REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 10 OF 2015

(FORMERLY SPM'S CHUKA SUCC. CAUSE NO. 346 OF 2014

IN MATTER OF THE ESTATE OF MURUNGI RUTERE ……DECEASED

EUSTACE MUTEGI MURUNGI…….....……1ST APPLICANT

AGOSTIN THIERI MUTHAA alias NTHIIRI MURUNGI…....….2ND APPLICANT

VERSUS

AGRIVINE KABURI NJOKA…….....….RESPONDENT

RULING

1. Before me is a Summons taken out under Order 45 of the Civil Procedure Code, Rules 63, 49 and 73 of the Probate and Administration Rules. The same is dated 18th June, 2015 and seeks the review of the order made on 6th May, 2015 by **Makau J** to include parcels Karingani/Muiru/3880 and 3881, respectively. The Summons is supported by an Affidavit of Njeru Ithiga Advocate sworn on 18th June 2015. The grounds upon which the application is brought are set out in the body of the Summons and the Supporting Affidavit. These are that; pursuant to a grant revoked by the court, the Respondent had caused the subdivision of the property known as Karingani/Muiru/145 into two parcels Karingani/Muiru/3880 and 38881, respectively; that parcel No. Karingani/Muiru/145 no longer exists; that it is that number that appears in the order of the court making it difficult for the order of 3rd June, 2015 to be effected. In view of the aforegoing, the Applicant contended that there was an error apparent on the face of the record which this court should review.
2. The deponent of the Supporting Affidavit swore that he was an Advocate who had the conduct of the matter for the Applicants; that a judgment was delivered by this court (**Makau J)** on 6th May 2015 revoking the grant issued on 24th June, 2014; that when he extracted the Order, order No. 2 was to the effect that parcel No. Karingani/Muiru/145 be cancelled alongside parcel Nos. Karingari/Weru/461 and Karingani/Mugirirwa/392 and that the same do revert back to the names of the proprietors as before the transfer; that the order could not be effected as land parcel No. Karingani/Muiru/145 had already been subdivided to Karingani/Muiru 3880 and 3881; that if the court was aware of the subdivision aforesaid it could not have included Parcel No. Karingani/Muiru/145 in its judgment since orders of court are not made in vain. The deponent therefore swore that it was a mistake or an error apparent on the record which this court should review in order for its order of 3rd June, 2015 to be effected.
3. At the hearing of the application Mr. Ondari appeared and held brief for Mr. Ithiga for the Applicant. He reiterated what was contained in the Supporting Affidavit and further submitted

that the subject judgment resulted from the Applicant's application for revocation of the grant which application the Respondent conceded. That by the Affidavit of Agrivine Kaburi Njoka filed on 29th January 2015, it was disclosed in paragraph 18 that parcel No. Karingani/Muiru/145 had since been subdivided to create Karingani/Muiru/3880 and 3881, respectively. Mr Ondari therefore argued that since that information was before the Court, it was an error apparent on the face of the record and should be corrected. Commenting on the Respondent's Replying Affidavit, Mr. Ondari indicated that the Respondent's arguments were directed at an application brought in respect of discovery of new material which is not the case with the application under consideration.

4. The application was opposed vide the Replying Affidavit of Mutegi Mugambi Advocate sworn on 12th January, 2016. Mr Mugambi swore that Order 45 of the Civil Procedure Rules requires an applicant to have exercised due diligence and for the new evidence not to have been within the knowledge of such an applicant; that the Applicant's Advocate had not exercised due diligence before filing the application dated 6th June, 2014 that resulted in the subject judgment; that there were no new matters to warrant the review of the order of the 6th May, 2015. He therefore urged that the application be dismissed with costs.
5. At the hearing, Mr. Mutegi Learned Counsel for the Respondent submitted that the Application was an abuse of the court process as there was no mistake apparent on the face of the record; that the Affidavit of 29th January, 2015 had disclosed in paragraph 18 that the subject property had been subdivided; that the Applicant was to blame for failing the supply the court with the relevant material. Counsel submitted that the remedy of review on discovery of new material is not available to a party who is not diligent. The cases of **Salama Mahmood Saad –v- Khikas Investiments Ltd & Anor [2014] eKLR and Ansilio Mungatia –v-Japheth Mburugu [2015] eKRL** were cited in support that submission. Counsel further submitted that there was no sufficient reason shown to grant a review sought. It was further submitted that the application was fatally defective as no copy of the decree or judgment had been annexed to the application. The Case of **Suleiman Murugu v. Nilestar Holdings Ltd [2015] eKLR** was cited in support of the proposition. Counsel further submitted that the basis of requiring an order or judgment to be annexed to an application for review is to enable the court to see or discern the mistake on a prima facie basis. Counsel therefore urged that the application be dismissed.
6. In rejoinder, Mr. Ondari submitted that the authorities relied on by the Respondent were distinguishable from the application before court. That the cases were dealing with the issue of discovery of new evidence whilst the issue in the instant application is error apparent on the face of the record; that there was an order which had been extracted and is on record which the court can refer to. That in any event, no prejudice had been suffered by the failure to annex that order to the application and that in any event such failure was curable under Article 159 (2) (d) of the constitution.
7. I have considered the Affidavits on record the submissions of Counsel and the authorities relied on. This is an application for review under Order 45 (1) of the Civil Procedure Rule. Under that Order, an order or decree can be reviewed on three grounds namely; an error apparent on the face of the record; discovery of new evidence which could not be discovered despite due diligence and for sufficient reason. According to the Applicant, the application before me, is predicated upon the first ground, that there is an error apparent on the face of the record. On the other hand however, the Respondent opposed the application on the basis that there was discovery of fresh/new evidence. In this regard, the issues for determination are, whether the application was grounded on there being new evidence or an error apparent on the face of the record, Secondly whether there was an error apparent on the judgment of **Makau J** delivered on 6th Mary, 2015.
8. However, before dealing with those issues, there was a preliminary issue that was raised by Mr. Mutegi Learned Counsel for the Respondent. Counsel argued that the application was fatally defective in that the order or Judgment that was sought to be reviewed was not attached or annexed to the application. Counsel relied on the case of **Suleiman Murunga –v- Nilestar Holdidngs Ltd & Anor (Supra)** wherein after reviewing the authorities, **Mutungi J** held that where no formal order is annexed to an application for review, such an application is fatally defective.
9. In the Murunga Case, **Mutunga J** cited with approval the pronouncements of **Visram J (as he**

then was) and Lesiit J in Wilson Saiha v. Joshua Cherutich T/a Chirutich Company Ltd [2003] eKLR and **Belgo Holdings Ltd -v- Robert Kotich Otach & Anor [2009] eKLR**, respectively.

10. In **Wilson Saiha Case (supra), Visram J** stated:-

"I respectively agree. In order to succeed on an application for review under Order XLV of the Rules (presently Order 45), one must show that he is aggrieved by a decree or an order. This cannot be done without annexing the decree or order for the court to determine that point. I therefore, agree with my learned sister the Honourable Lady Justice Jessie Lesiit's conclusion in Gatimu Farmer Ltd -v- John Njoroge Ndungu Nakuru HCC NO. 197/2001 that failure to annex the order or decree sought to be reviewed renders an application for review fatally defective. On this conclusion alone, I do not see the need to consider the Defendant's application further as no useful purpose will be achieved thereby".

While in **Belgo Holdings Case** (supra), **Lesiit J** delivered her self thus:-

"I respectively agree with the views of Nyarangi, J. it is trite that the decree or order sought to be reviewed must be annexed or attached to the application in order for the Applicant to clearly show what has aggrieved it. Before making the application, there must have been a decree or an order drawn which aggrieved the Applicant and that is the order or decree that it ought to have annexed to this application in its support. Failure to annex that decree or order is fatal to application".

11. An order or decree is but the formal expression of the decision of a court. An order emanates from a ruling whilst a judgment gives rise to a decree. My view is that Order 45 (1) has not expressly stated that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review of the same. My understanding is that, where a formal order or decree has been extracted and a party is able to direct the courts attention to that part of that order or decree which the party complains of, since such order is expected to be on record, the application for review cannot be said to be fatally defective. My view is, if the court is able to see or discern that part of the order, or decree complained of when it is considering the application can not be said to be fatally defective if the application by being properly directed by the Applicant in the application by way of Affidavit or in the prayer in the application. This I believe is the purpose of the overriding objective expressed in Sections 1 A and 1B of the Civil Procedure Act as well as Article 159 2 (d) of the Constitution of Kenya. In this regard, I hold that in the event a court is able to discern the part of the order or decree (ruling or judgment for that matter) that is being complained of, justice will demand that the court sustains such an application rather than declining the same.

12. In the present case, the Summons sought the order in the following terms:-

"1.THAT the judgment delivered on 6th May, 2015 and orders issued thereof and in particular order No.2 be reviewed to include land parcels KARINGANI/MUIRU/3880 ad KARINGANI/MUIRU/3881 which parcels resulted from the subdivision of land parcel No. KARINGANI/MUIRU/145".

The Applicant did not annex either the ruling or the order which was issued on 3rd June, 2015. I consider it to have been wrong for the Applicant to have extracted and the Deputy Registrar to have issued the order of 6th May, 2015. What should have been extracted and issued is a decree as what **Makau J** delivered was a judgment and not a ruling.

13. Although neither the judgment nor the extracted order was annexed to the Application, a copy of the judgment and extracted order were readily available in the court file. In any event, the two were produced by the Respondent vide the Replying Affidavit of Mutegi Mugambi. In this regard, since the court could readily ascertain from page 2 of the judgment of **Makau J** of 6th May, 2015 the order complained of and for the reason that no prejudice was shown to have been suffered by the Respondent for the Applicant's failure to annex the said documents, I hold that the application

was not fatally defective.

14. The Respondent's contention was that the Applicant had not demonstrated that there was new evidence which could not be discovered after due diligence. A look at the grounds in support of the Summons and in particular grounds (c) and paragraph 9 of the Affidavit in support shows that, the application was based on the allegation that there was an error apparent on the face of the record. In this regard, although the arguments and submissions of Mr. Mutegi are right on the principles applicable in an application under Order 45 Rule (1) based on discovery of new evidence, with due respect, the same are not applicable in the present case. The Applicant's made a clear choice that their application was predicated upon an alleged mistake or error apparent on the record. They cannot be boxed into relying on a ground they had not invoked. Accordingly, I make a finding that the application is predicated upon an alleged mistake or error apparent on the face of the record.
15. Was there any error apparent on the face of the record as contended by the Applicants? I have looked at the application dated 24th June, 2014 for revocation of grant which gave rise to the Judgment of 6th May, 2015. It is true that there was no express reference that parcel No. Karingani/Muiru/145 had been subdivided into Karingani/Muiru/3880 and 3881, respectively. There was also no prayer that the names in parcel No. Karingani/Muiru/145 do revert to the original names. What the Applicants sought was only the revocation and annulment. The court having found that the court that purported issued the subject grant did not have any jurisdiction to do so revoked the grant and gave consequent orders to support the remedy of revocation.
16. I have noted that in paragraph 6 of the Affidavit of the Summons dated 24th June, 2014, the deponent had alluded to parcel No. Karingani/Muiru/3881 having resulted from the sub-division of Karingani/Muiru/145. I have also noted that in paragraph 18 of the Replying Affidavit of Agrivine Kaburu Njoka sworn on 29th January, 2015 in opposition to Summons for revocation, the deponent disclosed that parcel No. Karingani/Muiru/145 was no longer in existence and parcel Nos. Karingani/Muiru/3880 and 3881 had resulted therefrom. In this regard, it is clear that the existence of the fact of subdivision of parcel No. 145 and the resultant parcel No.3880 and 3881 was brought to the attention of the court. Since the issue of reverting back the names of the owners of Karingani/Muiru/145 was a natural consequence of the court allowing the application for revocation it was upon the court to consider all the facts placed before it. The courts intention was to undo any wrong that had been committed in relation to the subject properties if it was an oversight of or the part of the court not to have remembered that Karingani/Muiru/ 145 had since been subdivided to Karingani/Muiru/3880 and 3881, respectively. It was a natural consequence of the orders granted by the court.
17. In this regard, I am satisfied that, it was an oversight on the part of the court to have referred to parcel Nos. Karingani/Muiru/145 in its judgment rather than Karingani/Muiru/3880 and 3881, respectively. Accordingly, the application succeeds. In the circumstances of this case, I order that each party do bear own costs.

DATED and DELIVERED at Chuka this 17th day of March, 2016.

A.MABEYA

JUDGE

Delivered in open court in presence of parties

A.MABEYA

JUDGE

17/3/2016