REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 371 OF 2014

IN THE MATTER OF THE ESTATE OF SHEBAN KANYANYA NANGABO (DECEASED)

SAINA MAKOKHA KANYANYA.....1ST PETITIONER/APPLICANT

FATUMA NYOROTSO OTENGO.....2ND PETITIONER/APPLICANT

VERSUS

HASSAN OWITI KANYANYA.....OBJECTOR/RESPONDENT

RULING

1. The applicant has filed an application dated 18/5/2018 seeking for orders that:-

   (a) The judgment delivered by this Honourable Court on 26/01/2016 be reviewed and/or set aside.

   (b) This Honourable court be pleased to order that land parcel No. East Wanga/Lubinu/1829 be shared equally and the resultant numbers be registered separately in the names of Saina Makokha Kanyanya and Hassan Owiti Kanyanya respectively.

   (c) The court be pleased to make such just orders.

2. The application is premised on grounds on the face of the application and supported by the affidavit of the applicant, Saina Makokha Kanyanya. The grounds thereof are that since the delivery of the judgment by Mwita J. on the 26/1/2016, the respondent has threatened to evict the applicant and has destroyed her house thereby forcing her to live in a makeshift house constructed by well wishers in the community. That reports to the police, by the Assistant Chief and the area Chief have not borne any fruit. That the respondent has ploughed the entire parcel of land leaving the applicant landless. That the applicant will suffer irreparably if the orders sought are not granted. That the respondent will not be prejudiced if the orders sought are not granted. That it is the interest of justice that the orders sought are granted.

3. The application was opposed by the respondent through his replying affidavit sworn on 1st April, 2017. The respondent states that the application does not exhibit any new matter envisaged by law to warrant review. That there is nothing in the impugned judgment that constitutes an error apparent on record to warrant review. That the alleged post-judgment matters cannot be the basis for review sought. That the said allegations are all false.

4. The applicant is a widow to the deceased in this succession cause while the respondent is her step son. In his judgment Mwita J. applied the provisions of Section 35 of the Law of Succession Act in distributing the property. The section grants a widow life interest to the estate of her deceased husband. The learned judge accordingly ordered that the deceased's estate be shared out equally and registered in the joint names of the applicant and the respondent with the applicant having a life interest on the land. The applicant seeks that this court reviews and orders that the land be shared equally between the two parties.

5. The advocates for the applicant, **Namatsi & Co. Advocates**, submitted that Section 35 of the Law of Succession Act that provides for a widow in having life interest in the estate of her deceased husband is discriminatory and oppressive. That courts have from time to time stated that peculiar circumstances of each case should determine whether to apply strictly the rule of life interest or to temper it in the interests of justice to all the affected parties. To support this position Counsels cited the case of **Estate of Mimpwi M'itaru (Deceased) [2019] eKLR (Meru High Court Succession Cause No. 740 of 2011)** where it was stated that:-

   "…Nonetheless, jurisprudence coming through is that strict application of Section 35 may breed injustice especially because, the spouse's life interest hovering over the whole estate, is an impediment on the right of enjoyment by the other dependants of their rightful shares in the estate. The spouse's rights to the property of their marriage should also not be reduced and confined

to mere life interest. Such connotes that the surviving spouse never had any property rights in the matrimonial properties; and, that upon the death of one spouse, the rights of the surviving spouse are obliterated and reduced to mere life interest. I do not think the law seeks such down trod on rights of spouses in their property of the marriage. It is time courts started bringing the law of succession into conformity with the Constitution on this matter. See Section 7 of the Sixth Schedule of the Constitution which provides as follows:-

> ***(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."***

In the said case the court cited the Court of Appeal decision in **Stephen Gitonga M'murithi –Vs- Faith Ngira Murithi [2015] eKLR** where it was held that:-

> ***"…As for the issue of the widow having been given an outright tangible shareholding in the net intestate estate of the deceased as opposed to a life interest, we find nothing in section 40 of the Laws of Succession Act that can prevent a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or temper with it in the interests of justice to all the affected parties. In the circumstances of this case having found that the principle in Section 38 was the appropriate applicable principle, ordering a life interest would have occasioned injustice to all the dependants as opting for such an option would have only bestowed upon the widow Naomi a hovering interest over the individual interests of all the other beneficiaries thereby making it impossible for all the beneficiaries to enjoy freely the resulting benefits from the deceased's estate. We find it was prudent for the learned trial Judge to accord a direct unencumbered benefit to the widow Naomi as opposed to a life interest."***

Counsels urged the court in the interests of justice not to apply Section 35 of the Law of Succession in this case and give the applicant her own share of land parcel East Wanga/Lubinu/1829.

6. The advocates for the respondent, **Nyikuli, Shifwoka & Co. Advocates** submitted that the matters complained of are post-judgment that cannot be a basis for review. That the current application seeks for the court to re-consider the law and the evidence and reach a different finding. That this would amount to sitting on appeal of its own decision. That it is settled law that wrong exercise of discretion cannot be a ground for review and neither is wrong application of the law.

7. Counsel submitted that a review can only be granted whenever the court considers that it is necessary to correct an apparent error or omission on part of the court. That the error or omission must be self evident and should not require an elaborate urguement. Counsel cited the Court of Appeal decision in **National Bank of Kenya Limited –Vs- Ndungu Njau (1997) eKLR** where it was held that:-

> ***"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.***
>
> ***In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."***

8. The application is made under Section 47 of the Law of Succession Act, Rules 47, 93 and 49 of the Probate and Administration Rules and under Order 3 A and 45 Rule 1 of the Civil Procedure Rules.

9. Rule 63 of the Probate & Administration Rules stipulates the rules of the Civil Procedure Act that are applicable in succession matters among them being Order 45 of the Civil Procedure Rules. An application for review made in a succession matter has therefore to comply with the substantive law set out in Order 45 of the Civil Procedure Rules as was held in **John Mundia Njoroge & 9 Others –Vs- Cecilia Muthoni Njoroge & Another (2016) eKLR** that:-

> ***"…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 Act."***

10. Order 45 of the Civil Procedure Act provides that:-

> ***"(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."***

11. The above means that an application for review can be made on the basis of:-

(1) Discovery of new and important matter or evidence.

(2) Mistake or error apparent on the face of the record.

(3) Any sufficient cause.

See the Court of Appeal decision in **Muyodi –Vs- Industrial & Commercial Development Corporation & Another (2006) 1EA 243**.

12. It is clear that the application is not made on the basis of discovery of new and important matter or evidence. The supporting affidavit of the applicant does not allude to that. The applicant does not allege that there is any apparent error or mistake in the judgment. Her urguement is that the learned Judge reached a wrong decision in law in failing to provide for equal sharing of the property. The submissions by her advocates were to the effect that the trial Judge was wrong in applying the principle of life interest in the matter. The advocates tended to challenge the reasonableness of the provisions of Section 35 of the Law of Succession Act.

13. In my view the urguements by the applicant are better reserved for an appeal than a review. In **Pancras T. Swai –Vs- Kenya Breweries Limited, Nrb Civil App. No. 275 of 2010** where the appellant challenged the decision on a matter of law the Court of Appeal held that:-

> ***"It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus officio and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts."***

14. It is clear than an incorrect exposition of the law or an erroneous conclusion by a judge is not a ground for review. Similarly misconstruing a statute or any provision of the law as is being alluded to in this application is not a ground for review. The impugned judgment was made after a full trial. For this court to move to review the judgment on the grounds stated herein would amount to sitting on appeal of a judgment of another Judge which is against the law.

15. The upshot is that there are no grounds for review in this application. The application is unmerited and is thereby dismissed with costs to the respondents.

Delivered, dated and signed at Kakamega this 22nd day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Namatsi consented through e-mail for the Applicants

No appearance for the Respondent

Applicants - absent

Respondent - absent

Court Assistant – Polycap

30 days right of appeal.