



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO 44 OF 2013

IN THE MATTER OF THE ESTATE OF ZACHARY MOMANYI ORANGI – DECEASED

AND

IN THE MATTER OF LR NO MAJOGE BOMBABA/538

AND

IN THE MATTER OF REVOCATION OF GRANT AND

RECTIFICATION OF THE REGISTER AND NULIFICATION OF TITLE

AND

IN THE MATTER OF LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA

BETWEEN

TOM OSEKO ORANGI.....PETITIONER/RESPONDENT

VERSUS

SAMWEL MOCHAMA MOMANYI.....OBJECTOR/APPLICANT

AND

JUSTINE NYAMBEGA ONDUSO.....INTERESTED PARTY

RULING

1. The application before me a Summons for Cancellation of Title and Rectification of Register dated 3rd October 2018 seeks to review the order of this court made on 27th June 2018 and an order cancelling parcel title no **LR NO MAJOGE/BOMBABA/5027** in the name of Justine Nyambega Onduso for equal distribution of the estate.
2. The application is supported by an affidavit of **Samwel Mochama Momanyi**. According to the applicant, upon re-survey it was discovered that one of the beneficiaries who was registered as the proprietor of **LR NO. MAJOGE/BOMBABA/5027** had more acreage on the title than on the ground thereby denying other beneficiaries the equal beneficial interest to the estate. He averred that it would be in the interest of all beneficiaries that the title **LR NO MAJOGE/BOMBABA/5027** be revoked and the estate be consolidated for equal distribution.
3. A brief background of this cause is that grant of letters of administration were initially issued to TOM OSEKO ORANGI but he failed to administer the grant in accordance with the Certificate of Confirmation of Grant. TOM OSEKO ORANGI subdivided parcel no LR NO MAJOGE/BOMBABA/538 into LR NO MAJOGE/BOMBABA/5025, 5026, 5027 and 5028. This court on application for revocation of grant on the grounds that TOM OSEKO ORANGI failed to administer the estate in accordance with the confirmed grant, revoked the grant issued to TOM OSEKO ORANGI and cancelled the transfers in regard to parcel LR NO MAJOGE BOMBABA/5026 and 5028.
4. The respondent and the interested party despite being served failed to respond to the application, nevertheless, the applicant is required to

prove its case on a balance of probabilities.

DETERMINATION

5. The only issue for determination is whether the applicant has established the threshold for the review of court orders. The law governing review applications is **section 80 of the Civil Procedure Act** and **Order 45 of the Civil Procedure** which provide 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

6. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

“45 Rule 1 (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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

7. Although I recognize that this is a succession cause and the applicable law is the Law of Succession Act and the rules thereunder, however, since the application before me is one for review it must meet the substantive requirements of a review application as set out in the Civil Procedure Rules. The court in **John Mundia Njoroge & 9 Others vs Cecilia Muthoni Njoroge & Another [2016] eKLR** 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.”

8. The principles that a courts must consider when dealing with an application for review were discussed in **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** observed where Mativo J as follows;

“29. I am not persuaded that the reasons offered by the applicant amounts to ‘sufficient reason’ within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. My finding is fortified by the holding in the case of Evan Bwire vs Andrew Nginda^[20] where the court held that ‘an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.

30. The principles which can be culled out from the above noted authorities are: -

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”

9. Having considered these principles against the application I find that the applicant has failed to demonstrate that there was discovery of new and important matter that was not within his knowledge at the time when the decree was passed; or that there is an apparent error or omission on the face of the record; or that for any other sufficient reason this court should review its orders.

10. Although Mr. Nyambati at the hearing of the application alluded to a report by the Land Surveyor, the same was never filed by the applicant in support of its case. In any event, there was no evidence of the purported resurvey as alleged by the applicant and thus the applicant has not made out a case for review.

11. In view of everything that I have said so far, it should be clear that there is no merit in the application dated 3rd October 2018 and the same is hereby dismissed. The administrator, SAMWEL MOCHAMA MOMANYI, is hereby directed to comply with orders of 27th June 2018. For avoidance of doubt, I direct that the administrator applies for confirmation within 45 days from the date hereof.

12. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF APRIL, 2021.

R. E. OUGO

JUDGE

In the presence of:

Mr. Nyambati For the Applicant

Respondent Absent

Ms Rael Court Assistant