



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 265 OF 2004

IN THE MATTER OF THE ESTATE OF BETH MUTHEI MULILI (DECEASED)

MUNYASYA MULILI

PHILIP MULILI MUTETI

KATUMBI MULILI

MALINDA MULILI.....PETITIONERS

VERSUS

SAMMY MUTETI MULILI.....PROTESTOR

AND

VIRGINIA MBITHE.....1ST APPLICANT

PAUL MUINDI.....2ND APPLICANT

CATHERINE WANJIKU.....3RD APPLICANT

EDWARD OMBUNA.....4TH APPLICANT

RULING

1. On 14th June, 2019, I issued the following orders in this matter:

1. THAT there be a stay of further execution of the orders made vide the ruling delivered on the 2nd May, 2017 by Lady Justice P. Nyamweya and all consequential orders in relation to the property known as Mavoko Town Block 3/1966 pending the hearing and determination of the Applicant's intended suit in the Environment and Land Court against the administrators of the Estate herein.
2. THAT the applicants herein are given 366 days within which to prosecute their suit pending before the ELC.
3. THAT depending on the outcome of the said suit, parties be at liberty to apply.
4. The Costs will be in the cause.

2. By Summons dated 22nd July, 2020, expressed to be brought under Section 47 of the *Law of Succession Act*, Rule 49, 63 and 73 of the *Probate and Administration Rules*, Order 45 Rule 1 of the *Civil Procedure Rules* and Article 165 of the Constitution of Kenya, the Interested Parties/Applicants herein have moved this court seeking a review of the said decision and extension of the period of stay issued in order (1) above for another 366 days or such other period as the court may deem fit and that the said period as extended be deemed to run

from 15th June, 2020.

3. According to the applicants, due to the death of the Protestor herein who is the 5th Defendant in the E.L.C. 166 of 2018, the applicants have been unable to prosecute the said suit. The information regarding the death of the said 5th Defendant was disclosed in July 2019. A result, counsel representing the said Defendant requested for time to have the said Defendant substituted with the administrator of his estate but that has not been done.

4. It was averred that the E.L.C. suit has come up for mention for directions on various dates when the Estate of the Protestor herein through the firm of L.N Ngolya Advocates sought time to substitute the Protestor herein. Though the said E.L.C. suit was scheduled for Mention on 18th March 2020, by the directions of the Chief Justice, all court proceedings were suspended with effect from 15th March, 2020, due to the onset of the COVID 19 pandemic.

5. As a result of the foregoing, the conclusion of the E.L.C. case has been made impossible due to matters beyond the Applicants' control despite the fact that the Applicants have been zealous in complying with all the pre-trial requirements and fixing the E.L.C. suit for directions for purposes of having the case proceed for hearing and conclusion. In the meantime, the stay of execution orders granted on 14th June 2019 expired on 15th June 2020.

6. As a result, it was contended that the Petitioners have been taking prospective buyers to Mavoko Town Block 3/1966 hence the applicants were apprehensive that there was an imminent risk that the aforesaid parcel of land will be sold before the E.L.C. suit is heard and determined causing irreparable damage to the Applicants.

7. In support of their application, the Applicants/Interested Parties relied on **Josiah Mwangi Mutero & another vs. Rachael Wagithi Mutero [2016] eKLR** and submitted that *this court has Jurisdiction to consider the Applicants' application for review*. It was submitted that based on the reasons disclosed in the supporting affidavit, the applicants have met the threshold for review of the orders aforesaid under the ground of "any other sufficient reason" and reliance was placed on the decision of the Court of Appeal in the case of **Tiras Karanja Ngatha vs. Silas Gachugu Ngugi & another [2017] eKLR**.

8. The application was not opposed.

Determination

9. I have considered the instant application.

10. There is no doubt that this court has the jurisdiction to review its decisions made on review pursuant to rule 63(1) of the **Probate and Administration Rules** as read with section 80 of the **Civil Procedure Act** and Order 45 of the **Civil Procedure Rules**.

11. 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—

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.

12. The foregoing provisions are based on section 80 of the **Civil Procedure Act** Cap 21 Laws of Kenya which states as follows:

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.

13. Unlike the provisions of Order 45 aforesaid, section 80 aforesaid does not prescribe the conditions upon which an application for review may be granted. In the case of **Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998** the Court of Appeal held that section 80 of the **Civil Procedure Act** enables a court to make such orders on review application which it thinks just so that the words "or any sufficient reason" as used in Order 44 [now Order 45] rule 1 of the **Civil Procedure Rules** are not *ejusdem generis* with the words "discovery of new and important matter" etc. and "some mistake or error

apparent on the face of the record” and that those words extend the scope of the review. Accordingly, the said court held that there is no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly section 80 of the **Civil Procedure Act** confers an unfettered right to apply for review and so the words “for any sufficient reason” need not be analogous with the other grounds specified in the Order.

14. In dealing with the delegated legislation made under the Act **Farrell, J** in **Sardar Mohamed vs. Charan Singh Nand Singh & Another HCCA No. 51 of 1959 [1959] EA 793** was of the following view, with which view, I respectfully associate myself :

“In terms section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on section 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of the other sections. Under section 81(1) of the Ordinance the Rules Committee has power to make rules “not inconsistent with the provisions of this Ordinance”. If a rule is inconsistent it is to that extent *ultra vires*; and if the Ordinance confers unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires*. If, however, a rule is capable of two constructions, one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle “*ut res magis valeat quam pereat*”. If the words “or for any other sufficient reason” can be given a liberal construction, there is nothing in Order 44, rule 1(1) in any way inconsistent with section 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the two grounds specified are such as would entitle an aggrieved party to apply for review”.

15. In the case of **Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998** the Court of Appeal held that section 80 of the **Civil Procedure Act** enables a court to make such orders on review application which it thinks just so that the words “or any sufficient reason” as used in Order 44 [now Order 45] rule 1 of the **Civil Procedure Rules** are not *ejusdem generis* with the words “discovery of new and important matter” etc. and “some mistake or error apparent on the face of the record” and that those words extend the scope of the review. Accordingly, the said court held that there is no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly section 80 of the **Civil Procedure Act** confers an unfettered right to apply for review and so the words “for any sufficient reason” need not be analogous with the other grounds specified in the Order.

16. Accordingly, the court’s discretion under section 80 of the Act is wider.

17. It is clear that at the time the Court issued the orders sought to be reviewed it was not within its contemplation that one of the parties would pass away and hence delay the hearing of the ELC case. The intervening circumstances were clearly matters which arose after the said orders and they were factors which the applicants had no control over.

18. Consequently, I find that the applicants have proved that there are sufficient reasons justifying the review of order (2) issued herein on 14th June, 2019. The said period is hereby extended by a further period of 366 days with effect from 15th June, 2020.

19. There will be no order as to costs.

20. It is so ordered.

Read, signed and delivered in open Court at Machakos this 22nd day of February, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ngethe for Mr Mwaniki for the applicants

Mr Ndegwa for the Respondent

CA Geoffrey