



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 64 OF 2010

IN THE MATTER OF THE ESTATE OF JOSEPHAT MBURU WANYOIKE (DECEASED)

PETER GITAU WANYOIKE.....1ST APPLICANT

ANTHONY WANYOIKE MBURU.....2ND APPLICANT

VERSUS

JOHN BROWN NDUNGU1ST RESPONDENT

FAMILY BANK LIMITED.....2ND RESPONDENT

RULING

1. The application coming for consideration in this Ruling is dated 17.2.2020 seeking the following orders.

(i) **THAT this Court be pleased to review or vary its ruling given on 11.10.2019 and to set aside conditions imposed for execution of the Court's decree.**

(ii) **THAT cost be provided for.**

2. The Application is based on the ground that there is an error apparent on the face of the record since the property the court ordered to be transferred to the Applicants was neither ascertained nor was there a prayer for the transfer of the property.

3. The Application is supported by the Affidavit of the 2nd Applicant ANTHONY WANYOIKE MBURU dated 17.2.2020 in which he has deposed as follows:

(i) **THAT on 10.5.2019 the Applicants filed a Summons dated 9.5.2019 seeking the Judgment against the Respondent in the sum of Ksh.113,275,698 plus interest at 12% per annum from 3.6.2010 until payment in full.**

(ii) **THAT the Court heard the Application and delivered a ruling on 11.10.2019 and ordered as follows:**

a) **“Judgment is entered in favour of the Applicants against the 1st Respondent in the sum of Ksh.113, 275,298.00 together with costs and interest from the date the grant was revoked (11.7.2011) until payment in full”.**

(iii) **THAT in order to facilitate execution of the Judgment, the Court further ordered as follows:**

b) **“THAT the subject property to be transferred to the applicants after valuation and the 1st Respondent to pay the difference if any.”**

c) **THAT the valuation to be undertaken within 45 days of the date of the Judgment and a Report be filed.**

d) **THAT the Deputy Registrar of the Court to appoint an independent valuer and the 1st Respondent to pay the**

costs of the valuation.

(iv) The 2nd Applicant further deposed that there is a mistake or error apparent on the face of the record since the property ordered to be valued and transferred was neither ascertained nor was there a prayer for the transfer thereof made by the Applicants.

(v) Further the Court mistakenly failed to consider 3rd party interests ranking in priority to the Applicant's Interest in that the said property is charged to equity Bank Limited and the same is therefore encumbered.

(vi) It was further deposed that the 1st Respondent is a dual citizen of both Kenya and the United States of American and could leave the country any time.

(vii) THAT Applicants are now asking the court to set aside the conditions attached to the Judgment.

4. The 1st Respondent filed a Replying Affidavit sworn on 24.2.2020 in which he deposed as follows:

(i) THAT the Application dated 17.2.2020 is fatally defective unprocedural and unknown under the law of Succession Act and therefore an abuse of the Court Process.

(ii) THAT the Application does not raise any ground to warrant review of the Ruling and Orders of this Court.

(iii) THAT the Applicants are guilty of inordinate delay of over 4 months.

(iv) THAT there is no mistake or error on the face of the record and the only avenue available to the Applicants is to file an appeal.

(v) THAT the Applicants in their summons dated 9.5.2019 had sought "such other or further orders as it shall deem just in the circumstances of the case....."

(vi) THAT the Court had wide discretion bestowed upon it under Rules 49 and 73 of the Probate and administration rules to issue the directions it gave towards the settlement of the Applicant's purported claim.

(vii) THAT the Land Parcel No. NAKURU/MUNICIPALITY BLOCK 12/60 and resultant plots are not charged or encumbered.

(viii) THAT the decree has never been extracted by the Applicants and the appointment of a valuer has not been done by the Deputy Registrar and the same cannot be blamed on him.

5. I have considered the Affidavits filed herein and I find that the Applicants are seeking review of this Court's orders and setting conditions for execution of the Judgment which was entered against the 1st respondent in favour of the Applicants.

6. The Conditions for review of an order or Judgment are provided for under **Order 12 Rule 7** of the **Civil Procedure Rules 2010** which provides that:

"Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just."

Order 45 of the Civil Procedure Rules, 2010 which provides 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. A party who is not appealing from a decree or order may apply for 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.

7. In **Benjoh Amalgamated Limited & Anor v Kenya Commercial Bank Limited [2014] eKLR** where this Court recognizing that it was no longer the apex court in the Republic after creation of the Supreme Court held on the issue of reviewing its earlier decisions:

"57..Jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to

boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).

.....

“61. It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice.”

8. In the current case, I find that there is an error apparent on the face of the record in that the property to be transferred was not ascertained during the hearing of the case and further that the said property is charged to Equity Bank Limited.

9. The 1st Respondent who opposed the Application for review stated that the land parcel No. NAKURU MUNICIPALITY BLOCK 12/60 and resultant plots are not charged.

10. I find that it is not possible for this Court to ascertain at this stage whether or not the said property is charged as the title documents were not produced during the hearing of the case.

11. I find that there is an error apparent on the face of the record that will impede the execution of the Judgment of this court.

12. The Application dated 17.2.2020 is accordingly allowed in the following terms:

(i) THAT the conditions for execution of the Judgment be and are accordingly set aside.

(ii) THAT the Order to have the property valued and transferred to the Applicants be and is hereby set aside as the same is an error on the face of the record since the said property was not ascertained.

(iii) THAT the Judgment herein still remains in the following terms:

“32. I accordingly enter Judgment in favour of the Applicants against the 1st Respondent in the sum of Ksh.113,275,6987 together with costs and interest from the date the grant was revoked (11.7.2011) until payment in full”.

(iv) Each party to bear its own costs of the Application dated 17.2.2020.

Orders to issue accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 6TH

DAY OF MARCH, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.