failure by the 4th administrator to attend meetings, that fact must have been well within the knowledge of the applicant at the time the court was making its decision. On the inability of the 4th administrator to run up and down owing to the complexity of the estate coupled with her advanced age, I dealt with the issue of complexity of the administration in my decision sought to be reviewed and as regards the immobility of the 4th administrator, administration of an estate being trust in nature does not necessarily require an athlete since it is not a marathon. One can easily administer an estate from the comfort of his office since in most cases, it is a matter of accounts.

33. My reading of the applicants complaint leads me to the conclusion that the applicant's grounds are based on alleged misconstruction of the evidence which is not a ground for review. The said grounds, I find, do not constitute any sufficient reason.

34. It is clear that this application was premised on a misconception or misunderstanding of the terms of the ruling in question. Misunderstanding of a decision of the court by a party cannot be a ground for review of the decision. In other words, a party cannot rely on her own failure to read and comprehend a decision as a basis for seeking review, particularly where the party is represented by counsel.

35. I also agree that the effect of granting the prayers sought by the applicant would amount to the revocation of the existing grant. Accordingly, I associate myself with the position adopted in *Re Estate of Joseph Otieno Oonga (Deceased)* [2019] eKLR where the court held that:

> " 23. The *Law of Succession Act* does not envisage removal of an administrator in the manner proposed by Bernard. When for whatever reason a party seeks to have an administrator

of an estate of a deceased person stripped of that role, such party must apply through summons, for the revocation of the grant issued to the administrator. It is trite law that where an established statutory procedure for redress of any grievance exists, a party must strictly follow the same in order to be deserving of any relief sought. This was the holding in Speaker of the National Assembly v James Njenga Karume [1992] eKLR where the Court of Appeal stated:

> 'In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.'

24. A clear procedure has been set out in section 76 of the *law of Succession Act* and Rule 44 of the Probate and Administration Rules for the revocation of a grant of representation. These are the provisions under which the Bernard ought to have moved the Court for revocation of the Grant issued to him and Carren. Such an application for revocation can then only be heard after all beneficiaries of the estate have been served and given an opportunity to respond thereto. The appointment of any other person as an administrator must also be with the consent of all other beneficiaries. In short, the prayers sought by Bernard cannot be granted."

36. Accordingly, I find no merit in this application which I hereby dismiss with costs to the parties who opposed the application.

37. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 3RD DAY OF AUGUST, 2022.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muriuki for the 4th administrator.

Mr Nzei for the 1st, 2nd and 3rd administrators.

Mr Chemei for an intereted party.

Mr Guantai for Thaara Housing.

Mr Omoya for Adeline Mbithi.

Mr Waiyaki for Ms Mutuku for Mr Mutisya.

Mr Kiluva for Mr Maindo for beneficiaries of 1st House.

Mr Nyarango for an interested party.

CA Susan