



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

SUCCESSION CAUSE NO. 51 OF 2017

(FORMERLY NAIROBI SUCCESSION CAUSE 667 OF 1984)

IN THE MATTER OF THE ESTATE OF PAUL MUTHIANI MUSAU (DECEASED)

PETER MWAKA MUTHIANI.....4TH ADMINISTRATOR/1ST APPLICANT

ALEXANDER MUOKI NYUMU.....2ND APPLICANT

ANTHONY KIIO MUTHIANI.....3RD APPLICANT

JOHN BOSCO MAINGI.....4TH APPLICANT

CHARLES MUMO NYUMU.....5TH APPLICANT

JIMMY MUTHIANI NYUMU.....6TH APPLICANT

ANDREW MUSYOKI MUTHUSI.....7TH APPLICANT

PAUL NZIOKA MUTHUSI.....8TH APPLICANT

RICHARD MANZA NYUMU.....9TH APPLICANT

JOSEPH MUTUKU SAMUEL.....10TH APPLICANT

VERSUS

BENJAMIN WAMBUA JAMES.....1ST ADMINISTRATOR/1ST RESPONDENT

JOSEPH KAWINZI MUTHIANI....2ND ADMINISTRATOR/2ND RESPONDENT

ANTHONY MUSAU MUTHUSI....3RD ADMINISTRATOR/3RD RESPONDENT

RULING

1. The background to this ruling is that this court on 5.11.2019 delivered a ruling with the following orders;

i. A fresh grant be and is hereby issued in the names of Benjamin Wambua James, Joseph Kawinzi Muthiani, Anthony Musau Muthusi and Peter Mwaka Muthiani.

ii. The administrators do agree on a mode of distribution of the remaining unutilized land and file an application in that regard detailing the mode of distribution within 60 days from the date hereof failing which the court shall adopt the mode in

the judgement issued on 21st September, 2012.

iii. The administrators are ordered to avail to court a report and inventory of their activities as per the provisions of section 83 of the Law of Succession Act within sixty (60) days from the date hereof.

iv. The status quo prevailing on the properties of the deceased namely L.R No.774 Komarock, L.R No.1158 Katunguni Kwa Katuku, Plot No.15 at Tala Market, Plot No. Katine section behind plot No.15 Tala Market be maintained pending final distribution thereof so as to ensure that the character of the properties is not altered to the detriment of the beneficiaries.

2. The Applicant was dissatisfied with the ruling of this court and through his advocates Ayora Magati Co. Advocates filed an application dated 22.9.2020 stated to be brought under Order 45 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules 2010 and sections 1A, 1B and 3A of the Civil Procedure Act. The following were the orders sought:

a. Spent

b. That this Honourable court be pleased to review order 1 of its ruling dated 5.11.2019 by setting it aside in relation to issuance of a fresh grant to the deceased's estate while there is another grant which has not been revoked.

c. That this Honourable court be pleased to review order 2 of its ruling issued on the 5.11.2019 in relation to the mode of distribution contemplated therein because it is inconsistent with the judgement date(sic) the 21.9.2012

d. That this Honourable court to order the Machakos County surveyor to proceed with the distribution of the estate from where they had stopped with in compliance of orders of Justice Musyoka dated 12.3.2014 and consent orders of Justice Kimaru dated 7th day of 2014(sic) respectively of which the same shall be concluded within 40 days from the date of ruling of this application under the supervision of the Deputy Registrar.

e. That this court be pleased to order the Deputy Registrar to execute requisite forms and consents to facilitate the transfer of the deceased's estate to each legal beneficiaries within 60 days upon the completion of physical distribution by the Machakos County surveyor and upon completion of the execution the Deputy Registrar shall return the order of distribution to this court for confirmation.

f. That in the event the Deputy Registrar is not through with the process the Deputy Registrar may extend the period for another 60 days.

g. That the OCPD Matungulu to enforce compliance and keep the peace during the said exercise.

h. That the cost of this Application be provided for.

3. The grounds of the application are that a ruling was rendered on 5.11.2019 on account of an apparent error on the face of the court record; that the court went into error in issuing a second fresh grant whilst there was still a grant dated 21.9.2012. It was stated that the court in its ruling legitimized illegal occupation by strangers who are not legal beneficiaries of the estate of the deceased. It was stated that the administrators had never validated any sale transactions and that this court had refused to send this file to the deputy registrar for implementation of the judgement of Justice Nambuye dated 21.9.2012 because according to counsel this court has vested interest. It was stated that the orders of this court were inconsistent with the judgement dated 21.9.2012 and that no distribution of Plot 774 had been filed in this court but however there was a consent adopted that was dated 7.5.2014 though the same had not been implemented by the 1st to 3rd respondents. It was stated that the orders of this court issued on 5.11.2019 were issued in bad faith and yet there was no application to review or appeal against the judgement dated 21.9.2012. It was also pointed out that the ruling delivered on 2.11.2019 reviewed the orders of Justice Musyoka issued on 12.11.2014 and the consent before Hon Justice Kimaru issued on 7.5.2014. It was stated that there was collusion between this court, the 1st to 3rd respondents and strangers to frustrate the implementation of the judgement dated 21.9.2012 that was demonstrated by this court quashing the judgement of the trial court in Criminal Appeal 94 of 2018. It was stated that the orders issued by this court on 5.11.2019 were illegal and that the delays caused by this court were indicative of bias hence the application be allowed.

4. The application was supported by an affidavit deponed by Peter Mwaka Muthiani on 21.9.2020. He reiterated the grounds in the application and annexed copies of the various orders that had earlier been issued.

5. The application was opposed vide a replying affidavit deponed by Benjamin Wambua James on 12.10.2020. He averred that the application raised no grounds to warrant review of the orders of this court issued on 5.11.2019. It was pointed out that the orders sought to be reviewed originated from the originating summons dated 25.9.2017 that had been filed by the 4th administrator herein. According to the deponent, the orders sought to be reviewed did not contradict any previous judgement. The deponent took issue with the applicant blaming this court for having a vested interest yet the applicant had not demonstrated the same. It was averred that the applicants ought to have filed an appeal if they believed that this court was biased. The deponent averred that the applicants are seeking for review of what they term an illegality and inconsistency with the judgement dated 21.9.2012 yet they ought to have filed an appeal. It was pointed out that the 2nd to 10th applicants are improperly before this court. It was further pointed out that the applicants had not explained the nine-month delay in bringing the instant review application before the court. According to the deponent, the third parties are purchasers for value of the respective portions of land as most of the beneficiaries had sold their shares including the 1st applicant/4th administrator who sold his portion in 2010. It was pointed out that plot 774 was already subdivided amongst the three houses in 2005. It was pointed out that the applicant's advocates and not the applicants seemed aggrieved with the ruling of the court made on 5.11.2019 and hence the said advocates seemed to have some personal interest in the estate of the deceased. The deponent urged that the administration should proceed in line with the judgement dated 21.9.2012, the ruling of this court dated 5.11.2019 and the order dated 12.3.2014 by Justice Musyoka. The court was urged to dismiss the application

dated 22.9.2020

6. The application was canvassed vide written submissions that are duly on record. Counsel for the applicant in submissions dated 26.10.2020 pointed out that this court looked down upon the consent order issued on 12.3.2014 and 7.5.2014. The issue for determination was whether there has been some mistake or error apparent on the face of the record. Reliance was placed on Order 45 of the Civil Procedure Rules and counsel went ahead to submit on the effect of a consent order and urged this court to restrict itself to the consent order that was issued by Justice Musyoka and Justice Kimaru. It was pointed out that the consent was already implemented. In addressing the element of inordinate delay, reliance was placed on what was stated to be the case of **Naftali Onyango v National Bank of Kenya** and it was submitted that the applicants were given leave to file the review out of time. Counsel went on and loquaciously reiterated that this court's ruling brought a stalemate in the distribution of the estate of the deceased. The court was urged to review its ruling dated 5.11.2019 so as to be at par with the Judgement of Lady Justice Nambuye dated 21.9.2012 and the two consent orders.

7. In response, counsel for the respondents submitted that the orders of this court dated 5.11.2019 did not contradict any previous judgement and took issue with the application for review as indicating grounds of appeal and not review. It was submitted that the instant application was brought after a nine- month inordinate delay. It was submitted that the advocates on record for the applicant seemed to be acting on personal interest in the estate as they want the estate to be distributed as per their wishes yet they are not beneficiaries of the estate. The court was urged to dismiss the application.

8. I have considered the application as a whole and submissions by learned counsel. As can be deduced from the notice of motion 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 lacking in merit, brought with unreasonable delay and an attempt to propel personal interests of the applicant's advocate.

9. The issues for consideration are:

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

b. Whether the applicants are entitled to the orders sought in the application.

10. 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 Order 45 of the Civil Procedure Rules.

11. 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.

12. 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 applicant's counsel that this court went into error in disregarding the judgement of Lady Justice Nambuye that was delivered on 21.9.2012, the consent that was entered on 12.3.2014 and 7.5.2014. For the avoidance of doubt, the judgement of Lady Justice Nambuye dated 21.9.2012 reported in **2012 eKLR** was in the following terms that I reproduce in material part;

14It therefore follows that the following are appointed as administrators of the estate of the deceased.

1. **Benjamin Wambua James.**

2. **Antony Musau Muthusi.**

3. **Joseph Kawinzi Muthiani**

4. **Peter Mwaka Muthiani.**

The four are ideal because they are adults and nobody has said that they are of unsound mind.

15. (i) The grant of representation in the names of the persons named in number 14 above will be extracted forth with.

(ii) In view of the protracted history of this matter the court invokes its inherent power under rule 73 of the probate and administration rules and as mandated by section 71(3) and 4 of the L.S.A. (Supra) and for the reasons given in the assessment above on this aspect of simultaneous confirmation an order and is hereby made and ordered that the grant issued in number 15(i) above be and is hereby ordered to be confirmed simultaneously with the issuance of the grant of representation.

(iii) The resulting administrators have liberty to have it gazette if they deem it fit to do so.

(iv) The move to gazette if any will not be a precondition to the appointed administrators moving forth with to administer and wind up the estate finally.

16. The extraction of the grant in number 15 above will be followed by an extraction of a grant of confirmation simultaneously. The mode of distribution to inform the content of the confirmed grant will be as party content in number 10 above for the list of properties forming the estate, number 11 above for the list of beneficiaries and in number 12 above for the mode of distribution of the estate.

17. All previous transactions whereby portions of the estate property are alleged to have been passed on to 3rd parties by persons other than personal representatives duly mandated by a grant of representation to do so be and is hereby are declared to be null and void and of no consequence.

18. The named appointed administrators are duly empowered with powers and duties prescribed in sections 82 and 83 of the L.S.A. (Supra)

19. The administrators are however at liberty to validate any sale transaction done without authority but falling within the share entitlement of the party who has purported to dispose of the said property without being holder of a grant of representation to the estate of the deceased.

20. Family members of deceased beneficiaries are to be assisted to get their rightful share of the grandson/sons of the deceased who have predeceased the winding up and final distribution of the estate.

21. In view of the previous hardship encountered by the would have been administrators in the administration of the estate, the court invokes its inherent power under rule 73 of the probate and administration rules to make these proceedings to be court surprised.

(ii) The administrators are required to file quarterly reports to court for progress on the administration of the estate.

22. All the newly appointed administrators are enjoined to cooperate fully in the administration of the estate.

(ii) In the event of any evidence of existence of irreconcilable difference the administrator causing the problem may be dropped from exercising the power of an administrator with leave of the court.

23. In the alternative to number 22 above, the remaining 3 cooperating administrators are at liberty to seek the assistance of the Deputy Registrar of the family division to execute the necessary paper works for any transaction that needs to be executed in furtherance of the smooth administration of the estate in the event of default on the part of any administrator to play his role in the administration of the estate.

(ii) Any allegation of default by any one administrator has to be brought to the attention of the party alleged to be in default by the party alleging the de default.

(iii) Each beneficiary will meet the costs of survey for his /their respective portions of land to be allocated to them.

(iv) Each party will meet own costs.

(v) There will be general liberty to apply.

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.

14. In the case of **Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173** 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. I have noted that order 1 that the applicants seeks reviewed is in the same terms as what was contained in paragraph 14 of the Judgement of Lady Justice Nambuye. The order in my ruling unlike what the applicant is insinuating did not overlap or disregard the judgement of the court as it merely ordered for a fresh grant since none was issued after Nambuye J (as she then was) had directed. At the time of determining the applicant's previous application culminating in the ruling complained of there was no grant drawn and issued in the court file and hence

this court directed that a fresh one be made and which was to be in the names of the administrators appointed vide the judgement of Nambuye J (as she then was) dated 21.9.2012. I therefore see no merit in prayer 2 of the application.

16. Prayer 3 in the application is to the effect that order 2 is inconsistent with the judgement dated 21.9.2012. The court in the said order 2 stated that in the absence of agreement on distribution, then the parties were to stick to the mode of distribution as per the judgement of the court on 21.9.2012 that was to the following effect.

“10. With regard to the identification of the properties forming the estate of the deceased order be and is hereby made and ordered that there is consensus amongst the beneficiaries that the deceased’s estate comprises the following properties:-

- (1) Land reference (plot) No.774 Komarock.
- (2) Land reference (plot) No.1158 Katunduni kwa Katuku.
- (3) Plot No.15 at Tala market.
- (4) Plot No. Katine section behind plot No.15 Tala market.

The respondents counsel added house hold goods and heads of cattle. House hold goods and heads of cattle have not featured anywhere in the deponents and annexures assessed in these proceedings and for this reason no pronouncement will be made on the same.

12. On the mode of distribution of the estate property in number 10 above the same is distributed as follows:-

(a) First each plot is to be subdivided into three equal parts.

(i) The first portion to go to the house hold of Syokwia.

(ii) The second portion to go to the house of Katile.

(iii) The 3rd portion will go to the house of Esther Mutindi.

(b) The mode of sharing for the house hold of Syokwia is that the resulting portion will be shared equally between the house holds of John Muthusi Muthiani, Samwel Musyoki Nyumu and David Kavatu.

(c) The mode of sharing for the house hold unit of Katile is that the resulting portion in favour of this house hold will be shared equally between the house holds of Jonathan Nyumu Muthiani and James Maingi Muthiani all deceased.

(d) The mode of sharing for the house hold of Esther Mutindi is that the resulting portion in favour of this house are to be subdivided into two equal portions. The first portion to go to the house of Katuku comprising Joseph Kawinzi Muthiani, Wambua Muthiani and Muema Muthiani.

(ii) The second resulting portion to go to the house of Mukii namely Peter Mwaka and Kiio Mwaka.

(e) Mary katoko (Kadogo) who has not lodged any claim herein but gave evidence in favour of Peter Mwaka and against Muthiani and his brothers will have a life interest in the share given to Peter Mwaka”

17. This means that the review order envisaged in prayer 3 would serve no useful purpose as the concerns of the applicant had already been catered for in the same order 2 that the applicant seeks reviewed.

18. Prayer 4 seeks resumption of distribution of the estate; the said order is quite outside the purview of a review application. In addition, the prayer is not supported by grounds to warrant grant of the same as affidavit is silent on the grounds relied upon so as to enable this court make a decision. Prayer 5 and 6 are a repetition of prayer 1 in the application dated 25.9.2017 that this court dismissed and the same are res judicata. I must quickly add that if a co-administrator, has refused to sign documents to effect the distribution of the estate, there are proper provisions in the Act under which one can bring an application for handling such a situation generally. By attempting to sneak in this prayer through the backdoor, the applicant is not being forthright. The Registrar of this court or his deputy or any other officer of the court would only come in after the court is satisfied that there has been a refusal by the co-administrators. In any case vide the judgement dated 21.9.2012 the Deputy Registrar had been mandated to step in and carry out the exercise of distribution in the event of failure by the administrators to do so. Further, it is noted that the parties have made progress in the exercise of distribution as they have filed reports dated 17.1.2020 and 28.7.2020 over the distribution and that they were to address the court over the same so that the distribution is finally brought to conclusion. Prayer 7 is also a repeat of prayer 5 in the dismissed application and the same is barred by the doctrine of res judicata. I am not convinced that there is an error apparent on the face of the record in this case as the orders made on 5.11.2019 were not inconsistent with earlier orders dated 21.9.2012, 12.3.2014, and 7.5.2014 in any way. I also disagree that there is sufficient reason raised by the applicant to warrant review of the orders of the court and in any event the decision rendered on 5.11.2019 is open to appeal to which the applicant can exercise. I must point out that the administrators should have their energies geared towards the final distribution of the estate and avoid engaging in side shows bearing in mind that the matter has been in the court corridors for about three decades and which should be brought to conclusion.

19. In the result it is my finding that the application dated 22.9.2020 lacks merit and the same is dismissed with no order as to costs. As the parties have already filed reports regarding the distribution of the estate in line with the orders dated 21.9.2012, 12.3.2014, 7.5.2014 and

5.11.2019 and that the learned counsels have also filed skeletal submissions then it is clear that the matter is at the tail end of being finalized. It is in the best interest of the parties and the beneficiaries that the matter be fast tracked and the distribution of the estate concluded. The parties should now proceed to fix a suitable date on priority in which they can address the court after which the court will issue final directions so that this old matter can be brought to conclusion.

It is so ordered.

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

D. K. Kemei

Judge