REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

SUCCESSION CAUSE NO. 294 OF 2015

IN THE MATTER OF THE ESTATE OF REUBEN WALTER MUVYA MUIU (DECEASED)

FLORENCE NDUKU MUIU.....ADMINISTRATOR/RESPONDENT

-VERSUS-

VICTORIA TATU MUIU.....1ST APPLICANT/ ADMINISTRATOR

ROBERT MUNYAO MUIU.....2ND APPLICANT/ADMINISTRATOR

RULING

1. This is an application seeking for an order of Review of the ruling of this court entered on 4.12.2019 and that the respondents be given an opportunity to be heard as well as for any other conservatory orders for the preservation of the deceased's estate. It is brought under Order 45 Rule 1 and Order 1 Rule 11 of the Civil Procedure Rules 2010 as read with Rules 47, 63(1) and 73 of the Probate and Administration Rules and Article 159(2)(a), (b) (d) and 50, 25(c), 27, 40, 46 (c), 47(3) (a), 48 and 10(2) of the Constitution.

2. The grounds of the application are that a ruling was rendered on 4.12.2019 on account of an apparent error on the face of the court record; that the court went into error in failing to consider the evidence adduced by the applicants and therefore finding that no gift *inter vivos* had been established in respect of Kithimani "A" Adjudication Plot Numbers Parcels 40, 182, 406, 1181, 2893, 2080 2081, 2895, 3920, 3917, 3918, 3919, 4620, 4621, 4002, 2705, 4028, 4029 and 4030 that were given as gift intervivos and therefore did not form part of the estate of the deceased. It was stated that the applicants had obtained new evidence that the said suit properties were given out as inter vivos gifts, being a finger print impression that corresponded on the ones on the questioned document where the deceased donated several parcels of land forming the suit properties that are the subject of the instant application.

3. The application was supported by an affidavit deponed by Robert Munyao Muiu on 15.7.200. He reiterated the grounds in the application and annexed copies of the identification documents of the deceased and certified copies of the verification documents issued by the National Registration Bureau.

4. The application was opposed vide a replying affidavit deponed by Florence Nduku Muiu the 3rd Administrator who took issue with the delay in filing the instant application and yet the ruling was made on 4.12.2019. It was averred that the applicants were served with notice to prosecute the applications dated 3.1.2016 and 11.7.2016 and that they did not produce the evidence that was available at the time. It was pointed out that the court already made its pronouncement on the issue and the only option available to the applicant was to appeal against the decision. The deponent upon advice from his counsel on record stated that there is a manifestation of intent to adduce new evidence that had not been earlier disclosed and use the same in a review application, which was an abuse of the court process.

5. On record are grounds of opposition dated 16.9.2020 filed by counsel for the respondent. Counsel took the view that the application dated 15.7.2020 was fatally defective, misconceived; that there was no sufficient cause to review the ruling dated 4.12.2019 as the ruling was correct in light of the evidence provided for by the applicants. The court was urged to dismiss the application dated 15.7.2020.

6. The application was canvassed vide written submissions. It is only the applicant's submissions that are on record. Counsel for the applicant in submissions dated 25.8.2020 cited the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR (Civil Application 211 Of 96); (27 May 1997)** and submitted that the error on the face of the record was the court overlooking the fingerprints of the deceased as verified at the National Registration Bureau that corresponded to the ones in the questioned document that donated the several parcels of land that are the subject of the instant application. It was the argument of counsel that the applicant met the threshold for grant of the review orders sought and urged the court to allow the application.

7. I have considered the application as a whole and submissions by learned counsel. As can be deduced from the chamber summons and

submissions, the summary of the applicant's case is that my ruling was an error. On the other hand, the respondent opposes the application arguing that this application is incompetent and fatally defective and an attempt to sneak in evidence through the backdoor yet the applicants failed to do so when the matter came for hearing of the applications dated 3.1.2016 and 11.7.2016.

8. The issues for consideration are:

a) Whether the applicants have satisfied the grounds to warrant an order of review.

b) ***Whether the applicant is entitled to the orders sought in the application***.

9. It is trite law that just like the right of appeal, an order in review is a creature of statute which must be provided for expressly. In considering an application for review, court exercises its discretion judicially as was held in the case of **Abdul Jafar Devji v Ali RMS Devji [1958] EA 558**. The law under which review is provided is Rule 63 of the Probate and Administration Rules, Section 80 of the Civil Procedure Rules and Order 45 of the Civil Procedure Rules.

10. Order 45 states 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. In order for an application for Review to succeed, the Applicant must convince the court of the existence 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. The applicant is obliged to clearly and specifically state the new evidence or matter and strictly prove the same. In the case of **James M. Kingaru & 17 others v J. M. Kangari & Muhu Holdings Ltd & 2 Others (2005) eKLR** the court rendered itself as follows: -

"Applications on this ground (review) must be treated with caution. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial.

12. Review cannot be an avenue to supplement or introduce new evidence. Having looked at the Applicants pleadings I find that there was no explanation why this evidence was not called during the hearing of the applications that led to the ruling now complained of. I am not convinced that there is new evidence that could not have been made available at the time of conducting proceedings on the applications to restrain interference with the estate of the deceased. It appears to me that either the information was available and within the knowledge of the applicants and they just failed or neglected to use it during the proceedings and I do not rule out the possibility that the evidence was custom-made with the instant application in view.

13. When directions were taken for the hearing of the injunction proceedings, the applicants vide their affidavits were stated as the witnesses in the instant matter and the court was not satisfied with their evidence and instead found that their claims would be handled during the confirmation of the grant. The applicants appear to be jumping the gun as it were since the summons for confirmation are yet to be heard. The two applications leading to the ruling now complained of only dealt with the interlocutory applications for issuance of conservatory orders pending the confirmation of grant. The issues raised by the applicants could still be brought before the court for consideration at that stage. At this point in time, the mentioned documents have no significance or relevance and even if the same were allowed, the same would not affect the decision of the court at this point in time since the issue of the confirmation of the grant is yet to be dealt with. The new and important evidence limb in the review application must thus fail.

14. The applicant appears to rely on the ground that there is a mistake or error apparent on the face of the record. It was the argument of the applicants that the trial court went into error in disregarding the evidence that the deceased made a thumbprint impression on the document where he donated the suit properties *inter vivos*. A misdirection by judicial officer on a matter of law cannot be said to be an error apparent on the face of the record. An error apparent on the face of the record was defined in **Batuk K. Vyas v Surat Municipality AIR (1953) Bom 133** thus:

"No error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it……..."

15. 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 mutates into an appeal.

16. In the case of **Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173** the court defined an error apparent on the face record, thus:

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

17. In the instant case therefore, I am not convinced that there is an error apparent on the face of the record in this case. What is being raised by learned counsel for the applicant requires examination of the evidence on record that was not even available at the time of the proceedings for injunctive orders. What the applicants need to do is to hold their horses as there will be ample time to present their evidence at the time for confirmation of the grant. In my considered view the applicants have not demonstrated an error apparent on the face of the record.

18. Regarding the element of sufficient reason, this means a reason sufficient on ejusdem generis to those in Order 45. In the instant case, a sufficient reason put forward by the applicant is that failure of the court to display cognitive abilities as it were and accept that the thumbprint on the document presented by the applicants was that of the deceased. Further, the applicants' documents annexed to the affidavits could not be authenticated by the court in the absence of evidence by the applicants themselves. I do not agree that there is sufficient reason raised and in any event the decision rendered on 4.12.2019 is open to appeal if the applicants are in a hurry to have the thumbprint on the document accepted by the court even before the confirmation proceedings. I decline to grant prayer 2 of the application.

19. Prayer 4 in the application appears to be a repeat of the prayers in the application where the ruling dated 4.12.2019 was issued. It is peculiar that by seeking a review of the said orders on one hand and seeking conservatory orders on the other, the applicants seem to be playing a game of Russian roulette in the manner that they want to take from the left hand and give it back to the right hand. In any case the ruling dated 4.12.2019 did capture the aspect of interim reliefs so as to preserve the estate and hence those orders are still in place and there is no need to regurgitate them again.

20. Consequently, I do not find any merit in the applicants' application dated 25.7.2020. The same is dismissed with no order as to costs. Parties are now directed to set down the matter for hearing of the summons for confirmation as a matter of priority.

It is so ordered.

Dated and delivered at Machakos this 21st day of October, 2020.

D. K. Kemei

Judge