



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT MERU

SUCCESSION CASE NO. 144 OF 2014

IN THE MATTER OF THE ESTATE OF PHILLIP KIOGO TUNGA Alias M’KIOGO TUNGA – DECEASED

MARY MPINDA.....PETITIONER

-VERSUS-

MUGAMBI KIOGO.....1ST RESPONDENT

MARGARET MUKIRI M’KIOGO.....2ND RESPONDENT

RULING

1. Before court are two applications.

The 1st application; review

2. The first application is a Summons dated 27th February 2020 expressed to be brought under **Section 47 Law of Succession Act, Rule 73 of the Probate and Administration Rules, Section 80 of the Civil Procedure Act and Order 45(1) of the Civil Procedure Rules and Section 80 of the Land Registration Act**. The applicants who are (the 1st and 2nd respondents herein) seek an order for the review of this court’s judgment delivered on 10th April, 2019.

3. The grounds upon which the Summons was grounded are set out in its body and the Supporting Affidavit of Mugambi Kiogo and Margret Mukiri sworn on 26th February, 2020. That upon perusal of the said judgment, the applicants noted that there were errors apparent on the face of the record. According to them, in the judgment, the honourable court made an erroneous finding that only the applicants had benefitted from the deceased during his lifetime and therefore should not benefit from **LAND REG. NO NYAKI/THUURA/2990 and NYAKI THUURA 2881** which is not factually correct since the respondent and other beneficiaries benefitted from the deceased through education and money they received to purchase their own parcels of land.

4. The said application is opposed by way of Replying affidavit sworn by Mary Mpinda (the petitioner herein) who deposes that the application is an abuse of court process, unmeritorious, incompetent, untenable, frivolous and devoid of substance. Further that the applicant has not met the threshold required for review because the fact that the applicant expressly and out rightly disagrees with the courts judgment should only entitle him to go on appeal and not ask for review.

5. The petitioner was categorical; that the application herein is an appeal against the judgment herein except it has been mischievously disguised as an application for review; and that the application ought to be dismissed and the Petitioner be allowed to enjoy the fruits of the judgment.

The 2nd application: dispense with production of original title

6. The second application is a Summons by Mary Mpinda (the Petitioner herein) expressed to be brought under **Rule 73 of the Probate and Administration Rules and any other enabling provisions of Law**. The significant order sought by the Applicant is that the court do direct the Land Registrar to dispense with the production of the original title deed in respect of land parcel **NYAKI/THUURA/2988**.

7. The grounds upon which the summons was grounded are set out in its body and the supporting affidavit of Mary Mpinda dated 4th of June 2020. She deposed that the protestors (1st and 2nd Respondents herein) have blatantly and contemptuously refused, failed and/or ignored to surrender the original title in respect of title **NYAKI/THUURA/2988**; the land Registrar also refused to issue a new title before surrendering the original title which is in the custody of the 2nd Protector.

8. She further averred that on 10th April the court delivered its Judgment on the cause herein and directed that 1/8 portion of land be excised from the land parcel namely **NYAKI/THUURA/2988** to form part of **NYAKI/ THUURA/2990**.

9. That the 2nd protestor has refused, failed and ignores the applicants request to surrender the original title despite the mutation form having been executed by the Deputy Registrar and attached copies of the mutation and search marked MMK-1 and MMK-2 respectively.

ANALYSIS AND DETERMINATION

Review

10. I will first tackle the request for review of judgment.

11. The court pronounced itself vide a Judgment dated 10th April 2019 and distributed the estate of the deceased. The grant made on 14/07/2014 was confirmed and a certificate of confirmation was issued.

12. The applicants have now approached the court for review of judgment on account of an apparent error on the case of the record. Is there such error?

The threshold

13. Jurisdiction to review its decisions draws from section 80 of the Civil Procedure Act which stipulates as follows:

Section 80. Review

Any person who considers himself aggrieved—

a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

14. This jurisdiction was incorporated into the law of Succession Act through rule 63 of the Probate and Administration Rules which expressly provided that Order 45 of the Civil Procedure Rules applies to succession cases. Order 45 of the CPR provided for grounds upon which a court may review its own decision or order as follows:

Order 45, rule 1. Application for review of decree or order.

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.

2. A party who is not appealing from a decree or order may apply for a 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”

15. Of error apparent on the face of the record; I am content to cite the case of *Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243*, where the Court of Appeal described an error apparent on the face of the record as follows:

“...In Nyamogo & 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 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.” (emphasis mine)”

16. Accordingly, an error apparent on the face of the record should be an error that is easily and readily discernible without much or copious explanations. I will apply this test.

17. For good reason I will state just enough to determine the application. This application seeks review on the ground of error apparent on the face of record. The Applicant has annexed evidence in his further affidavit dated 26th February, 2019 which he claims was not considered during the determination of the case. By the very nature of the arguments by the applicant, it is clear he is attempting to re-litigate this case. He also seeks to challenge the merit of the decision of court but through the wrong forum. The character of his complaints fits an appeal and not review.

18. Looking at the grounds cited, I do not even think there could be any other sufficient reason to review the judgment for he is calling upon the court to re-open the case and engage the process of reasoning, evaluation of evidence and determination of case afresh without laying any solid ground for that request. This is outside Review jurisdiction. I should also state that review jurisdiction is averse to such requests which offend its boundaries and purpose.

19. The overall impression of my analysis is that; (1) there is no error apparent on the face of the record; and (2) there is also no any sufficient reason to review the judgment.

20. In the upshot, I dismiss the Summons dated 26th February 2020 with costs to the Respondent/Petitioner.

Discretion to dispense with production of original title deed

21. In the application dated 4th June 2020, the applicant herein (hereafter the petitioner) seeks an order directing the Land Registrar to dispense with the production of the original title to Land parcel NYAKI/THUURA/2988 which is in custody of the 2nd Protestor but has blatantly declined to surrender the title deed.

22. The application is opposed by the 1st Protestor who deposes that the application is brought in bad faith as he is dissatisfied with the judgment of court dated 10th April 2019 and that as an act of good faith chosen to withhold the original title to the contested title pending the hearing and determination of the Review application they filed in court.

23. The application is in execution of the grant herein. Given the nature of orders sought in this application, it will profit jurisprudence to state that courts of law retain jurisdiction for purposes of execution of its decrees and orders. But, the power should not be misused to re-litigate claims which the court has completely and effectually determined. See the case of **Joseph Odhiambo –Vs- Nyakundi Omari [2016]** eKLR that;

“In this case, the Court’s jurisdiction is limited to enforcing its judgment and must not allow for an open window within which parties can relitigate decided matters”.

24. And also the English Appellate Court in ***Lamb & Sons Ltd V Rider [1948] 2 ALL ER 402*** had this to say about execution:

“.....Execution is essentially a matter of procedure – machinery which the Court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders”.

25. Of greater concern is that the Applicant has deposed that the Land Registrar has refused to register transfers herein until the original titles are produced. I do not wish to place blame on the Registrar for the title is available, except, it is in the hands of a person who is unwilling to surrender the title deed. He claims that it was out of good faith that he has withheld the title deed. The good faith according to him is in the fact that he is dissatisfied with the judgment of the court and he has filed an application for review. This expression is completely misguided and contemptuous of legal process of court for he does not have an order of court to that effect. The law loathes persons who take the law into their hands or turns themselves into judges of their cases.

26. Be that as it may, I am aware that production of the original title deed is the general requirement in registration of transfer of land. Nonetheless, I have lamented times without number in this jurisdiction about failure by registrars to exercise discretion provided in law to dispense with production of original title deed in appropriate cases.

27. **Section 31 of Land Registration Act** provides as follows;

“(1) If a certificate of title or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate of title or the certificate of lease shows all subsisting entries in the register, a note of the registration shall be made on the certificate of title or the certificate of lease

(2) Where the disposition is a transfer, the certificate shall, when produced, be cancelled, and in that case a new certificate may be issued to the new proprietor.”

28. The import of the above provision is that the Land Registrar has power to dispense with the production of the original title. There is no requirement that exercise of the power is dependent upon a Court order to do so.

29. I will couple the power in section 31 with the power of the Land Registrar under section 14 of the Land Registration Act to require any person to produce any instrument certificate or other document or plan relating the land, lease or charge in question, and that person shall produce the same; summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or

explanation.

30. Land Registrars should exercise the discretion and power given to them by statute. Failure thereto may become a subject of mandamus proceedings- something I think is not desirable to be in the file of a public officer.

31. In this case, however, I have not seen any evidence of the Registrar's refusal to dispense with the production of the original title deed for the suit land. There is no endorsement of rejection on the registration or booking form which would give reasons for the rejection or any other form of communication from the Land Registrar indicating rejection of the transfers and calling for the production of the original titles. However, I do note that the 1st Protestor has admitted that they are holding on to the title pending the determination of the application for review. I have chastised the unlawful act. And, the 2nd protestor must now release the title deed to the Land Registrar within 7 days of this ruling which failing the land Registrar is directed to dispense with the production of the original title deed in respect of Land parcel NYAKI/THUURA/2988 and register the necessary instruments of subdivision and attendant transfers forthwith.

32. Given the conduct of the 2nd protestor, he shall pay costs of this application. It is so ordered.

Dated, signed and delivered in Narok through Teams Application this 23rd day of November, 2020

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F. GIKONYO

JUDGE