REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 159 OF 2015

IN THE MATTER OF THE ESTATE OF LIVINGSTONE M'MUNGANIA (DECEASED)

MBOGORI BAICHU .....APPLICANT

VERSUS

DAVID GITONGA M'MUNGANIA .....RESPONDENT

R U L I N G

1. Before me is a Summons brought under ***Rule 63 of the Probate and Administration Rules, Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules CAP 21 of the Laws of Kenya***. The applicant seeks an order for the review of this court's judgment delivered on 4th May, 2017.

2. The grounds upon which the Summons was grounded were set out in its body and the Supporting Affidavit of Mburugu Mbogori Baichu sworn on 8th May, 2017. It is claimed that the applicant was aggrieved with the dismissal of his petition dated 29th May, 2015 by this court's judgment of 4th May, 2017.

3. That upon perusal of the said judgment, the applicant's counsel realized that the information that came to him through the advocate who had held his brief when the ruling of 30th March, 2017 was made was not what the court had directed. That as a result, there was lack of material element for the consideration of this court. That as a result, the applicant's affidavit dated 19th April, 2017 did not address the issue which the court had requested.

4. The applicant had in the **Meru HCCC No. 71 of 1995 (formerly HCCC No. 60 of 1987)** sued the respondent's father for recovery of land which he had sold to him, obtained the consent to subdivide and transfer but refused to do so after he had been paid the whole consideration. That the matter had recently come up for a notice to show cause but his Advocate caused it to be stood over generally to await the appointment of the respondent as personal representative of the estate of his late father.

5. The application was opposed vide grounds of opposition dated 22nd May, 2017. It was contended that the court is *functus officio,* judgment in the matter having been delivered and the file marked as closed. That the court was being asked to make orders in vain since **Meru HCC No. 71 of 1995** abated over 9 years ago and therefore there is no pending suit. Finally, that no ground for review as set out under ***Order 45 Rule 1 Civil Procedure Rules*** had been established.

6. The application was ordered be canvassed by way of written submissions. While the applicant filed his submissions, the respondent filed none. It was submitted for the applicant that he had purchased 15 acres of land from the deceased but the respondent was keen to frustrate his quest. That the applicant had now furnished the court with sufficient material to warrant the review of the judgment since the **Meru HCCC No 71 of 1995**. That the applicant had come to court through the *"sufficient reason"* element under ***Order 45 Rule 1 of the Civil Procedure Rules.***

7. The Applicant relied on the cases of **Edney Adaka Ismail v Equity Bank Limited [2014] eKLR**, **Re Estate of Lesinko Sorokote Kirayio (Deceased) [2014] eKLR** and **Wangechi Kimata & Another vs. Charan Singh (C.A No 80 of 1985) (unreported)** for the proposition that under the *"any other sufficient reason",* the court could review its judgment. That in the premises, this court is not *functus officio* to the extent that what was being sought was an order for review. I have considered the affidavit and the submissions on record.

8. There are certain orders of the Civil Procedure Rules that imported to matters of Succession and ***Order 45*** is one of them. This is provided for under ***Rule 63 of the Probate and Administration Rules***. ***Order 45 Rule 1*** provides 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".

9. For this court to exercise its jurisdiction under the said ***Order*** and grant a review, there must be discovery of new and important matter or evidence which was not within the knowledge or could not be produced at the time by an applicant; or on account of a mistake or error apparent on the record or any sufficient reason. In addition the application must be made timeously.

10. Firstly, the applicant made the present application four days after the judgment was delivered. In this regard, I am satisfied that the application was made timeously.

11. As to the ground for review, the applicant contended that the counsel who held brief on behalf of the advocate for the applicant earlier on gave misleading information which resulted in the applicant not supplying the court with what was required by the court.

12. In **Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR** Apaloo JA stated:-

"I think a distinguished equity judge has said:

'Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits'.

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline." (Emphasis).

13. The applicant alleged that a mistake occurred when counsel who held brief for his advocate passed on wrongful information. That had proper information been passed to his advocate, this court would have been supplied with what was required and a different result would have been arrived at. In the case relied on by the applicant of **Edney Adaka Ismail v. Equity Bank Limited (supra)** the court held:-

"The question then that arises is whether the Plaintiff has offered sufficient reason to persuade this Court to exercise its discretion in his favour and reinstate the application. It is true that where the justice of the Case mandates, mistakes of Advocates even if they are blunders, should not be visited on the clients when the situation can be remedied by costs. In the case of Lucy Bosire –vs- Kehancha Div. Dispute Tribunal & 2 Others (supra) Odunga J held as follows:-

"It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits..."

14. I am persuaded that blunders are at times made and a party should not be made to suffer the repercussions when such mistake is genuine, not fraudulent or overreaching. In the instant case, the applicant has indicated that his advocate acted on wrongful information passed on to him by an advocate who had held his brief.

15. In view of the forgoing, I am satisfied that the applicant has offered sufficient reason to warrant the review of the subject judgment. Consequently, I allow the application for review.

16. The judgment delivered on 4th May, 2017 was on the petition dated 29th May, 2015 where the Petitioner/Applicant sought that Letters of Administration ad litem to the estate of the deceased be issued to the respondent limited only for the purposes of the suit Meru HCCC 71 of 1995. ***Section 54 of the Law of Succession Act*** *states:-*

"A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act."

17. Further ***Para 14 of the Fifth Schedule of CAP 160*** provides:-

"When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution."

18. The applicant has produced to this court a notice to show cause for 6th April, 2017 and a mention notice for the 15th May, 2018 both issued in the aforesaid ***Meru HCCC No. 71 of 1995***. That confirms that the said suit is still in existence.

19. I am alive to the fact that, in the said judgment, the court observed as follows:-

> ***"13. One other thing, even if the Petitioner had proved the existence of the said Meru HCCC No. 71 of 1995, he still had to show this Court that the orders would not be made in vain. The deceased died on October, 2006. The present Petition was filed (9) years after his demise. It is trite that a suit abates after one (1) year of a party passing on. That period can only be extended for a limited period and for good reasons. In the present case, there were no reasons adduced why there was a delay of nine (9) years in seeking to appoint the Respondent as the representative."***

20. The foregoing notwithstanding, the issue whether that suit has abated or not is not for this court to make that finding but the court before whom that suit is pending. Accordingly, I allow the application and the judgment is reviewed. The resposndent is appointed a personal representative of the estate of the late of Livingstone M'Mungania.

21. For the avoidance of any doubt, for the purposes of computing time, the appointment of the respondent as personal representative shall be deemed to have been effected on the date of this ruling and not otherwise.

DATED and DELIVERED at Meru this 27st day of June, 2018.

A. MABEYA

JUDGE