



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CASE NO. 20 OF 1983

IN THE MATTER OF THE ESTATE OF JAMES SAMUEL GICHURU (DECEASED)

FLORENCE WANJIRU NDUNGI.....APPLICANT

JOAN NJOKI NDUNGI.....ADMINISTRATRIX

VERSUS

PERSIAH MUTHONI MASINDE.....RESPONDENT

RULING

1. Before the Court for determination is the Chamber Summons application dated 3rd July, 2020 brought by the Applicant pursuant to **rules 59, 63, 72 and 73 of the Probate and Administration Rules, Order 45, rule 2 of the Civil Procedure Rules, 2010 and Articles 40, 50 & 159 of the Constitution of Kenya**. The Applicant sought orders that the ruling delivered by this Court on 24th September, 2019 which directed that the estate of the deceased be divided equally between the administratrix and estate of John Gitau Gichuru be reviewed. Further, that the Court do make a finding that the estate of the deceased be divided equally between the administratrix and the estates of John Gitau Gichuru, Mary Nyaguthii Gichuru and Anne Njeri Gichuru.
2. The application is supported by the grounds on the face thereof and the affidavit sworn by the Applicant Florence Wanjiku Ndungi dated 3rd July, 2020. The Applicant averred that she is the executor of the estates of Mary Nyaguthii Gichuru and Anne Njeri Gichuru, both children of the late James Samuel Gichuru, the deceased herein, and was appointed as such pursuant to their wills of 17th July, 2001 and 23rd January, 2001 respectively.
3. The Applicant stated that Mary Nyaguthii Gichuru died testate leaving a will in which she bequeathed her whole estate including her entitlements from the estate of James Samuel Gichuru to the Applicant. Further, that the said will was propounded and a grant of written will of probate issued on 2nd July, 2002 and confirmed on 3rd June, 2003.
4. The Applicant further deponed that Anne Njeri Gichuru also died testate leaving a will in which she appointed the Applicant as an executor together with Muthoni Ndungi as co-executor. However, Muthoni Ndungi has since died. She averred that as the surviving executor, she is obliged to hold the estate in trust either to retain or sell and pay and/or vest the residue to Andrew Ndungi Riitho.
5. The Applicant averred that the ruling of this Court of 24th September, 2019 erroneously determined that Mary Nyaguthii Gichuru and Anne Njeri Gichuru died intestate and were not survived by either children or spouses between them. Further, that the Court made an erroneous determination that it was not clear under what wills the Applicant was mandated to be an executrix of their respective estates and that the wills referred to were not presented to court.
6. The Applicant asserted that Mary Nyaguthii Gichuru and Anne Njeri Gichuru were both children of the deceased and are entitled to an equal share of his estate as his other children. Further, that they did not die intestate as alluded to by the Court, but left valid wills upon which the Court issued grants of probate of written wills. She contended that the estate of James Samuel Gichuru which devolved to Mary Nyaguthii Gichuru and Anne Njeri Gichuru should be devolved to their respective estates and be administered in accordance with their respective wills. She contended that there were errors apparent on the face of the record warranting the review orders sought.
7. In response to the application and the grounds thereto, the Respondent filed a replying affidavit dated 31st August, 2020. She averred that although the documents relied upon in the application for review were issued by the Court in 2002 and 2003, they were never filed as evidence in this cause. Further, that they did not qualify as new evidence which after the exercise of due diligence, was not within the Applicant's knowledge and could not be produced by the Applicant prior to the ruling of 24th September, 2019. That consequently, the Court should not reconsider its decision therein.
8. Secondly, the Respondent averred that the application is an abuse of the Court process. She contended that the Applicant had taken undue

advantage and abused her relationship with the Administratrix, who is her mother, to illegally dispose of estate property while preventing the distribution of the estate of the deceased. She contended that any omission made by the Court was as a result of the Applicant's conduct in obstructing and perverting justice.

9. The Respondent asserted that there was no error made by the Court in its ruling, because the Court relied on evidence placed before it at the time of making the ruling. She urged the Court to dismiss the application with costs.

10. The chamber summons was canvassed by way of written submissions and highlighted orally by the learned counsels representing the parties herein. M/s Kithinji Marete Advocates for the applicant filed submissions dated 18th September, 2020 in which it was submitted that **Order 45** of the **Civil Procedure Rules** as adopted by **Rule 63** of the **Probate and Administration Rules** are the guiding statutes in an application for review. Reliance was placed on the cases of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR**, **Chandrakant Joshibhai Patel v R [2004] TLR 218** and **Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad [2019] eKLR**. All the cited cases discussed what constitutes a mistake or error apparent as one which is evident by itself and does not require examination, scrutiny and elucidation either of the facts or the legal position. The submissions were highlighted by learned Counsels Mr. Paul Muite and Mr. Marete Kithinji.

11. According to Mr. Muite, the core issue upon which the Applicant seeks the review orders is that the late Samuel Gichuru, also known as Mwalimu, was survived by four (4) beneficiaries, one (1) son and three (3) daughters. That two (2) daughters, Mary Nyaguthii Gichuru and Anne Njeri Gichuru survived him. Counsel asserted that in law therefore, the two (2) daughters immediately got vested interests in their father's estate as survivors and beneficiaries.

12. Mr. Muite submitted further that both Mary Nyaguthii and Anne Njeri left written wills, both of which were drawn by M/s Hamilton Harrison & Mathews Advocates. Counsel stated that the wills, which directed how the two wanted their estates distributed, have been proved and grants issued. Therefore, that when the court in its ruling of 24th September, 2019 stated that Mary and Anne died intestate, that statement amounted to an error apparent on the face of the record. He however attributed the error to the failure by the Counsel then on record to bring it to the attention of the court that the two had each left valid written wills.

13. Mr. Muite further pointed out that the ruling of 24th September, 2019 also stated that it was not clear how one Joan Ndungi was involved in the estate of the deceased herein. To this, Counsel stated that Joan Ndungi was one of those who survived the deceased by virtue of being a daughter to the deceased. He also noted Joan's daughter, the Applicant herein, was bequeathed part of the estate by her aunt Mary Nyaguthii.

14. In addition, Mr. Marete submitted that the application falls within the realm of review as it refers to a fundamental error on the face of the record. Counsel asserted that the court proceedings on the premise that the two daughters, Mary and Anne, died intestate was not correct since their respective wills were on record in the supporting affidavit of the administratrix. Counsel urged that the error was therefore deserving of review and to do otherwise would be to disinherit the two daughters.

15. M/s Shapley Barret & Co. Advocates filed submissions dated 14th October, 2020 on behalf of the Respondent. It was submitted that an error apparent on the face of the record only occurs when the Court fails to consider the evidence on record or to properly apply the law to the facts of the case. That the wills upon which the application was made were however being produced for the first time, and did not therefore fall within the ambit of an error apparent on the face of the record as espoused by the applicant. Therefore, that the application is an abuse of the Court process and ought to be dismissed.

16. In her oral submissions, learned Counsel Ms. Akello who was holding brief, stated that learned Counsel Mr. Oyatsi for the Respondent, wished to rely on his submissions as filed and had nothing more to add.

17. Review of decisions of a probate court is governed by **Rule 63** of the **Probate and Administration Rules** which recognizes that the provisions of **Order 45** of the **Civil Procedure Rules** are applicable to probate matters. It states that:

“Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), ... shall apply so far as relevant to proceedings under these Rules.”

18. In **John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another [2016] eKLR**, the court cited **Rule 63** of the **Probate and Administration Rules** and stated as follows:

“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.”

19. **Order 45, rule 1** of the **Civil Procedure Rules** captures the grounds upon which this court may review its own previous decision or judgement. It 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.

20. Therefore, in terms of **Order 45** of the **Civil Procedure Rules**, it is abundantly clear that a court can only review its orders if the following grounds exist:

- i. There is discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- ii. There is a mistake or error apparent on the face of the record; or
- iii. Any other sufficient reasons; and

The only rider is that the foregoing application must have been made without unreasonable delay.

21. The main ground relied on in support of the application is the contention, not that there is discovery of a new and important matter or evidence which after due diligence, was not within the Applicant's knowledge or could not be produced at the time that the ruling dated 24th September, 2019 was delivered, but that the Court arrived at an erroneous decision due to an error apparent on the face of the record. This is manifest at paragraphs 4, 8, 9 10, 11. 12 and 13 of the Applicant's supporting affidavit. It is noteworthy however that, in arriving at the decision, the Court applied its mind not only on the applicable law, but also on the evidence presented before it at the time.

22. In determining what constitutes a clear error on the face of the record, the Court of Appeal in the matter of **Nyamogo & Nyamogo Advocates vs. Kago (2001) 1 EA 173**, had this to say:

"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, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal..."

23. In the present application, it is the Applicant's case that there is an error apparent on the face of the record because the court made a finding that Mary Nyaguthii Gichuru and Anne Njeri Gichuru died intestate, when there are in fact, wills and grants of probate on record indicating otherwise. That in doing so, the Court went ahead and disinherited the executor, to whom their entitlements from the estate of the deceased should have devolved to. The dispute therefore is whether there exists an error apparent on the face of the record which ought to be reviewed.

24. This Court has perused the original affidavits on the proposed modes of distribution that resulted in the Ruling that is being sought to be impeached. Specifically, the affidavit by the Applicant dated 21st June, 2019, the affidavit by the Administratrix dated 8th April 2019 and the respondent's affidavit dated 21st June, 2019. In the affidavit by the Administratrix, she attached a certified copy of a grant of probate of written will of the estate of Mary Nyaguthii Gichuru issued on 2nd July, 2002 vide Nairobi Succession Cause No. 2712 of 2001 and a certified copy of a grant of probate of written will of the estate of Anne Njeri Gichuru issued on 4th December, 2003 pursuant to Nairobi Succession Cause No. 2800 of 2003. A certificate of confirmation of grant of probate of the estate of Mary Nyaguthii Gichuru was annexed to the Applicant's affidavit dated 21st June, 2019.

25. Although the wills in issue were not annexed to the affidavits, the annexures show that Mary Nyaguthii Gichuru who died on 2nd September 2001 and Anne Njeri Gichuru who died on 4th December, 2003 left behind written wills which were propounded in Court and the respective grants of probate of written wills issued. The Respondent did not challenge this evidence. She merely asserted that the Applicant who had been in possession of the two wills failed to file them in Court. She urged that the Court was clear in its ruling that there was no evidence of the existence of any will left behind by the two daughters of the deceased.

26. In its ruling, which the Applicant has sought to impugn, the Court pointed out in paragraph 22 that the wills under which the applicant Florence Wanjiru Ndungi was appointed executrix of the estate of Mary Nyaguthii Gichuru and Anne Njeri Gichuru were not presented in Court. Indeed, the two wills were not presented and the Court was therefore unable to determine the specific bequest, if any, made to any of the parties in this suit.

27. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. The error as alleged by the Applicant in the instant application, is self-evident and has been established, without lengthy and complicated arguments. The re-appraisal of the entire evidence or how the Court applied or interpreted the law would amount to exercise of Appellate jurisdiction, which is not permissible. In this case, the grants of probate were availed although the wills referred to were omitted.

28. An application for review may be allowed on any other "sufficient reason." In **Tokesi Mambili and others vs. Simion Litsanga [2004] eKLR** it was held as follows:

“...where the application is based on sufficient reason it is for the Court to exercise its discretion.”

29. In the case of **Evan Bwire vs. Andrew Nginda, Civil Appeal No. 103 of 2000, Kisumu, (2000) LLR 8340**, 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 afresh.”

30. A perusal of the instant application indicates that there are two wills annexed in respect of the estates of Mary Nyaguthii Gichuru and Anne Njeri Gichuru. The Court can therefore conclusively determine that they died testate. Having this in mind and considering the grants of probate that had been previously annexed in respect of the two deceased persons, there is sufficient evidence that Mary Nyaguthii Gichuru and Ann Njeri Gichuru, being daughters of the late James Samuel Gichuru died testate.

31. The issue therefore is whether, upon consideration of the provisions of the wills, the Court would have arrived at the same decision it did. It is my view that the two wills now on record touch on distribution of the deceased’s property which is the main issue upon which this cause was commenced. The wills have the effect of indicating how the estates of Mary Nyaguthii Gichuru and Anne Njeri Gichuru, including their rightful share from their late father’s estate should be distributed.

32. That, to my mind is sufficient reason for review. Moreover, **Rule 73 of the Probate and Administration Rules** clothes the Court with the necessary power to make such other orders as would be necessary to meet the ends of justice, for it provides that:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

33. The final limb for consideration is whether the application was filed without unreasonable delay. The application for review was filed on 8th July, 2020 and sought to impugn the ruling delivered on 24th September, 2019. The Court finds that although there was delay, it was not inordinate delay considering the circumstances of this case.

34. The upshot of the above analysis is that the Chamber Summons dated 3rd July, 2020 is allowed in the following terms:

- i) The ruling delivered on 24th September, 2019 by this Honourable Court be and is hereby set aside.
- ii) The Estate of the deceased shall be divided equally between the Administratrix herein, the estate of John Gitau Gichuru, the estate of Mary Nyaguthii Gichuru and the estate of Anne Njeri Gichuru.
- iii) The administratrix to proceed with the administration of the estate as ordered by the Court in prayer (1) and (2) of its decision of 24th September, 2019.
- iv) No orders as to costs.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 25TH DAY OF OCTOBER, 2021.

.....

L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....for the Applicant.

In the presence of.....for the Respondent.

In the presence of.....for the Administratrix.