



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

SUCCESSION CAUSE NO. 107 OF 2015 (76 OF 2018)

IN THE MATTER OF THE ESTATE OF OLIOKAMPAI SARAPAE

SANGUTI (DECEASED)

BETWEEN

JOSEPHINE SASINET OLOIKAMBAI.....1ST PETITIONER

JEREMIAH LEPAPA OLOIKAMPAI.....2ND PETITIONER

AND

PHILIP KOIPATON OLOIKAMBAI..... OBJECTOR

JUDGEMENT

Review of Court's own previous judgement-Section 80 of the Civil Procedure Act-Order 45 rule 1 and 2- Error apparent on the face of record.

Background

1. The Notice of Motion Application dated 21st of February 2019, brought in terms of Order 45 rule 1 and 2 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Cap 21 Laws of Kenya. The Applicant is seeking an order to review the judgement of the Court delivered on 15th October, 2018 only in respect of Land known as Kajiado/Kitengela/13470 pending the ruling reserved for 2018 and that the cost of this Application be in the cause.

Grounds of Review

2. The Applicant alleges that in the Judgement delivered by this court on 15th October 2018 the court erred in taking into consideration that the Co-Administrator was once given land measuring 10 acres which he sold and yet another 10 acres were allocated to him before the death of his father. The Objector had deponed in his further affidavit sworn on 19th December 2014 and filed in Court on 23rd December 2014 specifically at para 9 that the land known as Kajiado/Kitengela/13470 was sold and transferred to one Newton Njiru Jefitha by his late father before he died. In addition, it is indicated that the land set to be distributed consists of two parcels of land namely; Kajiado/Kitengela/13469(77acres) and Kajiado/Kitengela/13471 (10 acres).

The Applicant's Case

3. The Applicant's case is predicated upon a supporting affidavit of PHILIP KOIPATON OLOIKAMPAI, dated 21st February, 2019. It is indicated that he deponed in a further affidavit sworn on 19th December 2014, and filed in Court on 23rd December, 2014 specifically at para 9 that the land known as Kajiado/Kitengela/13470 was sold and transferred to Newton Njiru Jefitha by his late father. In the said further affidavit which I have perused, the Applicant annexed copies of transfer of land, National Identification cards, Pin Numbers, Application for Consent of land Control Board and Letter of Consent indicating that the land was being sold by my late father to Njiru Jefitha. The same is

marked as annexures “PKO 3a to 3g”.

Submissions

4. The 2nd Administrator filed submission dated 22nd March, 2019 in support of this Application. Learned Counsel for the 2nd Administrator contends that there is an error apparent on the face of record. It is indicated that the court’s finding in its previous finding that the 2nd Administrator has been given 10 acres of Land which he sold and allocated another 10 acres before his father died was an error apparent on the face of record. Counsel reiterated that the land in question being Kajiado/Kitengela/13470 was sold by his father before he died to one Newton Njiru Jefitha.

5. Further that there was no documentary evidence tendered in court by the 1st Administrator to prove that the 2nd Administrator was ever allocated such parcel of Land and that he sold it. Learned Counsel cited that Justice W. Karanga in **Helda Aneya Oduol vs Agneta Ooko (2007) eKLR; Abdullah Mohammed vs Mohamud Kahiye (2015) eKLR Justice R.E Aburili; Steven Boro Gititha vs Family Finance Society & 3 Others Civil Appeal Nairobi 263/2009.**

6. The 1st Administrator filed submissions dated 14th March 2019 in opposition of the instant application. The Learned Counsel for the 1st Administrator is that the order that her client is entitled to 10 acres was a slip. 1st Administrator rejected the position that there is an error on the face of the record. Learned Counsel cited several cases in support of this contention, which include the cases of **Muyodi vs Industrial and Commercial Development Corporation and Another E.A.R [2006]1 EA 243 at pages 246-247; Chandrakhant Joshibhai Partel vs R [2004] TLR, 218 and Michael Mungai vs Ford Kenya Election & Nomination Board & Others (2013) eKLR.**

7. The 1st Administrator reiterated that the finding of the Court was well founded. Counsel stated that there is still un-overturned finding of fact that the 2nd Administrator, Philip Koipaton Oloikampai has previously benefited from the deceased with land measuring 10 acres.

The Law

8. This court’s jurisdiction to review its decisions under the laws of Kenya is derived 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.”

9. Further, Order 45 encapsulates the grounds upon which this court may endeavor to review its own previous decision or judgement. It states 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”

10. Therefore, in terms of Order 45 of the Civil Procedure Rules, 2010, it abundantly clear that a court can only review its orders if the following grounds exist: -

a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

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

c) There were other sufficient reasons; and

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

11. The position for setting aside or modifying a court's judgements would appear to be no difference in both Zimbabwe and South Africa even though both those countries apply Roman-Dutch Law. Some helpful comments to that effect by the **Court of Appeal of Tanzania in the Transport Equipment Case (supra)** which quotes the leading textbook by **HERBSTEIN & VAN WANES: The Civil Practice of the Superior Courts in South Africa, 3rd Edition:**

“A final judgement being res judicata is not easily set aside, but the Court will do so on various grounds such as fraud, discovery of new documents, error and irregularities in procedure.”

12. The same seems to be the case in India. The above position for judicial review has also been upheld in numerous court cases. I shall take just a random sampling of a decision rendered by the Supreme Court of India: **Aribam Tuleswar Sharma v Ariban Pishak Sharma (1979) 45CC 389, 1979(11) UJ 300 SC**, which held that:

“The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.”

13. As regards error on the face of the record in Kenya, I associate myself with the case of in **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243**, 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)

14. In view of the above provision of law, there can therefore be no room for argument concerning the authority or power of this court to review its own judgements within the scope and ambit of section 80 of the Civil Procedure Act and Order 45(1) of the Civil Procedure Rules.

Discussion and Analysis

15. This application for review is hinged on the ground of error apparent on the face of record. Basically, what the Applicant brought to the fore that his evidence encapsulated in his further affidavit dated 19th December, 2014 was not considered during the determination of the previous matter. It is trite law that the error must be evident, it must not be one that has to be detected by a process of reasoning.

16. In the said further affidavit, specifically in terms of paragraph 9, it is indicated that the 2nd Administrator was never given Land namely Kajiado/Kitengela/13470 as the said land was sold by the deceased to one Newton Njiru Jefitha before he passed on. He annexed documentary evidence in support of this position which indeed the court did not take into account in its previous decision. The annexures indeed show that the land was sold by the deceased to a third party. Owing to the fact that the 1st Administrator did not offer any documentary evidence to controvert the 2nd Administrator's position that he did not benefit from this land, the 2nd Administrator has a genuine concern which ought to be considered. I'm in agreement with the 2nd Administrator's contention that there was indeed an error on the face of record since the court missed the 1st Administrator's said further affidavit.

17. In my view, it is not enough to simply establish that there was an error apparent on the face of record. The court should go further to determine whether the error has caused some kind of prejudice to any of the parties in this matter. The question to answer is, had the evidence of the 2nd Administrator been taken into account by the court, would it have arrived at the same decision it did. I'm of the view that the error apparent on the face record herein touches on distribution of the deceased's property which is the main issue upon which this matter was initially commenced. The error would have had an effect of denying the 2nd Administrator an equal share from the distribution his father's estate.

18. In the premises, the distribution of the two parcels of land namely, Kajiado/ Kitengela/ 13469(77acres) and Kajiado/ Kitengela/ 13471 (10 acres) shall be in terms of section 40 of the Law of succession Act. As an amendment to order (d) of the previous judgement, all surviving beneficiaries to the Estate of Oliokambai Sarapae Anguti (deceased) shall get an equal share.

19. It is so ordered.

Dated, and signed at Malindi this 27th day of June 2019.

Hon. R. Nyakundi

Judge of the High Court

Dated, Delivered and Signed in Open Court at Kajiado this 28th day of June 2019

Hon. Chacha Mwita

Judge of the High Court