REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.95 OF 2003

IN THE MATTER OF THE ESTATE OF JOHN KHAYIMBA SHILEHWA (DECEASED)

DAVID KHAYIMBA .... PETITIONER/RESPONDENT

VERSUS

AGNETA INGOSI SHILIWA .... 1ST OBJECTOR/APPLICANT

IBRAHIM MITALO SHILEHWA........................2ND OBJECTOR/APPLICANT

RULING

1. This is a ruling on the Notice of Motion dated 10th October, 2014 and filed in court on 30th October, 2014. The motion is premised on *rule 73* of the Probate and Administration Rules and *Order 45 rules 1* and *2* of the Civil Procedure Rules, 2010. It seeks review of the ruling on the distribution of the deceased's estate herein on the following grounds:-

> *"1.(a) THAT there is error of law on the face of record as the applicant was not a grandson to the deceased herein and any gift from his grandfather cannot form part of the estate of the deceased herein as provided for under section 42 of the law of Succession act.*
>
> *(b) THAT both petitioners had benefited from the estate of the deceased and were hence equally entitled to the remainder of the estate*
>
> *2.) THAT given the contentious nature of the issues herein, the parties hereto in addition to the affidavit be allowed to adduce evidence and witnesses cross-examined.*
>
> *3.) THAT the distribution as made disinherits the applicant from the estate of the deceased as the court considered property not part of the estate to deny the applicant inheritance.*

2. The motion is based on the affidavit sworn by the applicant who was the co-petitioner herein on the same day with the motion. The applicant deposes that prior to the demise of their father, he gave both the applicant and his brother **Parcel Numbers Idakho/Shiseso/51** and **52** respectively, and were duly registered as proprietors in 1973. Their father retained Parcels **Idakho/Shiseso/37, 50,** and **490** to himself. The applicant further deposes that **Parcel No. Idakho/Shiseso/38** which he owns was never owned by their father. The applicant says that the court, (Lenaola, J.) took into account *Parcel No.38* and proceeded as though the applicant was a grandson to the deceased and therefore made an error on his interpretation of *section 42* of the law of Succession Act. He was of the view, that the court was in error

in taking into account a gift from his grandfather as if it was part of his father's estate thereby denied him a share of his father's estate. The applicant prayed that distribution ordered herein be reviewed so that an equitable distribution be made.

3. The Notice of motion is opposed through a replying affidavit sworn on 9th April 2015. **Ibrahim Mitalo Shilebwa** who was the 1st objector in this cause deposes that directions were given that the issue of distribution be determined by way of affidavit evidence in the presence of counsel for both parties in the cause and none of the parties objected to this.

4. The 1st respondent further says that parties filed detailed affidavits on distribution following those directions on how each wished the estate of the deceased to be distributed. Following those affidavits, the respondent says, the court considered them and made a determination in a ruling dated 15th December, 2011.

5. After the ruling, the applicant is said to have applied for leave to appeal which leave was granted on 24th January 2012 and a Notice of appeal lodged. The respondent further says that he did not hear of the appeal but when he moved to enforce the decision by Lenaola, J. the applicant filed the present application.

6. The respondent takes the position that the grounds advanced in attacking the Judge's decision are not grounds for a review but appeal since they are based on a misapprehension of facts and law. That the court is being invited to sit or appeal on a decision of court of concurrent jurisdiction. The applicant is also accused of delay from the date the ruling was made to the time this application was filed and that the delay has not been explained. The applicant is therefore accused of laches.

7. When the application came up for hearing on 8th February 2016, Mr Anziya appeared for the applicant and Mr Akwala for the 1st respondent. Mr Anziya, learned counsel for the applicant, urged the motion and asked the court to grant it saying, that there is an error on the face of the record. The error identified by Mr Anziya, is that the court while distributing the estate of the deceased, did not give the applicant any portion from his late father's estate and cited *sections 26, 35* and *42* of the Law of succession Act. Learned counsel submitted that the court had taken into account the estate of the parties' grandfather while distributing the estate. Counsel submitted that, that was an error because the issue at hand was the estate of the deceased herein, estate of the applicant's father, and not their grandfather's. That error, submitted counsel, denied the applicant a share of his father's estate. According to counsel, the court ought not to have considered the applicant's grandfather's estate in determining the petitioner's share which led to a miscarriage of justice. Counsel identified the error complained of at paragraph 16 of the ruling he seeks to have reviewed. He prayed that the motion be allowed.

8. Mr Akwala, learned counsel for the respondent on his part, opposed the application and submitted that the application has no merit. Counsel reiterated what is contained in the replying affidavit saying that parties agreed to have the issue of distribution determined by way of affidavit evidence which was done, and the court considered them in arriving at the decision it made. Counsel submitted that what each party had received before the demise of their father was duly considered as was contained in the affidavit in support of summons for confirmation of Grant the court was considering. According to counsel, the applicant had admitted to have received **Parcel No. Idakho/Shiseso/38** from his grandfather and **Parcel No. Idakho/Shiseso/50** from the deceased, while the objector received **Parcel No. /Idajkho/Shiseso/51** from the deceased herein.

9. Counsel disputed the applicant's assertion that he did not get a portion from his father's estate saying, that his share was to go to the person he had sold it to, and referred to paragraph 16 of the ruling under attack. The same facts relied on in this application were before the court, counsel submitted. He said the applicant should have moved to the Court of Appeal since he already lodged a Notice of appeal. He asked the court to decline sitting on appeal under the guise of review. He also accused the applicant of delay in moving the court for review – and urged that the application be dismissed.

10. I have perused the record and considered submissions by counsel on behalf of their respective parties. The motion is for review of the ruling of *Lenaola, J.* delivered on 15th December, 2011. *Rule 73* of the Probate and Administration Rules, gives this inherent Court powers to make such orders as may be necessary for the ends of justice. *Order 45* of the Civil Procedure Rules (2010), which is permissible under the Probate and Administration rules, allows a party to apply for review. It provides where necessary as follows:-

> *O.451(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* ***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 the judgment to the court which passed the decree or made the order* ***without unreasonable delay.”*** *(emphasis)”*

11. The applicant has in his motion moved this court on the basis that there is an error apparent on the face of record. Counsel for the applicant while urging the motion identified the error to be at paragraph 16 of the ruling. The learned Judge had said at paragraph 16 –

> *“In the end, I am convinced, that the only lawful distribution would be to deny David Khayambi any part of titles Nos.37, 50 and 490 (save for the portion that he sold to Alphonce Bukhala out of No.490 and which should be transmitted to the said Bukhala ...”*

12. Counsel submitted that the Judge wrongly applied *section 42* thus denied the applicant a share of his father’s estate. Counsel for the responded on the other hand has faulted the applicant saying that the Judge was right and that the application for review has been made with inordinate delay and has accused the applicant of laches.

13. An application for review under Order 45 can be made on three grounds; discovery of new and important evidence, mistake or error apparent on the face of the record, and other sufficient reason. The applicant herein has identified error apparent on the face of the record as his ground for seeking review and has identified where he believes the error is in the ruling.

14. It is strite law that a party cannot apply for review when the argument is that the Judge misapprehended the evidence or law in making his determination, which is a good ground for appeal and not review. I will refer to a few decisions to demonstrate this:

In the case of **Abasi Belinda v Fredrick Kangwamu & Another** [1963] EA 557 **Bennet, J.** held:-

> *“A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.”*

In the case of **National Bank of Kenya Limited v Ndungu Njau** [1997] eKLR, the Court of Appeal held:-

> *“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 provisions of law cannot be a ground for*

review."

Yet in another case, that of **Francis Origo & Another v Jacob Kumali Mungala** [2005] eKLR, the Court of Appeal concluded:-

> *"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal."*

And in the case of **Pancras R. Swai vs Kenya Breweries Limited** [2014] eKLR the Court of Appeal while dismissing an appeal against the High Court's refusal to allow an application for review, held:-

> "The appellant's right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the court was wrong either on account of wrong application of the law or due to failure to apply the law at all."

15. I have read the ruling by the learned Judge which the applicant seeks to review, and in particular paragraphs 11 and 15 of the said ruling. The judge after quoting *section 42* in extenso at paragraph 11, stated at paragraph 15;

> *"If section 38 as read with section 42 is to be applied properly, Khayambi's attempt at obtaining another 4.8 hectares or 11.850 acres of land would give him an unfair advantage over all other beneficiaries and the law cannot countenance such a proposition."*

16. It is clear that the Judge was applying section 42 of the Law of succession Act and his decision at paragraph 16, reproduced elsewhere in this ruling, was a result of his exposition of the law as he understood and applied it. To my mind, this is not an error, mistake or omission apparent on the face of the record. It could only be, in the applicant's view, a misapprehension of the law, hence a ground of appeal and not ground for review.

17. *Order 45* of the Civil Procedure Rules is also clear that an application for review should be made without delay. The ruling, the subject of this application was made on 15th December, 2011. An application for review was not filed until 30th October, 2014 almost 3 years after that ruling. This delay has not been explained even though the respondent had raised this issue in his replying affidavit and counsel for the respondent through his submissions during the hearing of the motion. It is true that the application is guilty of laches; in making this application.

18. In the case of **Anthony Gachara Ayub vs Francis Mahinda Thinwa** [2014] eKLR, where the appellant's application for review made after 3 years was dismissed by the High Court, and on appeal, the Court of Appeal observed that an application for review should be promptly filed. The Judges of Appeal were of the view that three years delay in that case was inordinate. The learned Judges explained what an error apparent on the fate of record means, and quoted with approval the decision of the High Court in the case of **Draft and Develop Engineers Limited v National Water Conservation and Repeline Corporation, Civil Case No.11 of 2011:-**

> *"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 options, a clear case of error apparent on the face of the record could be made out. An error which has to be established by a long process of reasoning or on the points where there may be conceivably 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."*

19. Taking into account the *order 45 rule (1)* of the civil Procedure Rules and the decisions cited above, and considering the ruling by the learned judge, I am of the considered view that the application herein does not meet the principles and standards for review. The applicant should have pursued an appeal as he attempted to do but not come by way of review. Even considering the lapse of time since the impugned ruling was made, circumstances do not favour him. The applicant seems to be seeking to have a second shot at the matter since he wants it re-opened and evidence taken afresh. That is not review on account of an error apparent on the face of the record.

In the words of the learned Judges of Appeal in the case of **Francis Origo** (supra):

> *"Once the applicants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end."*

20. I would adopt the words of the learned Judges and only substitute the word "**applicants**" with **"applicant"** and say, once the applicant herein chose the path of review rather than appeal, he was, obviously in my view, heading in the wrong direction and has now come to a dead end.

21. In the end, the applicant's Notice of motion dated 10th October, 2014 is hereby dismissed with costs.

Dated and delivered at Kakamega this 25th day of February 2016.

E.C. MWITA

JUDGE