



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 88 OF 2011

IN THE MATTER OF THE ESTATE OF SIMOTO OMWENJE ISAKA (DECEASED)

RULING

1. The application for determination is dated 23rd September 2019, and was filed by the 1st administrator, Laban Oburenji Likoko, to be referred to hereafter as the applicant, seeking review and setting aside of the proceedings and orders of 11th October 2016. The foundation of the application is that there is an alleged error apparent on the face of the record, being that the 2nd administrator misinformed the court with an intent to lock the applicant out of the proceedings by stating that he had been served with the relevant court process, and that the date when the matter came up for hearing had been taken by consent, a position that is false.

2. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which provides as follows: -

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

3. In *John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another* [2016] eKLR, the court cited Rule 63 of the Probate and Administration Rules, and then stated as follows:

“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. 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 Rules.”

4. It is, therefore, clear that any party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 of the Civil Procedure Rules.

5. The substantive provisions of Order 45, state as follows:

“1. (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) ...”

7. Order 45 provides for three circumstances under which an order for review can be made. To be successful, the applicant must demonstrate to the court that there has been 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. A party may successfully apply for review, secondly, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.

8. The applicant herein grounds his application on an error or mistake apparent on the face of the record.

9. In *Muyodi vs. Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record, and stated 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 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 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.”

10. In *Paul Mwaniki vs. National Hospital Insurance Fund Board of Management* [2020] eKLR, it was said:

“... 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.”

11. The court went on to say-

“37. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation 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 and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

38. The wisdom flowing from jurisprudence on this subject is that 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.”

12. From the above, it is clear that the error the subject of the application ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long-drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. The issue of service or lack of it is, in my view, a substantial issue that can only be established by way of evidence, and cannot, therefore, be regarded as an error apparent on the face of the record.

13. In *Republic vs. Cabinet Secretary for Interior and Co-Ordination of National Government Ex Parte Abullahi Said Sald* [2019] eKLR, the court observed, with respect to any other sufficient reason:

“A court can review a judgment for any other sufficient reason. In the case of Sadar Mohamed vs Charan Singh and Another [19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [20] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement. [21]

31. I also find useful guidance in *Tokesi Mambili and others vs Simion Litsanga* [22] where they held as follows: -

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

14. The applicant herein, save for the ground of error on the face of the record, has stated that he has been locked out of the succession cause unheard. It should be noted that the applicant herein filed an application to have the grant issued on the disputed date revoked, the application was heard and determined. He also had the option of appealing against the said orders. He clearly had other remedies available, and he has since explored some of them. It is, therefore, my finding that the applicant has not provided any sufficient reason to warrant grant of the orders sought.

15. It should also be noted that the application herein was made three years after the impugned orders were made. It is trite law that an application for review should be made without unreasonable delay. The applicant herein has advanced no reason for the three-year delay before the filing of the application.

16. With regard to delay in seeking review, the court, in *Stephen Gathua Kimani vs. Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR, stated:

“One thing is clear in this application. The delay of one year has not been explained. Perhaps, it’s important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads “... may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

The logical question that follows is, was the present application made without unreasonable delay? Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay.

Such a long delay must be sufficiently explained.”

17. The applicant, in his submissions and the affidavit in support of the application, has not addressed the delay in filing the application for review, let alone the reasons for it. The delay is, therefore, not explained. It is my view that a delay of three years is gross and unreasonable, and, therefore, the orders sought in the instant application cannot be available for granting.

18. In the upshot, the applicant has utterly failed to provide sufficient grounds to justify grant of the orders sought in the application, dated 23rd September 2019, and the same is hereby dismissed. This being a family matter, there shall be no order on costs. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20th DAY OF November, 2020

W MUSYOKA

JUDGE