



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 588 OF 2011

IN THE MATTER OF THE ESTATE OF KAMAU MWOSA THUMBU (DECEASED)

PHYLLIS KAETI KABETE.....PETITIONER/APPLICANT

AND

JOSEPH NGUMBI NDAMBUKI.....1ST INTERESTED PARTY

WILFRED SAMSON MUTUA.....2ND INTERESTED PARTY

JOSEPHINE SYEKONYO JOSEPH.....3RD INTERESTED PARTY

PAULINA SYOMBUA JOSEPH.....4TH INTERESTED PARTY

SHADRACK MBITHI MUTISYA.....5TH INTERESTED PARTY/RESPONDENT

JACINTA NZILANI MBALUKU.....6TH INTERESTED PARTY

JULIUS KIJANA MBITHI.....7TH INTERESTED PARTY

BERNARD MUSYOKA MUUTU.....8TH INTERESTED PARTY

MICHAEL MUNYAO KASUVA.....9TH INTERESTED PARTY

HELLEN MUINDE.....10TH INTERESTED PARTY

KENNEDY KIVAA KAMIL.....11TH INTERESTED PARTY

JULIUS MWOSA KAMAU.....12TH INTERESTED PARTY

BONIFACE MUTIE KAVUVI.....13TH INTERESTED PARTY

PAUL KIOKO NGUTHI.....14TH INTERESTED PARTY

JOHN MUANGE MULWA.....15TH INTERESTED PARTY

KELVIN KILONZO MUSYOKA.....16TH INTERESTED PARTY

FIDELIS SILINGI MUSILA.....17TH INTERESTED PARTY

RULING

1. The Petitioner has filed an application dated 1/03/2021 seeking the following reliefs:-

i. Spent

ii. Spent

iii. That this Honourable court be pleased to review, vacate, vary and or set aside the orders issued on 11/02/2021.

iv. Costs of the application be provided for.

2. The application is supported by the grounds set out on the body thereof as well as the affidavit of the Petitioner sworn on even date. The Petitioner's gravamen is *inter alia*: that there is an error apparent on the face of the record; that the orders issued on 11/02/2021 are in error in that the court awarded the **5th Interested Party/Respondent** five (5) acres when he actually owns ¼ acre of the deceased's estate; that there are sufficient grounds upon which the court should be pleased to review, vacate, vary or set aside its orders issued on 11/02/2021; that the court did not consider crucial evidence which was not available at the time of canvassing the application and by reason that no viva voce evidence was tendered to cross-examine the Respondent; that no prejudice will be suffered by the Respondent if the orders are granted; that other rightful beneficiaries are bound to lose their share of the estate if the orders are not reviewed; that the Respondent has been convicted and sentenced to one (1) year imprisonment by **Machakos Chief Magistrate's Court vide Criminal Case No. 4073 of 1999** for the offence of altering a document without authority contrary to section 347 (b) as read with section 349 of the Penal code wherein he had altered the acreage for land bought from the deceased from ¼ acre to five acres; that the Respondent did not appeal against the judgement in that case; that the beneficiaries of the estate stand prejudiced if the order herein is not varied, reviewed or set aside.

3. The application is strongly opposed by the Respondent who filed a replying affidavit sworn on 6/04/2021 wherein he deponed *inter alia*: that the Petitioner cannot now purport to introduce proceedings and judgement when she had earlier claimed that the same could not be traced and which fact the court relied on it in the impugned ruling; that the petitioner should proceed on appeal and not review as herein; that the petitioner has not met the grounds for grant of review and hence the application should be dismissed.

4. Parties agreed to canvass the application via written submissions. The Petitioner's submissions are dated 5/07/2021 while those of the Respondent are dated 25/06/2021.

5. Mr. Kamolo for the Petitioner first submitted that at the time of the impugned ruling certain documents in support of the petitioners claim were not available and which have been obtained and which consist of the criminal proceedings in **Machakos CM Criminal No. 4073 of 1999** wherein the Respondent herein was imprisoned for one year for the offence of altering/forging the sale agreement between himself and the deceased herein. It was submitted that due to some challenges the petitioner at the time could not manage to get the crucial documents and she should now be allowed to contest the Respondent's claim to the deceased's land by having the ruling reviewed or set aside. Finally, it was submitted that the Respondent is only entitled to ¼ acre of land from the deceased's estate instead of the alleged **5 acres** as the beneficiaries and other interested parties stand to be prejudiced if the order is not reviewed.

6. Mr. Musya for the 5th interested party/Respondent submitted that the Petitioner has not satisfied the conditions for review under section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Learned counsel contended that the Petitioner's claim that the court went into error by finding that the 5th interested party is entitled to 5 acres instead of ¼ acre is not actually an error on the face of the record and which should be rejected because mere error or wrong view is not a ground for review but a ground for appeal. It was submitted that the error apparent is not evident since the court duly considered the evidence presented and came with a decision that the 5th interested party was entitled to 5 acres of land and not ¼ acre. Finally, it was submitted that an order or decisions cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court and hence the petitioner if aggrieved by the Ruling should proceed or file an appeal. Reliance was placed in the case of **Republic –vs- Advocates Disciplinary Tribunal Exparte Apollo Mboya [2019] eKLR, Nyamogo and Nyamogo –vs- Kogo [2001] EA 170, Attorney General & Others –vs- Boniface Byanyima**. Citing **Leviouta –vs- Uganda Transport Company [1995] HCB 340**. Learned counsel pointed out that an erroneous order/decision cannot be corrected in the guise of exercise of power of review and hence the application should be dismissed with costs.

7. I have considered the rival affidavits plus the submissions and authorities presented. The issue for determination is whether the Petitioner has furnished sufficient reasons to warrant an order for review of the ruling dated 11/02/2021.

8. The law guiding the grant of an order of review is found in section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides 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 not appeal is allowed by the 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.

On the other hand, Order 45 Rule 1 of the Civil Procedure Rules provides as follows:-

“Any person who considers 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 the 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 in 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.”

The Petitioner has claimed that the orders made on 11/02/2021 has an error apparent on the record in that the court awarded the 5th interested party five acres instead of ¼ acre of land from the deceased’s estate. It is further the petitioners contention that the court did not consider crucial evidence which was not available at the time of canvassing the application and also that no viva voce evidence was tendered where the 5th interested party could have been cross-examined.

The 5th interested party/Respondent contends that there was no error apparent on the record since the court has already considered the evidence adduced by the parties and ruled on what the 5th interested party is entitled to in the estate of the deceased and therefore the alleged error is not evident and requires detailed examination, scrutiny and clarification of or legal points of law.

9. Looking at the Petitioner’s request, it seems she wants the court to correct an apparent error or omission on the part of the court. If that is so then it must be quite clear that the same is self-evident and can be seen without the need for elaboration to be established. It is trite law that review cannot be granted on the basis that the court proceeded on an incorrect exposition of the law and thus arrived at an erroneous conclusion. In **Nyamogo & Nyamogo –vs- Kogo [2001]EA 170** the court held as follows:

“An error apparent on the record cannot be defined precisely or exhaustively, there being an element of undefiniteness inherent in its very nature and it must 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 on in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record could be made out. 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. 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

10. The Petitioner/Applicant has availed copies of proceedings in **Machakos Chief Magistrate’s Court Criminal Case No. 4073 of 1999** wherein the 5th Interested party was convicted for an offence of altering a document without authority contrary to section 347 (b) as read with section 349 of the Penal Code and sentenced to serve one-year imprisonment. The Petitioner now claims that had these proceedings been availed to the court at the time of determination of the application dated 13/06/2019 leading to the impugned ruling of 11/02/2021 then the court could have arrived at a different finding preferably in favour of the Petitioner. Indeed, the court in the said ruling pointed out that the Petitioner ought to have availed the criminal proceedings to back her case. If the Petitioner has now availed them, she still has the burden of proving her claim against the 5th interested party by calling the area chief who had witnessed the sale agreement between the deceased and the 5th interested party. It is instructive that the said witness did not file an affidavit in support of the petitioner’s application. All these would still call for a long drawn process of reasoning on points where there may conceivably be two opinions. These state of affairs cannot by any stretch of imagination imply that there is an error apparent on the face of the record. This court in its ruling considered the rival claims and arrived at a finding that the proper version of events appear to have been presented by the 5th interested party and not the petitioner as the same was convincing in view of the documents availed. Even if the Petitioner had availed the above criminal proceedings without calling the person who witnessed the sale agreement or secure an affidavit from him, the court could still have arrived at the same decision. My considered view of the petitioner’s present claim that there is an error apparent on the record is that he is saying that the court made an error in its decision. If that is the case, then the Petitioner’s redress lies in an appeal. The petitioner’s conduct seems to be an unwitting attempt to persuade this court to sit on an appeal in a matter it has already decided. The Petitioner clearly seeks to drive this court to arrive at a different verdict from the one it had made on 11/02/2021 on the basis of the new documents. Even though the Petitioner had informed the court that the court proceedings could not be traced nothing prevented her from securing an affidavit from the area chief who had witnessed the sale agreement to back up her case against the 5th interested party. In the absence of such evidence, the decision of the court still remains as such and hence I do not see any error apparent on the face of the record. Again, the petitioner’s claim that she was not given an opportunity to present oral evidence and which could have helped her cross examine the 5th interested party is not convincing in view of the fact the parties agreed to canvass the application by way of written submissions. The petitioner cannot now attempt have her cake and eat it by seeking to have the ruling reviewed so as to give her an opportunity to adduce oral evidence. Clearly, she is out to have a second bite at the cherry which cannot be countenanced. The ground cited by the petitioner does not at all qualify to be ground for review to bring the application within the purview of the grounds specified in Order 45 Rule 1 of the Civil Procedure Rules. Consequently, I find this is not a proper case for the court to grant the review sought. The Applicants remedy lies in an appeal.

11. In the result, the Petitioner’s application dated 1/3/2021 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER,2021.

D. K. KEMEI

JUDGE

DELIVERED AT MACHAKOS THIS 25TH DAY OF OCTOBER, 2021.

M. W. MUIGAI

JUDGE