REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 959 OF 2015

IN THE MATTER OF THE ESTATE OF JACKSON NICHOLAS KYENGO MULWA alias KASANGA JOEL MULWA (DECEASED)

MARY AGATHA MULWA.....APPLICANT

VERSUS

MARTHA KASANGA MULWA.....1ST RESPONDENT

JOSEPH KONZOLO MUNYAO.....2ND RESPONDENT

SAMMY MWENDWA MUTAVI MUVE.....3RD RESPONDENT

DR. ANDREW KAVULYA MULEEI.....4TH RESPONDENT

RULING

1. This ruling disposes two applications, namely, the applicant's Notice of Motion dated 29th June, 2018 (herein after referred to as the first application) and the 1st respondent's chamber summons dated 19th April, 2019 (herein after referred to as the second application). In the first application, the first respondent seeks a review of the order of the court issued on 13th March 2018 while in the second application the applicant is seeking her appointment and that of the 1st respondent as joint administrators of the estate and also reasonable financial provision for herself pending the hearing and determination of this cause.

2. **In the first application**, the 1st respondent through a notice of motion dated 29th June 2018 seeks the following orders:

   i. A review of the order issued on 13th March 2018 dismissing the applicant's application dated 4th March, 2016

   ii. Setting aside of the order issued on 13th March 2018 and to substitute it with an order allowing the application dated 4th March, 2016

   iii. In the alternative, the court to grant such other or further orders as it may deem fit and just in the circumstances of this case.

   iv. Costs of the application be provided for.

3. In her affidavit in support of the application dated 29th June 2018, Martha Kasanga Mulwa states that she is the widow of the deceased herein. She contends that in her application dated 4th March, 2018 she sought leave of the court to build a guardhouse, put up a gate and fences and dig trenches on designated areas on the property known as L.R 8857/72 due to intermeddling on the estate property. She further states that on 13th March, 2018, the Court dismissed her application for lack of *locus standi* and that intermeddling had not been established. She asserts that the court in reaching the finding failed to take into account Articles 22 and 258 of the constitution which confer standing to a party to act on behalf of another who cannot act in his name. Further, that there was omission on the part of the court when it failed to consider the Section 7(1) of the sixth schedule of the constitution, which requires that all laws in force before the date of promulgation of the constitution be construed with the alterations, adaptations and qualifications necessary to bring it into conformity with the constitution. She further avers that the extent of the application dated 4th March, 2016 was to protect the property rights of the deceased and the beneficiaries guaranteed under Article 40 of the constitution.

4. The deponent maintains that the court completely disregarded the evidence of intermeddling presented, which is a patent error on the face

of the record warranting a review of the ruling delivered on 13th March, 2018. She further asserts that the court erroneously noted that the application as argued by Mr. Kamau and Mr. Ahmednassir whereas it was argued by Ms Odari and Mr. Tebino respectively. She intimated that she was not aware when the ruling was delivered, as the said matter was not causelisted on the day the ruling was set to be delivered thus the reason she could not file this application earlier. She asserts that no prejudice will be occasioned to the respondents if the prayers sought are granted.

5. In opposition to the application, Mary Agatha Mulwa filed a replying affidavit dated 16th July, 2018. She avers that the application by the 1st respondent is bad in law for having failed to extract and annex the order which she seeks to be reviewed. Further, that the court's jurisdiction in an application for review is limited to an error on the face of the record, discovery of new and important matter which after due diligence was not within the knowledge of the applicant and any other sufficient reason and not where the applicant alleges erroneous conclusions, as is the case herein. She asserts that the grounds raised by the 1st respondent on the allegations of the failure to consider the provisions of the constitution and evidence are grounds of appeal not review.

6. On the allegation that the court erroneously noted the names of wrong counsel who submitted for the parties, she avers that Ms. Odari was holding brief for Mr. Kamau Karori while Mr. Tebino was holding brief for Ahmednassir Abdullahi, SC. The deponent contends that an application for review must be made without unreasonable delay and the 1st respondent is guilty of laches for making her application four calendar months after the order was issued, which constitutes unreasonable delay. The applicant that the reasons advanced for the inordinate delay are not sufficient to warrant the issuance of the orders sought. She urges the court to dismiss the application being that it lacks merit.

7. The application was canvassed by way of written submissions. It was submitted for the 1st respondent that Article 22 and 258 of the Constitution of Kenya did away with previous restrictions of *locus standi*, and the court erroneously made a decision on such basis. The 1st respondent urged the court to be guided by the finding in the case of **Zablon Mokua v Solomon M. Choti and 3 others [2016]eKLR.** It was further submitted that there was an error apparent on the record by virtue of the court having erroneously altered the names of the advocates who argued application in court. It was stated that this qualified as an error apparent on the record to warrant the review orders sought. Thirdly, it was submitted that the failure to annex the decree sought to be reviewed is not fatal as guided by the court of appeal decision of **Sheikh Ali Taib v George Ellam Wekesa and another [2017]eKLR**. Finally, it was submitted that the delay in filing application had been explained and was excusable. The 1st respondent urged the court to be guided by the court of appeal decisions of **Gorge Kagima Kariuki and 2 others v George M. Gichimu and 2 other [2014] eKLR** and **Stanley Kahoro Mwangi and 2 others v Kanyamvi Trading Company Limited [2015] eKLR** in support of her case.

8. In response, it was submitted for the applicant that failure to extract the relevant decree which was sought to be reviewed is fatal as was determined in the decision in **Thomas Owen Ondieki v National Bank of Kenya Limited [2011]eKLR**. The applicant asserted that that Order 45 of the Civil Procedure Rules provides the grounds for review. It was her position that the grievances raised herein are touching on the law and status of the court which are issues that should be heard on appeal and not review. Further, that the mere showing that there is an alleged error apparent on the face of the record within the meaning of Order 45 of the civil procedure rules does not warrant the grant of orders sought. She urged the court to rely on the court of appeal decision in **National Bank of Kenya Limited v Ndungu Njau, Civil Appeal No. 211 of 1996.**

9. Having carefully considered the pleadings of both the 1st respondent and the applicant, there are two substantive issues for determination:

a) Whether the application meets the threshold for granting Review orders.

b) If the application meets the threshold, what orders should the Court issue

There are certain orders of the Civil Procedure Rules that are imported to matters of Succession and Order 45 is one of them. This is provided for under **Rule 63 of the Probate and Administration Rules**. **Order 45 Rule 1** 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.

10. The grounds enumerated in the above provisions are specific. The principles for interference in exercise of review jurisdiction are well settled. The court passing the order is entitled to review the order, if any of the grounds specified in the previously mentioned provisions are satisfied. The Right of Review is a remedy to be sought for and applied under special circumstances and conditions. The objective of this right is to correct the error or any mistake made in the decision of the court. Whatever reasons or grounds an applicant invokes, the application must be made without unreasonable delay.

11. The instant application was filed on 2nd July 2018 which is 111 days after the order of the court was issued on 13th March, 2018. The 1st respondent in her affidavit in support of the application cited the lack of communication from the court through cause listing of the matter when it came for ruling and difficulties in retrieving the file in time from the registry in time to know the outcome of the court decision. This she stated were reasons why her application was not filed timeously. In opposition, the applicant contended that it was general knowledge that matters coming up for ruling are not cause listed and the ruling was issued on the same date it was scheduled to be delivered. Further,

that the application was an afterthought.

12. From the record, I note that the ruling date of the application was issued on 6th February, 2018 in open court and in the presence of Mr. Ahmednassir, Mr. Tebino, Ms. Odari and Miss Kithee counsels who were present for the parties. Further, the ruling was delivered on 13th March, 2018 as scheduled by the Court in presence of Mr. Tebino and Ms. Odari. It is my view that although the application was not filed timeously, the delay in filing the application was adequately explained by the 1st respondent.

13. The second limb of **Order 45 Rule 1** refers to an error apparent on the face of the record. In making an examination as to whether there is an error apparent on the face of the record, the court must be quick to draw a parallel between a decision that is merely erroneous in nature and an error that is self-evident on the face of it. A review application must confine itself to the scope and ambit of Order 45 rule 1 lest it morphs into an appeal. The Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited Civil Appeal No.275 of 2010 [2014] eKLR** opined thus:

"…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 fanctus officio and have no appellate jurisdiction…"

14. The 1st respondent argued that there was an error apparent on the face of the record when the court in its decision stated that the application was argued by Mr. Kamau and Mr. Ahmednassir whereas it was argued by Ms Odari and Mr. Tebino respectively. In response the applicant asserted that Ms. Odari and Mr. Tebino were holding brief for the respective counsels and this does not amount to an error apparent. Upon perusal of the record, I find that indeed the application was argued by Mr. Tebino holding brief for Mr. Ahmednassir and Ms. Odari holding brief for Mr. Kamau. The omission in noting that the counsels were holding brief for other counsels a common phenomenon in legal practice is not fatal and could not in any way affect the outcome of the court decision.

15. The 1st respondent also argued that the court failed to consider her evidence and articles of the constitution which should have been relied on to reach a determination. The 1st respondent contended upon analyzing the impugned decision, no error or mistake apparent on the face of the record has been pointed out to warrant an order for review. In the order given by this court on 13th March, 2018, this court considered all the facts that had been placed before it by the parties, and reached a conclusion that intermeddling had not been established and that the applicant had no *locus standi* to bring the application.

16. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. The term "mistake or error apparent" by its very connotation signifies an error which is evident by itself from the record of the case and does not require detailed examination, scrutiny and interpretation either of the facts, or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of **Order 45 Rule 1 of the Civil Procedure Rules.** Bearing that in mind, the Court cannot sit on its own decision, as the arguments made on the error adverted to, do not demonstrate an error apparent on the face of the record.

17. The last limb advanced is whether there is any other sufficient cause that would allow the court to exercise powers of review under Order 45. The 1st respondent strongly argued that the application before the court is premised on sufficient reason. The only reason advanced was that she is seeking to protect estate property from intermeddlers. The requirement of "sufficient cause," is synonymous with the requirement of "good cause." I have keenly considered the record and I find that the 1st respondent has not demonstrated to the court, any other sufficient reason to warrant the review of the court's ruling.

18. For the foregoing reasons, I find that the application dated 29th June, 2018 lacks merit and is dismissed with no orders as to costs.

Second Application

19. In her chamber summons dated 29th April, 2019, the applicant Mary Agatha Mulwa is seeking;

i. The appointment of Martha the 1st respondent(Martha Kasanga Mulwa) and herself as joint administrators of the estate of the deceased herein.

ii. That the Honorable court direct the joint administrators to receive all income on behalf of the estate of the deceased and file audited accounts in court with regard to all income generating activities emanating from all that land parcel originally known as L.R 8857/72 and L.R No. 15269 both situate in Machakos

iii. Grant of reasonable financial provision for herself(Mary Agatha Mulwa) from the estate of the deceased pending the hearing and final determination of this cause

iv. An order prohibiting/restraining the Respondents, their agents, servants or anyone acting under their authority from intermeddling with the estate of the deceased namely parcel originally known as L.R 8857/72 and L.R No. 15269 both situate in Machakos District and the deceased's personal bank account no. 0112065372500 at Co-operative Bank Athi River Branch pending the hearing and determination of the objection application dated 3rd July, 2015.

v. Costs of the application

20. The summons is supported by the grounds listed on the face and the affidavit of the applicant Mary Agatha Mulwa dated 29th April 2019 wherein she depones that she is the first widow of the deceased. She avers that the 2nd to 4th respondents filed a petition for grant of probate of the last will and testament of Jackson Nicholas Kyengo Mulwa, the deceased herein on 22nd April 2015. That on 5th June 2015 the petition was duly advertised in the Kenya Gazette and on 3rd July, 2015 she filed an objection under Section 68 of the Law of succession act against the said petition which objection is still pending before this Court.

21. She claims that the 1st respondent is currently operating a large scale quarry business on estate property and retaining all income therefrom for herself and her family to her exclusion. She asserts that the 1st respondent is neither an executor of the last will and testament of the deceased, nor is she an administrator of the estate. She contends that this is tantamount to intermeddling with the property of the deceased. She further avers that she is currently unemployed due to advanced age and in need of financial assistance, lacking continuous/stable source of income.

22. In response to the summons, Martha Kasanga Mulwa through a replying affidavit dated 31st May, 2019 denies claims that the applicant has no stable income. She avers that the deceased set up various farming activities including livestock and poultry rearing for her benefit in addition to rent generating properties in her possession. She claims that the applicant recently sold a property in Nairobi for her benefit. She contends that the applicant is not destitute as alleged.

23. On the prayer by the Applicant to be appointed as interim joint administrators, the 1st respondent is apprehensive asserting that their differences will make it impossible to make any joint decision for the benefit of the estate. She proposes that a neutral party be appointed as an administrator on the interim basis pending the hearing and determination of the objection filed by the Applicant. She avers that the executors appointed by the deceased in his will are best suited to be issued with the grant of probate *pedente lite* and no prejudice will be occasioned on any of the beneficiaries.

24. In addition, the 1st respondent denies claims of intermeddling in the property by operating, or managing the quarry business and retaining all the income to the exclusion of other beneficiaries. She affirms that prior to his demise, the deceased had leased the quarry and the rental income was being deposited in the deceased's Co-operative bank account in Athi-River Branch. She also denies intermeddling in the deceased's bank accounts, stating that withdrawals were frozen upon the demise of the deceased herein, pending the issuance of a grant of probate. She asserts that the applicant's claims are baseless and her application lacks merit and should be dismissed.

25. In a further affidavit dated 11th October, 2019, the applicant avers that she retired in 1994 and had been running a poultry farm which collapsed in 2017. Further, that the deceased's ongoing projects at the time of his demise are still wholly and exclusively managed by the 1st respondent and her children. She denies owning property generating rental income purchased by the deceased and operating a livestock farm. She also denies receiving proceeds from the sale of property as alleged by the 1st respondent. The applicant claims that the 1st respondent has unlawfully appointed herself as the defacto administrator of the estate of the deceased dictating what she is entitled to. She affirms that she has challenged the entire will in her objection, which is yet to be heard. She further claims that the proposed executors who derive their authority from the challenged will are close acquaintances' of the 1st respondent and are not likely to undertake their duties in a just manner. She urges the court to grant the prayers sought in her summons.

26. The summons were canvassed by way of written submissions. The applicant submitted that she had submitted sufficient reasons for the appointment of herself and the 1st respondent as joint administrators and was supported by paragraph 10 of the 5th Schedule of the law of succession act. On the prayer for reasonable financial provision, she submitted that the court has the power to make such orders in deserving cases as the applicant is retired with no regular income. The applicant contended that she had not in any way intermeddled contrary to the allegations by the 1st respondent affirming that it was the 1st respondent who was intermeddling within the meaning of Section 45 of the Law of Succession Act.

27. In response, the 1st respondent submitted that the provision of appointment of an administrator was not mandatory, and the court could only exercise its discretion when sufficient reasons have been established. Further, that although the Applicant filed an objection on 24th September 2015 challenging the validity of the will, she did not fault the suitability of the executors to administer the estate of the deceased. On the prayer for reasonable financial provision, the 1st respondent submitted that the applicant had not substantiated her claim that she is in need of urgent financial assistance pending issuance of the full grant. In conclusion she submitted that the applicant had in no way demonstrated that the 1st respondent had taken actions constituting intermeddling of the free property of the deceased. She urged the court to dismiss the application.

28. The applicant argued that the current executors derive their authority from the challenged will and in the event that her objection succeeds, they will have no mandate over the deceased's estate. She has accused the 1st respondent of being the defacto administrator having control over estate property and intermeddling. She sought appointment as an interim administrator with the 1st respondent. On her part, the 1st defendant argued that the executors of the estate appointed by the will of the deceased were capable of performing their duties under Law. Further, that her differences with the applicant will make it impossible for them to be co-administrators pending the hearing of the objection.

29. From the foregoing, I note that the validity of the will is challenged. The executors derive their powers from the will and are entitled to exercise the powers and discharge the duties. However, this would mean that the foundation of their authority to act as such would be shaky, and it would be prudent not to assert the right to act as such prior to determination of the validity of the will. Where the question arises after a grant has been made, the executor or grant-holder would be entitled to continue acting as such until the court rules on the validity of the will. Where the issue arises prior to the making of the grant then the proper thing to do would be to proceed under paragraph 10 the Fifth Schedule to the Law of Succession Act, which states as follows -.

> **'Pending any suit touching on the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of the deceased person, who shall**

have all the powers of a general administrator, other than the right of distributing the estate, and the administrator shall be subject to the immediate control of the court and shall act under its direction.'

30. The petition for grant of probate is opposed by the applicant herein who is challenging the validity of the will. At this point in time, the question of the validity of the will is moot. According to section 79 of the Law of Succession Act, Cap 160, Laws of Kenya, a grant of representation vests all the property of the deceased in the executor or the administrator appointed in cases of intestacy. That would suggest that the property in this case is yet to vest in the executor. However, **Section 79** should be read together with section 80(1) of the Act, which establishes that a will takes effect upon the death of its maker and that the grant of probate merely authenticates it and gives validity to any acts of the executor carried out between date of death and the date of the making of the grant.

31. The court of appeal in **Sewe v Sewe and another [1991] KLR 105** stated that the appointment of administrators is not the same as distributing the assets to those who are entitled to inherit. Therefore, an appointment of the applicant and the 1st respondent as interim administrators would not in any way make them guaranteed heirs to the estate of the deceased entitled to inherit from his estate. The 1st respondent is apprehensive that she will not be able to work with the applicant as co-administrators. However, the roles of interim administrators is limited pending the hearing of the objection. Consequently, in my view it is only fair and just that the two be appointed as interim co-administrators pending the hearing of the objection by the applicant.

32. On the prayer for financial provision to the applicant, it was argued that she was retired and lacked a stable source of income. Further, that her poultry business had collapsed in 2017 and she was unable to cater for her needs. The applicant also stated that currently she was not engaged in any income-generating venture but that was strongly disputed. Having considered the evidence for and in opposition to the prayer, I am of the view that the applicant has not made out a case for provision of some financial relief from the estate accounts pending the hearing of her objection.

33. The applicant also sought an order of prohibition against the 1st respondent restraining her from accessing bank accounts of the deceased and two properties in Machakos county namely L.R 8857/72 and L.R No. 15269. However, no evidence was tendered that demonstrate that indeed the 1st respondent had intermeddled on the two properties and had accessed the bank accounts belonging to the deceased. The prayer sought therefore fails.

34. Consequently, I hereby make the following orders to dispose of the application dated 29th April, 2019:

i. that Mary Agatha Mulwa and Martha Kasanga Mulwa are hereby appointed as administrators of the estate of the deceased pending hearing and determination of the objection proceedings filed by the objector;

ii. that a grant of letters of administration *pendente lite* shall issue to the administrators, limited in the manner prescribed in paragraph 10 of the Fifth Schedule to the Law of Succession Act;

iii. that the administrators shall access the funds and assets of the estate only with leave of court, to be utilized in such manner as the court shall direct;

iv. that upon the grant referred to in (ii) above, limited as aforesaid, being issued, the administrators, or any one of them, shall be at liberty to move the court appropriately for any orders relating to the management of the estate of the deceased;

v. directions for the objection proceedings to be taken forthwith;

vi. that each party shall bear their own costs

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 30TH DAY OF SEPTEMBER, 2020

L. A. ACHODE

HIGH COURT JUDGE

In the presence of ……Advocate for the Applicant

In the presence of ……Advocate for the 1st Respondent

In the presence of ……Advocate for the 2nd Respondent

In the presence of ……Advocate for the 3rd Respondent

In the presence of ……Advocate for the 4th Respondent