



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 282 OF 1994

IN THE MATTER OF THE ESTATE OF DAVID MBUVI WAMBUA (DECEASED)

REGINA MWIKALI MUTHAMA..... APPLICANT

VERSUS

LUCY NZISA MUSAU.....1ST PROTESTOR

MICHAEL MAKAI MUSAU.....2ND PROTESTOR

BERNARD MUSYOKA MUSAU.....3RD PROTESTOR

RULING

1. The background to this ruling is that this court on 24.9.2018 delivered a ruling with the following orders;

a) The grant of letters of administration issued to the Petitioner on 13th February, 1995 and confirmed on 4th May 2001 is hereby revoked.

b) An inhibition be registered on the subject property Machakos/Kiandani/2264 until the issue of ownership is determined.

c) Each party to bear their own costs.

2. The applicant was dissatisfied with the ruling of this court and through his advocates Mutia J. M. & Associates filed an application dated 29.1.2020 stated to be brought under Order 45 Rule 1 of the Civil Procedure Rules 2010, Section 47 of the Law of Succession Act CAP 160 and Rule 63(1) of the Probate & Administration Rules. The following were the orders sought:-

a) That this Honourable court be pleased to review the ruling made on 24.9.2018 and reinstate the applicant as the administrator of the estate of the late David Mbuvi Muthama (Deceased).

b) That the costs of this Application be provided for.

3. The grounds of the application are that a ruling was rendered on 24.9.2018 that revoked the grant of letters of administration that were granted to the applicant and that the estate of the deceased was left without an administrator. It was stated that the only land title number Machakos/Kiandani/2264 has no one to pursue the issue of ownership of the same that is in a dispute before the Environment and Land court.

4. The application was supported by an affidavit deposed by Regina Mwikali Muthama on 29.1.2020. She reiterated the grounds in the application and annexed nothing in support of the averments in the affidavit.

5. The application was not opposed by the objectors or any of the beneficiaries.

6. The matter was reserved for ruling after it was noted that there was no opposition to the application.

7. I have considered the application as a whole and as can be deduced from the notice of motion and the provisions of the law under which it was brought, the summary of the applicant's case is that my ruling was an error.

8. The issues for consideration are:

- a) *Whether the applicant has satisfied the grounds to warrant an order of review.*
- b) *Whether the applicant is entitled to the orders sought in the application.*
- c) *What orders may the court grant?*

9. It is trite law that just like the right of appeal, an order in review is a creature of statute which must be provided for expressly. In considering an application for review, the court exercises its discretion judicially as was held in the case of **Abdul Jafar Devji v Ali RMS Devji [1958] EA 558**. The law under which review is provided is Order 45 of the Civil Procedure Rules.

10. Order 45 states that:

(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.

11. The applicant appears to rely on the ground that there is a mistake or error apparent on the face of the record. It was the argument of the applicant that the trial court went into error in revoking the *grant of letters of administration issued to the Petitioner on 13th February, 1995 and confirmed on 4th May 2001* hence leaving the estate of the deceased without an administrator.

12. In making an examination as to whether there is an error apparent on the face of the record, the court must be quick to draw a parallel between a decision that is merely erroneous in nature and an error that is self-evident on the face of it. A review application must confine itself to the scope and ambit of Order 45 rule 1 lest it mutates into an appeal.

13. In the case of **Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173** defined an error apparent on the face record, thus:

“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. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

14. I am not convinced that there is an error apparent on the face of the record in this case. I also disagree that there is sufficient reason raised by the applicant to warrant review of the orders of the court and what is being raised are grounds that would befit an appeal and not a review. The courts have been cautioned against sitting on appeal against their own decisions in an application for review. I therefore associate myself with the dictum of the court of appeal in the case of **Sanitam Services (E.A.) Limited v Rentokil (K) Limited & another [2019] eKLR** where the learned Justices of appeal stated that;

“The said Section 80 of the Civil Procedure Act and Order 45 of the Rules made thereunder allow a court to review a judgment or order in circumstances that we have enumerated in this judgment. The purpose and purport of the said provisions of law is not to change or alter the judgment of the court as originally decreed. A party must satisfy the court that there is discovery of new and important matter which that party, on exercise of due diligence was not within his knowledge or that there is a mistake or error apparent on the face of the record or for such other sufficient reason that would satisfy the court to review the judgment or order and the application must be made without unreasonable delay.....

The learned Judge had no jurisdiction or power in the application for review to give orders that substantially altered the said orders. The effect of Ruling No. 2 was that the learned Judge sat on appeal against his earlier orders, something that the law did not allow him to do.

We have not seen the material that was placed before the learned Judge on which he could exercise his discretion in an application for review as was before him...

15. I find that the first limb of prayer (1) of the application lacks merit and will order that it be dismissed.

16. The 2nd limb of the prayer (1) in the application seeks the reinstatement of the applicant and if I were to read the mind of counsel, he seeks a variation of the order 1 of this court as contained in the ruling dated 24.9.2018. By dint of section 47 of the Law of Succession Act, this court has inherent jurisdiction to vary its own orders in the interests of justice. See **Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 Others (2017) eKLR**.

17. The applicant in her affidavit has averred that there is a pending ELC matter touching on the estate of the deceased and she is unable to act for the estate since the letters of administration were revoked. I see no pleadings in respect of the same attached to the affidavit in support of the application hence I am not convinced with her argument and find no merit in the ground raised by applicant.

18. Be that as it may section **82(a) of the Law of Succession Act** provides that;

“Personal representatives shall, subject only to any limitation imposed by their grant, have powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

19. In the case of **Alexander Mutunga Wathome v Peter Lavu Tumbo & Another [2015] eKLR (Machakos Succession Cause No. 80 of 2011)** the court noted that

“In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. In addition, section 82 of the Law of Succession Act provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person.”

20. I can envisage the concern that the applicant has as the revocation of the grant has left the administration of the estate of the deceased in a vacuum and the applicant cannot take any other action in respect of the estate of the deceased without the grant in force. It is also pertinent to note that the purpose of letters of administration is not merely the distribution of the assets of the deceased. The purpose of the grant is to give the administrator the legal power necessary to deal with the assets and also the administrator has the power to sue or prosecute any suit, or otherwise act as representative of the deceased, until the probate or letters of administration has or have been recalled or revoked (see section 71 to 84 of The Law of Succession Act). An administrator of a deceased person is his or her legal representative for all purposes.

21. It is for this reason that I find merit in the 2nd limb of prayer 1 in the application and set aside the order of revocation of the *grant of letters of administration issued on the Petitioner on 13th February, 1995 and confirmed on 4th May* and reinstate the applicant as administrator of the estate of the deceased so that she may continue in administration of the same or until such a time when other administrators are appointed.

22. In the result the application dated 29.1.2020 succeeds to the extent that the applicant is hereby reinstated as administrator of the estate of the deceased David Mbuvi Muthama. There will be no order as to costs.

Orders accordingly.

Dated and delivered at Machakos this **18th** day of **January, 2021**.

D. K. Kemei

Judge