REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NUMBER 76 OF 2016

IN THE MATTER OF THE ESTATE OF KARORI KIHAGI (DECEASED)

MOSES KARANJA KAHOCHIO -1ST APPLICANT/ADMINISTRATOR

MUNGAI KAHOCHIO.....2ND APPLICANT/ADMINISTRATOR

VERSUS

JOEL MBURU KANYUKU.....1ST RESPONDENT/ADMINISTRATOR

ISAAC MUNGAI KARANJA.....2ND RESPONDENT/ADMINISTRATOR

RULING

1. Karori Kihagi ("Deceased") died intestate on 18/07/2003. He had no wife and no children. He had one brother – Mutonga Kihagi – and three step-brothers – Kanyuku Kihagi, Muchai Kihagi and Kabucho Kihagi. All these four siblings of the Deceased pre-deceased Karori Kihagi. Each of the four siblings had children who are the protagonists in this case.

2. The Applicants are the sons of Mutonga Kihagi. All along, they have felt that only the sons of Mutonga Kihagi should inherit the property of the Deceased. They feel that Section 39 of the Law of Succession Act gives them preference as children of the brother of the Deceased. They feel that the Respondents as children of step-brothers to the Deceased are not entitled to share in the estate. Other than the legalistic foundation of their views on who should inherit the Deceased's property, they also trace their preferred mode of distribution to the family history: the fact that their grandfather had two wives – one who bore their father and the Deceased – and the other who bore the Respondents' fathers. The Applicants say that when the grandfather was distributing his property, the Respondents' house ended up with 60% (61.40 acres) while their house ended up with 40% (40.04 acres) of the entire estate. They, therefore, feel justified in laying sole claim to the estate of the Deceased. Conversely, they feel it is unfair for the Respondents to lay any claim to the estate of the Deceased in view of the fact that their fathers got the Lion's share of their grandfather's estate.

3. Consequently, when time to file for Letters of Administration to the estate of the Deceased came, quite naturally, the Applicants filed as Co-Administrators – completely shutting out their cousins. They named only their siblings as beneficiaries to the estate. They filed the Succession Cause in Githunguri. It was titled Succession Cause No. 37 of 2004.

4. When the Respondents got wind of the Petition, they responded by filing an Answer to the Petition; a Petition by Way of Cross-Petition for Grant; and an Objection to Making a Grant.

5. It is fair to say that the Succession Cause was fairly adversarial if not acrimonious. It culminated with the Honourable L. Mutai issuing a joint grant to four administrators: Moses Karanja Kahochio; Mungai Kahochio; Joel Mburu Kanyuku and Isaac Muigai Karanja. The grant was issued on 05/01/2006. Needless to say, the first two Co-administrators are the Applicants herein while the last two are the Respondents.

6. After this grant of letters of administration, the Applicants herein made an application to transfer the Succession Cause to the High Court on account of the pecuniary jurisdiction of the Magistrate's Court. They were successful. The Succession Cause was transferred to the Family Division of the Milimani High Court. It became Succession Cause No. 1516 of 2008. A few adversarial interlocutory applications ensued. Eventually, the Respondents herein filed Summons for Confirmation of Grant. It was dated 06/08/2013. It was supported by an affidavit deposed by Joel Mburu Kanyuku which contained a proposed mode of distribution which distributed the estate among all the cousins i.e. nephews and nieces of the Deceased.

7. The Summons for Confirmation of Grant were duly served on the Applicants. By this time, the Applicants were being represented by John Mburu, Advocate. The parties appeared before the Learned Justice Kimaru on 11/03/2014 for hearing of the Summons for Confirmation. The Applicants had not filed any response to the Summons for Confirmation. The Learned Judge directed the Applicants to file their response and all parties to return to Court on 07/05/2014 for directions.

8. On 07/05/2014, the parties appeared before Justice Kimaru again. John Mburu, Advocate sent a Mr. Momanyi to hold his brief. By that time, the Applicants herein had not filed their responses to the Summons for Confirmation of Grant. The Court directed the Applicants herein to file their responses and return to Court for the hearing of the Summons on 27/06/2014. The Learned Judge also directed that all the beneficiaries show up for the hearing on that day.

9. On 27/06/2014, the matter was placed before Justice Kimaru as earlier directed. The Applicants herein were not present. Neither was John Mburu, Advocate. Instead, John Mburu, Advocate had sent a Miss Onyinkwa to hold his brief. The Applicants herein had not filed any responses to the Summons for Confirmation of Grant. The Respondents herein and their siblings were all in attendance.

10. Faced with this situation, the Learned Judge ruled thus:

> *In view of the fact that Mr. Mburu has not filed any affidavit of protest to the Application [for] Confirmation of Grant dated 06/08/2013, the same is hereby confirmed. The estate of the Deceased shall be distributed in accordance with the proposals made in Paragraph 2 of the said Summons for Confirmation of Grant.*

11. It is this order that has set the stage for the present Application. The Applicants herein responded by, first, replacing their lawyer and filing a Notice to Act in Person. Then, they filed a Summons for Revocation of Grant. That Application is dated 08/07/2014. It came before Justice Musyoka and was fully argued. Justice Musyoka gave his ruling on 26/10/2016 dismissing the Application and finding no grounds to revoke the Confirmed Grant. Enroute to giving the dismissal orders, Justice Musyoka remarked that given the facts pleaded and sought to be proved, the Applicants ought to have approached the Court by way of Review or Appeal but not seek revocation of the Confirmed Grant.

12. Consequently, the Applicants approached the Court herein vide a Notice of Motion dated 17/11/2016. It seeks the following orders:

> i. **THAT** the Orders made on 27th June, 2014 confirming the grant be REVIEWED to give the Applicants an opportunity to give the Honourable Court additional information regarding the Estate of the Deceased Karori Kihagi.
>
> ii. **THAT** pending the hearing and determination of this Application, an order of STAY do issue distribution of Estate of Deceased in line with Orders made confirming the Grant on 27th July, 2014.
>
> iii. **THAT** such further Orders and/or directions be given in the interest of justice and to preserve the subject matter.
>
> iv. **THAT** the costs of this Application be provided for.

13. The Application was argued by way of Written Submissions followed by oral highlighting by both parties.

14. The basic argument by the Applicants is that orders for review are warranted here because they seek to provide more information about the estate that the Court did not have when it confirmed the Grant. They argue that they had instructed Messrs John Mburu Advocates to file an affidavit providing information regarding the concealment of important facts regarding the estate of distribution of the Deceased's Estate. However, the Applicants say that they discovered later that the Advocates never filed their affidavit as instructed. As such, they were not involved in the process of Confirmation of Grant and hence ended up being severely prejudiced. Indeed, the Applicants argue that the result of the failure of their Advocates to file their affidavit was that the Court ended up being misled to distribute the estate of the Deceased to people who are not beneficiaries by law.

15. The Applicants insist that by dint of Section 39 of the Law of Succession Act, they are the closest relatives to the Deceased who should inherit his estate to the exclusion of the Respondents because they enjoy a higher degree of consanguinity to the Deceased than the Respondents.

16. The Applicants argue that the mistakes of Counsel should not be visited on clients. They cited ***Joseph Mwangi Mutero & Another v Rachel Wagithi Mutero (Succession Cause No. 76 of 2005)*** where, they argue, Justice Mativo remarked that Courts must readily excuse a mistake of Counsel if it affords a justiciable, expeditious and holistic disposal of a matter. Refusal or failure by an advocate to follow the instructions of a client to file an affidavit is sufficient reason or cause to review a resulting order or ruling, they Applicants argue. They also cited two Tanzanian cases: ***The Registered Trustees of the Archdiocese of Dar es Saalam v The Chairman Buju Village Government (Civil Appeal No. 147 of 2006)*** and ***Bamanya v Zaver (2001) 2 EA 329, DC***. However, the Applicants advocates did not supply these cases to the Court. I was, therefore, unable to determine the holdings and reasoning of these persuasive authorities.

17. In actual fact, the Applicants' lawyer has misapprehended the holding and reasoning of Justice Mativo in the ***Joseph Mwangi Mutero Case***. In fact, Justice Mativo said the exact opposite of what they claim he said! Indeed, Justice Mativo was of the view that mistakes of counsel that amount to negligence, sloppiness, malfeasance and the like are not sufficient reason to review an otherwise valid Court order. It bears quoting Justive Mativo in *extenso* without including internal quotations:

> Counsel for the applicants strongly argued that the application before the court is premised on *"sufficient reason."* The reason offered for the delay is that the applicants previous advocates are to blame for failing to take the necessary steps until the present advocates came on record. The crucial question to resolve is whether indeed the alleged failure on the part of the advocates constitutes sufficient reason. Discussing what constitutes "*sufficient reason*" in an application for review, the Supreme Court of India in the above cited case of ***Ajit Kumar Rath vs State of Orisa& Others*** stated *"any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"*

Shah, Owuor and **Waki JJA** in the case of ***Zacharia Ogomba Omari and Another vs Otundo Mochache*** held that "*An application for review based on any other sufficient reason which is not analogous to or ejusdem generis with the first two circumstances in Order 44 (Now O. 45) is not available where the reason given is that their advocate was not available at the hearing when his absence amounted to taking*

the Court for granted."

A similar view was held in the case of ***Sadar Mohamed vs Charan Signh and Another*** where 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* (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 sufficient reason' is wide enough to include misconception of fact or law by a Court or even by an advocate*." This definition only covers misconception of facts of law but not negligence or conduct of an advocate.

In the present case, there is in action in that the blame is placed on the advocate then on record at the material time who is alleged to have failed to act and or the blame is placed upon the said advocate though no details have been given to demonstrate that the advocate failed to act as alleged….I am not persuaded that the reason offered amounts to *'sufficient reason'* within the meaning of the rules cited above nor is it *analogous* or *ejusdem generis* to the other reasons stipulated in Order **45** Rule **1.**

18. Justice Mativo cites with approval ***Evan Bwire v Andrew Nginda*** where the Court remarked as follows: "*an application for review will only be allowed on very strong grounds' particularly if its effect will amount to re-opening the application or case a fresh.*"

19. The present case is on all fours with the ***Josiah Mwangi Mutero Case*** as well as the cases cited in that decision by Justice Mativo. Our decisional law is consistent that negligent or culpable conduct by Counsel does not constitute sufficient reason to review Court orders absent exceptional circumstances. Our case law holds that pure and simple inaction by an advocate does not amount to a mistake such as to attract the positive exercise of discretion by the Courts. Indeed, our jurisprudence draws a distinction between mistakes/errors and negligence. See, for example, ***Mawji v Lalji [1992] LLR 2778 (CAK)*** and ***Kinuthia v Mwangi [1996] LLR 505 (CAK).***

20. In the present case, all we have is the claim by the Applicants that they had given instructions to their Advocates to file an affidavit and that he had failed to file one leading to a decision being made without their input. I note that the alleged affidavit which was drawn but not filed has not been exhibited anywhere in the Applicants' Application. I also note that the Applicants have been remarkably silent on what action they took against the offending Advocate if indeed he acted so negligently. At the very least, we should have had the benefit of the Advocates' affidavit confirming that he had failed to file the affidavit.

21. There is another aspect of the case that militates against the granting of this discretionary relief. It is this. The Summons for Confirmation of Grant was filed on 06/08/2013. It was served shortly thereafter. The impugned orders were given by the Court on 27/08/2014. That is more than one year after the Summons were filed and served. It appears incredulous or an exhibition of inexcusable nonchalance for a party which was engaged in an intensely fought Succession battle not to have known or followed up on when the matter had been slated for hearing even after being served with the Affidavit which proposed a mode of distribution the Applicants vehemently disagreed with.

22. The conclusion, then, is that while justice of particular cases might influence the Court to offer relief a litigant who has suffered because of genuine mistakes by a lawyer, the justice of the case in this particular case does not compel me to exercise my discretion to review the orders of the Court.

23. The bottom line is that litigation must, at some point, come to an end. That point has now been reached in this case. As Lord Griffins remarked in ***Kettleman v Hansel Properties Ltd [1998] 1 All ER 38 at 62***: *There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads....*

24. This is one such case. Re-opening this long-standing family feud will not serve the interests of justice. Matters should lie where they are.

25. **Consequently, I find no merit in the Notice of Motion dated 17/11/2016. It is dismissed with costs**.

26. Orders accordingly.

Dated and delivered at Kiambu this 8th day of March, 2018.

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JOEL NGUGI

JUDGE