In re Estate of Michael Thomas Kinyany (Deceased) (Succession Cause 9 of 2019) [2024] KEHC 16610 (KLR) (31 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16610 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

SUCCESSION CAUSE 9 OF 2019

RE ABURILI, J

DECEMBER 31, 2024

IN THE MATTER OF THE ESTATE OF MICHAEL THOMAS KINYANY (DECEASED)

IN THE MATTER OF

JAMES MUDHUME KINYANY ..... 1ST PETITIONER

MARY JOSEPHINE KINYANY ..... 2ND PETITIONER

RULING

1. This ruling determines the applicant/2nd petitioner's chamber summons application dated 12th June, 2024 brought under certificate of urgency seeking for stay of distribution of the estate of the deceased Michael Thomas Kinyany pending hearing and determination of the application; review of the ruling of 29th June 2023 together with all subsequent and attendant orders; and an order that the court appropriately redistributes the estate of the deceased herein Michael Thomas Kinyany.

2. The grounds upon which the application is predicated are too elaborate and argumentative supported by an equally argumentative elaborate affidavit sworn by the applicant who is the second administratix/ petitioner. However, only one ground crowns it all namely: that having given up the entire estate of the deceased in favour of the other beneficiaries, on condition that she gets the property comprising land and the house on plot No. Kisumu Municipality Block 4/319 and taking into account the decision in the case of Ripples International v *Attorney General & another; FIDA (Interested Party) (Constitutional Petition E017 of 2021*) [2022] KEHC 13210 (KLR) (29 September 2022) (Judgment), the court ought not to have given her a conditional ownership of the said property, having found that this was matrimonial property.

3. The application was opposed by the 1st administrator/ petitioner who swore a replying affidavit deposing that the application does not meet the threshold for review under Order 45 of the Civil Procedure Rules and that she seeks to have the case on distribution reopened and reheard meaning, she wants this court to sit on its own appeal.

4. That the applicant seeks to relitigate the suit yet the court relied on her own proposed mode of distribution of the estate.

5. That there was no pleading or documents filed in court stating that the applicant's proposed mode of distribution of the estate was conditional and that therefore she cannot impose upon this court her own conditions upon being aggrieved by the court's decision on distribution of the estate.

6. That this court is functus officio having pronounced itself on the matter based on arguments by both parties and that what was remaining was the furnishing of this court with the progress report of the distribution process.

7. Further deposition was that this application is devoid of any merit, is frivolous, vexatious and an abuse of court process and an afterthought hence it should be dismissed.

8. That after delivery of the judgment, the 1st administrator filed a Notice of Appeal to preserve the right of appeal of the beneficiaries and he served the Notice of appeal upon the 2nd administratix applicant herein who filed notice of address of service for purposes of the appeal, instead of filing her own Notice of appeal. That the applicant has had to rectify the certificate of confirmation of grant dated 18th September 2023. That subsequently, he wrote to the 1st administrator's advocates seeking for documentation to enable distribution of the estate.

9. That the redistribution of the estate will prejudice the rights of other beneficiaries and that the applicant has maintained that no distribution will take place until her demands are met.

10. The parties filed written submissions which they highlighted orally on 24th October, 2024. The applicant's counsel argued that her client wanted to be given the house absolutely since the decision on life interest was declared unconstitutional in the Ripples international v Attorney General case, HC Constitutional Petition No. E017 of 2023.

11. Opposing the application and supported by the interested parties, Ms Ndirangu submitted that the case was heard by way of viva voce evidence and that the applicant's claim that there is a mistake should have been taken on appeal and not a review. Further, that there is inordinate delay as the judgment was rendered in June 2023 and in October the same year, the applicant sought for rectification of the certificate of confirmation of the grant, which the co administrator had no issue with.

12. The interested party submitted that one cannot seek for review where an appeal was a possibility.

13. In a rejoinder, the applicant's counsel submitted that the first review was for correction of the Bank name while in this application, they are challenging a conditional distribution.

14. I have considered the application, the opposition thereto and the submissions for and against. The issue for determination is whether the application has merit.

15. The law on review is well e stablished under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, since the *Law of Succession Act* and Rules do not specifically provide for review of decisions in succession proceedings.

16. Section 80 of the *Civil Procedure Act* as cited provides as follows:

    80. Any person who considers himself aggrieved—

        (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

17. The above section is the substantive law on review of decrees or orders in civil matters. A decree is the summation of the judgment while an order is the summation of a ruling. The procedural aspect that operationalizes the above section is Order 45 of the *Civil Procedure Rules* which stipulates that:

Order 45 - Review

1. Application for review of decree or order

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

2. To whom applications for review may be made

(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

3. When court may grant or reject application

(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

4. Application where more than one judge hears

(1) Where the application for a review is heard by more than one judge and the court is equally divided the application shall be dismissed.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

5. Re-hearing upon application granted

When an application for review is granted, a note thereof shall be made in the register, and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

6. Bar of subsequent applications

No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.

18. In the case of *Sanitam Services (E.A.) Limited V Rentokil (K) Limited & Another* [2019] eKLR, the Court of Appeal held that: -

> "Jurisdiction to review a judgment or order of a court is donated by Section 80 of the *Civil Procedure Act* and Order 45 Civil Procedure Rules. By those provisions of law, any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is 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 – a person who fits within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay".

19. The question before me, therefore, is whether the applicant has satisfied any of the conditions set out in Order 45 of the Civil Procedure Rules. In the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 Other*s (2021) eKLR, Mativo J stated:

> "The power of review can be exercised by the court in the event discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. As the Supreme Court of India [15] stated: -
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> "The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the

record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ... means a reason sufficiently analogous to those specified in the rule."

20. Order 45 Rule 1 (1) (b) *Civil Procedure Rules* sets out the parameters for an Application for Review. This is intended to avoid situations where the Review Court turns into an Appeal Court over its own Ruling or Judgment.

21. Thus, the Court may only hear a new and important matter or evidence which was not within the knowledge of an Applicant or could not be produced by him at the time when the Order was passed. Secondly, the Court may only consider a mistake or error apparent on the face of the record. On this, the record must speak for itself or by itself without much explanation. Thirdly, the court may consider any other sufficient reason.

22. The Court of Appeal in the case of *National Bank of Kenya Ltd vs Ndungu Njau* (Civil Appeal No. 211 of 1996 (UR) 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 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 provision of law cannot be ground for review."[emphasis added].

23. The Court of Appeal in *Pancras T. Swai –vs- Kenya Breweries Ltd*. (2014) eKLR at paragraph *23* still on Review stated thus:

> "The Applicant's right to seek review though unfettered, could not be successfully maintained on the basis that the decision of the court was wrong either on account of wrong application of the law or due to failure to apply the law at all."

24. In the instant cause, the applicant filed a mode of distribution of the estate where she proposed distribution of the estate to all beneficiaries. She then laid claim to the house only on account that it was her matrimonial home and that if she was to get the said house absolutely, then she would not lay claim to any of the other assets including money held in Bank Accounts.

25. This court in the judgment which is sought to be reviewed, and for which the 1st petitioner has filed notice of appeal but is comfortable, from his supporting affidavit, to having the estate distributed in the manner confirmed by this court, allowed the distribution mode proposed by the applicant save that it gave a condition that she would only hold a life interest in the house in question, being the matrimonial home.

26. She now seeks for review of that conditional distribution and that if she is not given the house absolutely, then the entire estate should be redistributed to allow her benefit from the rest of the assets in the estate which assets she had renounced to other beneficiaries if she got the matrimonial house.

27. The 1st petitioner and interested parties who are also beneficiaries on the other hand oppose the application for review on account that the applicant had the opportunity to appeal the decision which

she did not and that she has not satisfied the conditions for review. Further, that the review sought is an appeal and that it will prejudice the other beneficiaries.

28. In *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608. The Supreme Court of India had this to say concerning the power to review:

> " The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason".....means a reason sufficiently analogous to those specified in the rule" [emphasis]

29. The reason for the above limitation was explained by Mativo J (as he then was) in *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR citing the above decision of the Indian Supreme Court and I concur, is that, it is an indulgence given to a party to get the previous decision altered on the basis of discovery of important evidence which was not within his knowledge at the time of original hearing. So, in the fitness of things, a person, who relies on such circumstances to obtain a review, should affirmatively establish them. The latitude shown to a party by a court is conditional upon strict compliance with that requirement.

30. The learned Judge further stated and I agree, that oordinarily, the expression 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 order was made would refer only to a discovery made since the order sought to be reviewed was passed. That an applicant alleging discovery of new and important evidence must demonstrate that he has discovered it since the passing of the order sought to be reviewed.

31. In this case, the applicant has cited the case of Ripples International v *Attorney General & another; FIDA (Interested Party) (Constitutional Petition E017 of 2021*) [2022] KEHC 13210 (KLR)which decision was never cited in the proceedings giving rise to the judgment which is sought to be reviewed, although the decision was rendered earlier than the judgment of this court.

32. In that decision in the Ripples International the petitioner challenged the provisions of sections 35 (1) (b), 36(1)(b) and 39(1)(a) of the *Law of Succession Act* for being discriminatory of women in the distribution of estates of deceased persons.

33. The Court in its landmark judgment though persuasive to this court but being good law, pursuant to the interpretation of the Constitutional provisions on non-discrimination and the equal protection of the law, had this to say:

> " 26. The text of sections section 35(1) (b), section 36(1)(b) and section 39(1)(a) and (b) of the *Law of Succession Act* as set out above are clear restrictive of the women and female child's right to inherit in equal measure and circumstances as the men and male child.

27. Sections 35(1)(b) and 36(1)(b) of the Act restricts a widow life interest in the property of her deceased spouse when she remarries unlike the widower who remarries.

28. Section 39(1)(a) and (b) gives priority to the father ahead of mother over the property of a child who dies intestate, unmarried and childless.

29. Article 27(4) of *the Constitution* prohibits discrimination of the grounds of sex and marital status among other grounds as follows:

> "(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

30. The differential treatment of the female as against their male counterparts is indefensible, and the *Law of Succession Act* which predates *the Constitution* of Kenya 2010, has no explanation for the latent discrimination and restriction. Article 45(3) of *the Constitution* clearly recognises the equality of men and women in marriage set up as follows:"Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage".

37. There is no evidence of how the impugned provisions have discriminated against the persons, of other tribes, allegedly living in the gazetted areas. The court does not find that evidence has been adduced as to discrimination of women under the customs and practices of the peoples in the areas set out in section 33 of the *Law of Succession Act* with regard to the inheritance matters relating to the property set out in section 32 thereof to warrant any intervention by the court.

38. However, the discrimination of women and female children under the impugned provisions of sections 35, 36 and 39 of the *Law of Succession Act* is textually clear, and in terms of article 27 (1) of *the Constitution* these provisions of the *Law of Succession Act* are unconstitutional for failing to provide equal protection and benefit of the law to women as with the men.

39. Having so declared, the interpretation of the sections 35, 36 and 39 of the *Law of Succession Act* must be interpreted in manner that gives effect to the equality of women and men with regard to the protections and benefits accruing under the said provisions. Indeed, clause 7 (1) of the Transitional and Consequential Clauses under article 262 of *the Constitution* of Kenya 2010 provides for such adaptation in the instructions as follows:

> "(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."
>
> The consequential adaptation which must be made to the *Law of Succession Act*, 1981 is that women and men, male and female children, married and unmarried shall have equal protection and

rights on administration and succession of Estates of deceased persons under the Act.

34. The above decision was equally not referred to by the 1st petitioner and neither has there been a challenge to the decision which declares the provision that the widow has life interest in the property of her deceased spouse when she remarries unlike the widower who remarries.

35. In my humble view, the above decision changed the landscape of the law of inheritance and establishes sufficient reason for the review of this court's judgment on the distribution of the estate of the deceased not as a whole, since the applicant in her submissions focused on the interest in the property which this court found to be matrimonial property.

36. That decision was not brought to the attention of this court during the confirmation and objection proceedings hearing and now that this court is made aware of the decision, I find and hold that there is sufficient reason and ground for this court to review its order on distribution of the deceased's estate, this court having found at paragraphs 43 and 36 of the impugned judgment that the applicant had sacrificed her interest in the rest of the assets of the estate in favour of the other beneficiaries and that therefore she was exclusively entitled to the property Kisumu Municipality Bock 4/319 as he matrimonial property.

37. Accordingly, the order granting the applicant only a life interest in the matrimonial property being plot No. Kisumu Municipality Bock 4/319 and for it to devolve to the surviving beneficiaries is hereby reviewed and set aside.

38. In its place, the court orders that the applicant herein shall have the matrimonial property being plot No. Kisumu Municipality Bock 4/319 absolutely without any conditions.

39. Consequently, the rectified certificate of confirmation of grant shall be amended to reflect the review orders herein and reissued to the petitioners/ administrators.

40. Each party to bear their own costs of the application.

41. This ruling to be uploaded.

42. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE