REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 3081 OF 2014

IN THE ESTATE OF THE LATE JAPHET AVUGWI LUSENO (DECEASED)

AND

IN THE MATTER OF THE PETITION

BY

CHARLES LUSENO.....1ST PETITIONER /APPLICANT

DOUGLAS S MUDAVE.....2ND PETITIONER/RESPONDENT

VERSUS

PETER LIGALE LUSENO.....RESPONDENT

RULING

1. By a notice of Motion dated 18th February, 2010 and filed on 21st February, 2020, the Petitioners/Applicants herein moved this court for orders as follows;

(1) Spent

(2) That the application herein be set down for interpartes hearing on priority basis.

(3) That the Honourable court be pleased to stay the judgment entered on the 13th July 2017 by Hon Justice J. N. Onyiego.

(4) That the honorable court be pleased to set aside and or review paragraph 33-36 of the judgment entered on the 13.7.2017 by Honourable Justice J.N Onyiego to include an order that; LR 9615/Molo /Elburgon be declared a property subject to distribution in this Succession Cause No. 3081/2014; L. R. 965/Molo/Elburgon be shared out equally among all the 12 beneficiaries listed as follows ;-

(a) Aggrey Luseno

(b) Grace Wambwa

(c) Peter Luseno

(d) Harriet Luseno

(e) Lynette Kidimu

(f) Douglas Mudave

(g) Eliud Luseno

(h) Beeson Avugwi

(I) Charles Avugi

(j) Florah Luseno

(k) Estate of the late Samuel Asiligwa (Deceased)

(l) Estate of the late Erick Keya (Deceased)

2. The application is premised upon grounds stated on the face of it and averments contained in the affidavit in support sworn on 18th February, 2020 by Charles Luseno with authority from his co-Petitioner According to the applicants, the hearing of the suit culminating to the delivery of the impugned judgment went on in their absence and that the petitioners and other beneficiaries came to know of the said judgment when they met on 30th November, 2019 during a family meeting in which they agreed that L.R 9615/Molo/Elburgon be distributed equally amongst all beneficiaries.

3. He averred that the reason for agreeing to distribute the estate equally was because some two sisters were left out and other beneficiaries got less share than the others.

4. He contended that according to the judgement, the court was informed that the public trustee's instrument of assent never provided for all the beneficiaries as two of them namely; Grace Wambwa and Florah Luseno were left out.

5. In response, one of the beneficiaries known as Lynette opposed the application through her replying affidavit sworn on 25th May 2020 stating that the property sought to be distributed was a subject of **Succession Cause No 25 of 1969** administration of which was completed and estate shared out. That the confirmed grant in **Succession Cause N0. 25 of 1969** is still in force and that L.R 9615/Molo/ Elburgon cannot be distributed again. She averred that review should have been filed under **Succession N0. 25 of 1969** and not in this file.

6. During the hearing, M/s Kathurima appearing for the applicants/Petitioners reiterated the averments contained in their affidavit in support. Learned counsel contended that the gist of the application is to review court's judgment at paragraph 33-36 and paragraph 44 (A) where the court removed LR 9615/Molo/Elburgon from the list of assets.

7. M/s Kathurima further contended that there is now new evidence that beneficiaries have agreed to share the estate property in question a fact that was not in the knowledge of the applicant hence aground to review its orders to include the property in the list of assets and distribute the same equally. That with this new agreement, the orders made in **Succession Cause No 25/1969** have been overtaken by events.

8. On his part, Mr Gaita opposed the application arguing that the applicants have not met the criteria for review of the court orders and or judgment as provided under Order 45 of the Civil Procedure Rules. Counsel submitted that the land in question was shard out under **Succession Cause No 25 of 1969**. According to Mr Gaita, the orders sought should have been directed under **Succession Cause No 25/1969.**

9. Further, Mr Gaita submitted that there were no positive orders made to warrant stay of execution. It was counsel's submission that the applicants have come to court rather too late in the day considering that the impugned judgment was delivered on 13th July, 2017.

10. Regarding the contention that the applicant did not participate in the proceedings, counsel submitted that the applicants were all through represented by an advocate of their choice up to the end of the proceedings.

Determination

11. I have considered the application herein, response thereto and oral submissions by both counsel. Issues that arise for determination are:

a) whether the applicants have met the criteria for review orders;

b) whether the applicants did participate in the proceedings and if not, whether judgment herein can be set aside on that ground;

c) whether the applicants have established the grounds for stay of execution;

d) whether the applicants did participate in the proceedings herein and if not, whether the judgment can be set aside.

12. Before I endeavor to determine the issue at hand, a brief background of the suit would suffice. The deceased herein died intestate on 16th June, 1968. On 18th October, 2004, Charles A. Luseno and Douglas S. Mudave petitioned for a grant of representation. Among the properties listed for distribution was L.R 9615/ Elburgon North Nakuru District.

13. On 15th April, 2020 a grant of representation was issued to the two petitioners jointly who proceeded to apply for confirmation of the grant on 23rd October, 2006. Subsequently, Peter Ligale filed an affidavit of protest dated 13th November, 2006 claiming that some

beneficiaries had not consented to the mode of distribution. He further claimed that some deceased beneficiaries had purportedly signed consent for distribution of the estate. In the affidavit of protest, Ligale listed other beneficiaries among them Lynette the respondent herein.

14. Equally, Lynette filed an affidavit of protest on 15th December, 2011 claiming that despite being a beneficiary she had been left out. Further, she stated that LR. No. 9615/Molo/Elburgon had been shared out to the beneficiaries under **Succession Cause No. 25 of 1969** in which she got 10% of the property and a title deed issued in her name through the public trustee as the administrator.

15. Upon service of the affidavits of protest, the petitioners filed answer to affidavit of protest on 11th May, 2009 thus opposing the protest. On 6th July, 2017 parties agreed to have the matter disposed of through written submissions. Consequently, a mention date to confirm compliance was set for 15th February, 2017. Mr Deya was directed to notify the firm of Kibet and Ohaga then appearing for the Petitioners.

16. On 15th February, 2018, present were Mr Aswani for the 1st Protestor/ Objector, Abitha for the Petitioners and Ms. Nduta for the second Protestor/Objector. By that day, counsel for the Petitioners had not complied. Again, they agreed to file their submissions to dispose the protests. Mr Aswani appearing for the 1st Protestor was ordered to serve his submissions within 14 (fourteen) days. The second Protestor/Objector was ordered to file her's within 14 (fourteen) days from the date of service by the 1st protestor. The petitioners were also to file theirs within 14 (fourteen) days from the date of service. Mention was fixed for 28th March, 2017 to confirm compliance.

17. On 28th February, 2018, Mr Abitha for Petitioners was present, Mr Macharia holding brief for Aswani for the 1st Objector was present and Ms Nduta for the 2nd Objector was also present. On that day, M/s Nduta requested for 14 (fourteen) days more to enable her comply with filing submissions. Her request was granted and mention fixed for 11th April, 2017.

18. On 11th April, 2017 Mr. Aswani for the 1st Objector and Miss Wangui holding brief for Miss Nduta for the second Objector were present. There was no appearance for the Petitioner. On that day, Mr Aswani confirmed that the Protestors had filed their submissions and that the Petitioner had not. Mr Aswani and Ms Wangui invited the court to give a judgment date. The Court then proceeded to give a Judgment date on 16th May, 2017. Since the Judgment was not ready on that day, the same was rescheduled and delivered on 13th July, 2017 in the presence of M/s Nduta Counsel for the 2nd Objector. The Court then directed notice of delivery of judgment to issue to all parties.

19. From the above analysis of the events culminating to the delivery of Judgment, it is clear that the Petitioners/Applicants were throughout represented by their counsel. Failure to attend date of delivery of judgment by their counsel is not a fault on either party or the court. The Petitioners' counsel did not bother to file submissions even when indulged severally to comply. The Petitioners cannot therefore claim non-participation in the proceedings. For those reasons, that ground fails.

Whether the applicants have met the criteria for review of the impugned orders/judgment.

20. The law governing application for review orders is Order 45 Rule 1 (1) of the Civil Procedure Rules which provides that;

"**R1(1) -any person considering himself aggrieved-**

a) by a decree or order from which an appeal is allowed but for 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 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."

21. It is trite law that an application for review is not meant to substitute the remedy of appeal against the impugned decision. It is incumbent upon the applicant to establish the conditions set out under Order 45 rule 1(1) which is a replica of section 80 of the Civil Procedure Act.

22. The above grounds can be summarized as;

a) Discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed or the order made or;

b) there was a mistake or error apparent on the face of the record or;

c) Existence of any other sufficient reason;

d) the application must have been made without undue delay.

23. In the case of **Francis Njoroge Vs Stephen Maina Kamore (2018)eKLR** the Court emphasized on proof of the above conditions before an order for review can issue. Similar position was held in **Muyodi Vs Industrial and Commercial Development Corporation and another (2006) IEA 243** where the Court of Appeal held that;

"….in Nyamogo and Nyamogo Vs Kogo (2001) EA 174 this court said that 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 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, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record could be made…."

24. In the instant case, the claim made is that there is new evidence available that beneficiaries have now agreed to share the estate equally. There is no dispute that the property in issue was a subject of **Succession Cause No 65 of 1969**. This issue was canvassed through submissions and the court found that LR. 9615/Molo/Elburgon having been distributed in **Succession Cause No 25 of 1969** was not available for redistribution under this file.

25. The alleged agreement to share the land/ property in question equally cannot amount to discovery of new evidence or important matter to warrant the court to ignore the orders in **Succession Cause No. 25 of 1969** where the same property was distributed. To that extent, A review order as envisaged under Order 45 of the Civil Procedure Rules has not been met on that ground. The appellants have not established any new evidence or fact that was not within their knowledge when the decree was made. They are simply seeking to appeal the decision through a disguised review application.

26. They should have filed an appeal or seek review and amendments in **Succession Cause No.25 of 1969**. Parties who are not satisfied with the court judgment on merit have a recourse to appeal.

See **Menginya Salim Murgani Vs Kenya Revenue Authority (2014) e KLR** where the court held that;

"It is a general principle of law that a court after passing judgment, becomes functus officio and cannot revisit the judgment on merits or purport to exercise judicial power over the same matter, Save as provided by law".

27. Equally, there is no proof of mistake or apparent error on the face of the record. For those reasons that ground fails.

Whether the Applicants have established the threshold for grant of stay of execution.

28. Stay of execution order is anchored under Order 42 Rule 6 of the Civil Procedure Rules which provides that for a party to qualify for stay of execution orders he must proof that;

(i) he or she is likely to suffer substantial loss if the orders are not granted;

(ii) that the application has been filed within reasonable time and that;

(iii) security for the due performance of the decree has been furnished and;

(iv) Existence of any other sufficient cause.

29. It is incumbent upon the applicant to prove the above ingredients. This position was succinctly stated in the case of **Kenya Shell Limited Vs Benjamin Karuga Kabiru and Another (1986) e KLR where the court held that**;

"...substantial loss in its various forms is the cornerstone for granting stay. That is what has to be prevented. Therefore without evidence it is difficult see why the respondents should be kept out of their money."

30. In the instant case, there is no claim of likelihood for the applicants to suffer substantial loss. There is no appeal preferred to warrant the application of Order 42 of the Civil Procedure Rules.

31. Regarding whether there are orders capable of stay, Mr. Gaita submitted that there is no positive order made by the court. It is trite that where there is no positive order made, a stay of execution order cannot issue. See **Executive Estates Limited Vs Kenya Ports Authority and another (2005)1EA 53** where the court stated that;

"…the order which dismissed the suit was a negative order which is not capable of execution".

32. The court dismissed the proposal to distribute the property in question and stated reasons on merit. Any Aggrieved party should have preferred an appeal not review. Accordingly, there is nothing executable from that order to warrant stay.

33. Regarding furnishing security, this is not a monetary claim. Being a family dispute, harmonious co-existence is crucial hence nobody should be burdened with depositing security.

34. Concerning time factor, the application was filed about three (3) years down the line after delivery of judgment. The applicants cannot feign lack of knowledge that there was a judgment since July 2017 up to July 2020. They had counsel on record who participated all through except on the date of delivery of Judgment. After parties filed submissions, judgment was to follow. The Petitioners' counsel knew that a Judgment must have been delivered. Notice for parties to attend for Judgment must have been sent and that is how some parties attended. The delay in filing this application is unreasonable and litigation must come to an end. In this regard I am guided by the decision in the case of **Patrick Gathenya Vs Esther Njoki Rurigi and another (2008) e KLR** where the Court stated that;

"…public policy principle that there must be an end to litigation triumphs over the equally weighty principle that justice be done and must be seen to be done in each case that comes before the court for determination"

35. It will be a grave injustice to re-open **Succession Cause No 25 of 1969** through the backdoor and after a long period after delivery of judgment dismissing the same prayers. In view of the above, I do not find any merit in the application herein and the same is dismissed. Regarding costs, this is a family matter hence each party shall bear own costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY

THIS 30TH DAY OF NOVEMBER 2020.

J. N. ONYIEGO

JUDGE