REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

P & A NO. 391 OF 2013

IN THE MATTER OF ESTATE OF MUTIO MUTWI KAMWILU (DECEASED)

MBATHA MUTIO MUTWII)

ALPHONSE NZIOKA MUTIO).....PETITIONERS/APPLICANTS

FERDINARD MATILU MUTIO)

AND

PATRICK KIVINDYO MUASYA.....INTERESTED PARTY/RESPONDENT

RULING

1. By Ruling dated 2/10/2015, this court (B. Thuranira-Jaden, J.) held as follows**:-**

1. The deceased, ***Mutio Mutwii Kamwilu*** *passed away on the 2nd of May 2004. The three petitioners herein petitioned the court for the grant of letters of administration on the 5th June, 2013.*

2. The interested Party, ***Patrick Kavindyo Muasya*** *entered appearance and filed an affidavit in these proceedings under Rule 60 of the Probate and Administration Rules. The interested party claims to be entitled to a share of the estate of the deceased as a purchaser from the deceased of land parcel No. Machakos/Konza/North/Block 1/382 and the deceased's shares No. 527 in Konza Ranching and Farming Co-operative Society Limited.*

3. According to the aforesaid affidavit, the Interested – Party purchased the property in question from the deceased on 16th November, 1987 during the lifetime of the deceased. The sale agreement (annexture "PKM 1"), a letter dated 12th September, 1995 from the Konza Ranching and Farming Co-operative Society Limited (annexture "PKM 2") and a letter dated 10th April, 2012 from the Chief's office, Kangara Location (annexture "PKM 3") were annexed to the aid affidavit.

4. *The Petitioners then filed a preliminary objection objecting to the interested-parties pleadings on the following grounds:-*

> ***"(a)That this Honourable Court lacks Jurisdiction to hear the objections f the Interested Party.***

(b) That this Honourable Court lacks jurisdiction to hear the claims raised by the Interested Party.

(c) That the entire claim raised by the Interested Party is an abuse of the process of the court.

(d) That the entire claim raised by the Interested Party offends the mandatory provisions of the Land Control Board Act, (Cap 302), Laws of Kenya.

(e) The entire claim raised by the Interested Party offends mandatory provisions of the Law of Limitations Act (Cap. 22) Laws of Kenya.

(f) The jurisdiction of this Honourable Court is not invoked at all."

5. The Preliminary Objection was canvassed by way of written submissions which I have duly considered.

6. In ***Mukisa Biscuits Ltd v. WEST End Distributors Ltd*** *(1969) E.A on the scope of meaning of preliminary objections, at page 700 Law J.A laid down the law as follows:-*

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

And to the same effect Newbold, P stated (P. 701):

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A Preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop."

7. The court is also enjoined under Article 159 of the Constitution to administer justice without undue regard to technicalities of procedure.

8. The core of the dispute between the petitioners and the interested-party is the ownership of the afore stated property. To answer the question who is the owner of the said property, the court would need to look at both the facts and the law relating to the same.

9. The preliminary objection raises both matters of law ad disputed facts. The issues raised are therefore not appropriate for disposal by way of a preliminary objection.

10. Rule 60 of the Probate and Administration Rules provides as follows:

"Every interested person (whether or not he has been served with notice thereof) who wishes to be heard upon or to oppose any application, and has not already appeared in the proceedings, shall enter an appearance in Form 26 in the registry in which application is made giving his address for service, and may file such affidavits as he considers proper, to each of which the Applicant may with leave of the court file an affidavit in reply."

11. The entry of appearance by the interested-party is therefore provided for by the law and the

matter ought to go through the due process of the law. Whether or not the dispute between the Petitioners and Interested-Party will be resolved through this succession Cause or through the Environment & Land Court is a matter to be determined by this court after the objection herein has been heard on merits.

12. With the foregoing, I find no merits in the preliminary objection and dismiss the same with costs.

Dated and Delivered at Machakos this 7th day of October 2015.

B. THURANIRA-JADEN

JUDGE"

2. The applicants seeks review of the court's ruling of 7/10/2015 by Notice of Motion dated 1/2/2016 for specific prayers as follows:-

1) This application be certified as urgent, and an earlier hearing date be given on priority basis.

2) Upon hearing this application, this Honourable court be pleased to review the ruling and/or orders made on 7th October, 2015 by setting the same aside and substituting thereof with an order dismissing the interested party – PATRICK KIVINDYO MUASYA, claim in this Succession Cause No. 391 of 2013.

3) The costs of this Application be in the cause.

3. The Notice of Motion is based upon grounds set out in the application as follows:-

1. The Honourable court delivered a ruling on 7TH October, 2015 stating and holding that the Applicants/Petitioners preliminary objection dated 19th September, 2014 filed in court on the same date objecting to the Interested Party's claim, which claim was br9ought to court after lapse of after 24 years is mere technicality. The said ruling is an error on the face if record which urgently needs to be rectified through a review.

2. That there is an apparent error on the face of the record in the ruling of the Court dated 7th October, 2015 which clearly remiss of the Court's failure to apply the Law of Limitations of Actions applicable to this matter and thereby misdirecting itself and delivered a ruling which has resulted in miscarriage of justice which resulted in the objector being granted orders or reliefs that are invalid or a nullity, and consequently, the decision is otherwise a total perversion or miscarriage of justice as it renders it completely unnecessary for a party to a dispute before a court of Law to plead limitation of action which is significantly a substantive Law rather than a technicality.

3. That there is an apparent error on the face of the record in the ruling of the Court dated 7th October, 2015 which error occasioned injustice to the applicants by contravening the law of Limitations Act, Chapter 22 Laws of Kenya, at section 7 of the Act, resulting in failure or miscarriage of justice thus eroding public confidence in the administration of justice.

4. That there is an apparent error of law on the face of the record in the ruling of the Court dated 7th October, 2015 which error and/or mistake occasioned injustice to the applicants by contravening the law as provided under Sections 6(1) as read with 9(2) of the Land Control Act (Cap 302) and thereby occasioned significant injustice, resulting in failure to give effect to the intention of the laws of Limitations Act, Chapter 22 Laws of Kenya, AND the applicants have been wrongly deprived of protection of the Law and proper administration of Justice and good reason when the Court clearly overlooked the Law by holding that these pieces of legislation are a mere

technicality, when the Law is that Limitation of actions is not a procedural law but a substantive law. It is not in the class of technicalities or procedural process envisaged in Article 159 of the Constitution of Kenya, 2010. This certainly invokes the Courts greater amplitude for review.

5. Unless this Honourable Court reviews its ruling of 7th October, 2015, there will be occasioned a grave e miscarriage and the Applicants/Petitioners

6. This application is brought without any undue delay and it is in the best interests of justice to grant the orders sought.

4. The interested party filed Ground of opposition dated 8/2/2016 as follows:-

GROUNDS OF OPPOSITION

(Notice of Motion dated 1st February, 2016)

The respondent herein will at the hearing of the Applicants' Notice of Motion dated 1st February, 2016 in opposition to the same raise and argue the following grounds of opposition:-

1. The application for review is fatally defective and contrary to order 45 Rule 1 of the Civil Procedure Rules, 2010 in that the Applicant has not annexed an extracted copy of the order sought to be reviewed.

2. That the Notice of Motion is untenable and incompetent in that the Ruling was delivered on the 7th October, 2015 and if the Petitioners/Applicants were aggrieved they would have appealed.

3.** The Petitioners/Applicants in ground No. 2 and also in paragraph 9 of their Supporting Affidavit depose as to the Court **"…….misdirecting itself and delivering a ruling which has resulted in miscarriage of justice …… ".

This can only ventilate in appeal as this Honourable Court is not entitled to address its own misdirection as doing so would be sitting on appeal in its own decision.

4.** The Applicants are misleading this Honourable Court ad distorting facts in his ground No. 1 of review and paragraph 4 of their Supporting affidavit by stating that the court in its ruling held that **"…..lapse of 24 years is a mere technicality…,

*Whereas the court did not state so but rather the Court in Paragraph 7 of its ruling stated that **"this court is also enjoined under Article 159 of the constitution to administer justice without undue regard to technicalities of procedure.***

***5.** The review sought is an abuse of the court process as it is an afterthought having been brought 4 months after the Ruling was delivered and apparently to cover up the Applicant's failure to lodge their Appeal.*

6. The application is aimed at defeating the process of justice.

7. The Application for review is fatally defective in that the orders against which the review is sought have not been specifically quoted or brought before the Honourable Court.

8. The Applicant does not specifically plead or allege any error apparent on the face of the record, nor does he disclose any sufficient cause/reason to justify a review.

The petitioners/Applicants are thus not entitled to the orders sought and their application should be dismissed with costs to the Interested Party/Respondent."

5. Curiously and irregularly, the applicants filed a replying affidavit sworn by the 3rd Petitioner on behalf of the petitioners in response to the Interested Party's Ground of Opposition. The said Replying Affidavit offends the provision of Order 19 rule 3 of the civil procedure rules for being argumentative and making legal submissions on the matter rather than being an averment of facts.

6. The parties then filed written submissions on the review application of 1/2/2016, respectively dated 24/2/2016 and 25/2/2016 by M/s Nchoe Jaoko & Co Advocates for the applicants and M/S F. M. Mulwa Advocates for the Interested Party.

7. This court has considered the applicants affidavit and Ground of opposition and submissions of the Parties therein with respect, the application appears to be misconceived and based on a misapprehension of the process of the court by way of review and appeal. The former is a relook of a matter based on new facts that were not before the court at the time of the making of the ruling or judgment (From which an order or decree is extracted) sought to be reviewed. The latter is a redetermination based reconsideration of the matter as it was presented before the court at the time of the ruling or judgment appealed from , often resulting in reversal of the finding of the court, but which may also result in the affirmation of the conclusions of the court appealed from.

8. The essential difference of the review and appeal procedures was the subject of the Court of Appeal decision in ***William Karani & 47 others v. Wamalwa Kijana & 2 others*** [1987] eKLR where Platt, JA. (Nyarangi and Gachuhi, JJA. concurring) held as follows:-

> *"Both section 80 and order XLIV commence by explaining the fundamental nature of review. It is to be a means of curing gross or obvious errors when an appeal is allowed by the Act, from a decree or order, but no appeal has been preferred; and secondly in cases where no appeal is allowed at all. The broad division then is between the appeal procedure as the general method of curing errors, with its scope to deal with errors of evidential fact or law, or mixed fact and law, and the review procedure, to cure a narrower compass of defects, which cannot be allowed to stand in justice, simply because there is no appeal. From the nature of section 80 and order XLIV both procedures cannot be adopted at once.*
>
> *Hence, supposing that an appeal is allowed by the Act but has not been preferred, review may be taken, if appropriate. Once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.* ***It would not be possible for example to pray for review because there was error on the face of the record,*** *on the grounds that the court had no jurisdiction to pass the decree or order complained of, and then by an appeal complain of misdirections on the evidence. That would be an absurd use of the appeal process, because if the court had no jurisdiction, the misdirections on the evidence would, of course, be unimportant. The proper approach would be to put all the complaints into one appeal."*

9. The Applicants are challenging the interpretation and conclusion of the court in matters of law and fact in the consideration of the pending objections on Limitation of Actions. For instance, Ground No. 5 of their Submissions challenges the finding of the court on the matter as follows:-

> *"5. Your Ladyship; the Petitioners submits that the trial Court declared the Limitations of Actions Act* ***Section 7 of the Act And the law as provided undersection 6(1) as read with 9(2) of the Land Control Act (Cap 302) dealing with transaction which are null and void for want of consent AS BEING TECHNICALITIES ENVISAGED UNDER ARTICLE 259 OF THE KENYA CONSTITUTION. THIS IS TOTALLY AN ERROR OF LAW. I now point out that Article 259 of the Constitution neither amended Section 7 of the law of Limitations of Actions Act, nor it do away with the law as to Limitation of Actions still apply to date."***

10. Where a person seeks a different interpretation or adjudication on a matter which has specifically been ruled upon by a court, the correct procedure is to appeal the decision to a higher court. This Court cannot by pretext of review sit on appeal from the decision of a court of equal jurisdiction (B. Thuranira-Jaden. J.)!

11. And this question is governed by authority of the Court of Appeal (Kwach, Akiwumi and Pall, JJA) in ***National Bank Of Kenya Limited v Ndungu Njau*** [1997] eKLR as follows:-

> *" 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.*
>
> *In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."*

I find that as the matter has already been adjudicated by this Court differently constituted and it can only be reconsidered on appeal.

Orders

12. For the reasons set out above and without commenting on the respective merits of the parties' cases, the court dismisses the application for review dated 1/2/2016 with costs to the Interested Party.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 24TH DAY OF MAY, 2018.

D. KEMEI

JUDGE

Appearances:

M/S Nchoe, Jaoko & Co. Advocates for the Petitioners.

M/S F. M. Mulwa Advocate for the Respondent.