REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO.232 OF 2013

IN THE MATTER OF THE ESTATE OF TOM NZIOKA SAMUEL (DECEASED)

MARY SAMMY MUSILA.....1ST PETITIONER

SABINA NDUKU SAMMY.....2ND PETITIONER

-VERSUS-

ESTHER NDULU MUTUKU.....APPLICANT

AND

MUTUKU NGEI.....OBJECTOR

RULING

1. The Applicants filed an amended notice of motion dated 26.6.2020 that was brought under section 1A, 1B, 3A, 63(e) and 80 of the Civil Procedure Act CAP 21 of the Laws of Kenya, Order 45 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules 2010 that sought that the following orders;

a. Spent.

b. That this Honorable court be pleased to review and/or set aside the orders issued on 21st April, 2020 through its ruling delivered in open court and in the absence of the parties.

c. Spent.

d. That this Honorable court be pleased to issue an order allowing the petitioners to file and serve their written submissions in response to the affidavit of protest dated 8.2.2016 within 3 days.

e. That this Honorable court be pleased to deliver a fresh ruling with the inclusion of the petitioners' submissions as part of the decision,

f. That this Honorable court be pleased to issue such further order to the applicant/petitioner as it deems fit and expedient in the circumstances.

g. That the costs of this application be provided for.

2. The application was grounded on the following facts as disclosed on the face of the notice of motion; that there is an error apparent in the face of the ruling as it finalized the distribution of the deceased's estate in exclusion of the beneficiaries of the estate; that the court concluded a succession matter without according the widow a chance to be heard; that the court omitted to pronounce itself on what the beneficiaries of the estate shall inherit from the estate.

3. In the amended supporting affidavit of Sabina Nduku Sammy deponed on 26.6.2020 it was averred that this court directed that the grant of

letters of administration issued on 24.6.2013 confirming that the land parcel **Machakos Block 1/88** be registered in the name of the objector Mutuku Ngei. The deponent took issue with the failure of the objector to take over ownership of the suit property in 1983 when he was said to have purchased the same only to emerge when the succession was being finalized and which appeared to be suspect. According to the deponent, the court ought to hear from all the parties hence allow the written submissions of the deponent's advocates in respect of the affidavit of protest dated 8.2.2020 to be filed and served.

4. In reply to the application, Esther Ndulu Mutuku vide affidavit dated 3.7.2020 deponed that her late husband purchased the suit land from the registered owner Tom Nzioka Samuel alias Nzioka Sammy Musila as evidenced by the sale agreement and transfer form marked MN1. It was averred that the petitioners obtained grant of letters of administration without disclosing that the suit property had been sold to the deceased and this court revoked the grant with instructions that the deponent file an affidavit of protest. It was pointed out that this court delivered a ruling on 21.4.2020 prior to which advocates for the parties agreed on 7.3.2019 to file submissions but however counsel for the petitioner did not comply. It was pointed out that on 3.12.2019, a ruling date was reserved and the petitioner's counsel had not complied with the directions to file submissions and that thereafter on 21.4.2020, this court delivered a ruling based on the evidence presented. The court was urged to dismiss the application.

5. The court directed the parties to file and exchange submissions.

6. The applicant vide submissions filed on 28.7.2020 by Keli, Kamura & Machogu Advocates raised three issues for consideration. Firstly, whether the petitioners are deserving of a stay of execution of the court orders issued on 21.4.2020; Secondly, whether the petitioners are to be allowed to file their submissions on the affidavit of protest dated 8.2.2016 and finally whether the applicant is entitled to the orders being sought. In respect of the 1st issue, it was submitted that the applicants were deserving orders of stay pending appeal. Reliance was placed on the case of **In Re Estate of Nasotokini Ole Sane (Deceased) (2020) eKLR.** The court was urged to grant the orders sought.

7. Counsel for the Respondents vide written submissions filed on 6.8.2020 framed two issues; firstly, whether the petitioners have satisfied the principles for setting aside the judgement (sic) of this court dated 21.4.2020 and Secondly, whether the applicants are entitled to the orders being sought. On the 1st issue, in placing reliance on the case of **Ernest Mungai Kamau & Another v Kenya Railways Corporation & Another (2017) eKLR,** it was submitted that the applicants and their advocates had not given reasons why they failed to comply with the court directions that were issued and hence they were not deserving of the orders sought. In respect of the 2nd issue, it was submitted that the grounds advanced by the applicants are grounds for appeal and not review. It was pointed out that this court was already functus officio.

8. I have considered the rival affidavits and the submissions of both learned counsels and find the following issues necessary for determination:

i. Whether the applicants have met the threshold for grant of review orders.

ii. Whether the justifiable reason has been given to set aside the ruling of the court.

iii. What orders may the court grant?

9. In respect of the 1st issue, 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 Act 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 this application for review to succeed, the Applicant must convince the court that it went into error in making the decision that it did. The record speaks to the fact that the objector filed an affidavit of protest dated 8.2.2016 to the confirmation of grant and which was responded to by the petitioner. Parties later agreed to canvass the summons for confirmation of grant and the protest by way of written submissions. When directions were taken for the hearing of the objection proceedings, the objector complied with the directions and filed submissions. The petitioner did not file submissions and despite their counsel being in court on 30.7.2019 when the directions were issued and further on 3.12.2019 when the matter came up for mention when the said petitioner's counsel undertook to file submissions within 14 days. The same was not complied with by the petitioner's counsel and thus the court went ahead to deliver the ruling on 21.4.2020 in which it based its decision on the facts gleaned from the rival affidavits and the submissions filed.

12. The applicants appear 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 applicant that the trial court went into error in agreeing that indeed Mutuku Ngei purchased the suit property hence directed that the same be registered in his names. They were of the view that the widow of the deceased was not heard and that the beneficiaries' interest in the estate

were not considered. 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..."

13. 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. A misdirection by a judicial officer on a matter of law cannot be said to be an error apparent on the face of the record.

14. 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."

15. In the instant case therefore, I am not convinced that there is an error apparent on the face of the record as claimed by the petitioners. What is being raised by learned counsel for the applicants requires examination and long reasoning. This court made a decision based on what evidence was available on record. In my considered view the applicants are at liberty to appeal against the decision as this court had already discharged its functions and pronounced itself on the merits of the objection. The applicants' suggestion that their submissions was the missing link and could have swayed the court's view of the matter is not persuasive since the gist of the matter in dispute had already been presented via affidavit evidence which the court relied upon. Hence I find that even in the absence of submissions, this court had enough material to determine the matter. The request for review on that ground must fail. I also find that there is no other sufficient reason to warrant review. I decline to grant the 1st limb of prayer 2 of the application.

16. The 2nd limb of Prayer 2 in the application seeks that the ruling of the court be set aside. I draw wisdom from the case of **Remco Limited v Mistry Jadva Parbat & Co Ltd & 2 Others, (2002) 1 EA 233** where it was observed that the Court has discretion to set aside a regular judgment upon such terms that are just.

17. I am persuaded that the petitioner had every opportunity to indicate her preferred mode of disposal of the summons and protest either via viva voce evidence or written submissions. Her advocates opted for the latter and thus the court accepted the parties' decision and proceeded to determine the matter. Her advocate also had appeared in court on two occasions in 2019 when directions were issued to file submissions and he still failed to do so. I associate myself with the finding in **Charles Ratemo Nyamweya v Joyce Bochere Nyamweya & 8 Others (2016) eKLR** and hold that the applicants by their conduct as well as by the conduct of their advocates are undeserving of the order now sought for the setting aside the ruling of the court. In any event the court duly considered the rival affidavits before coming up with the decision. It is thus not true that the court did not consider the petitioner's averments vide her affidavit in response to the protest.

18. The applicants have also sought for an order of stay of execution in the form of stopping the registration of the suit land in favour of the objector. Having established that the applicants have not managed to establish the grounds for review, then it follows that prayer 3 of the application cannot be granted. Similarly, prayers 4, 5 and 6 in the application must meet the same fate since this court is already functus officio having discharged its duty. The only avenue is for the applicants to lodge appeal against the ruling in question.

19. In the result, it is my finding that the Applicants' application dated 26.6.2020 lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at **Machakos** this **17th** day of **November, 2020.**

D. K. Kemei

Judge