



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 244 of 2014 formerly CIVIL SUIT NO. 95 of 2006 (OS)

**IN THE MATTER OF THE ESTATE OF MOHAMED OMAR MOHAMED HATIMY
(DECEASED)**

PUBLIC TRUSTEEAPPLICANT

VERSUS

MOHAMED OMAR MOHAMED..... 1ST RESPONDENT

AHMED OMAR MOHAMED..... 2ND RESPONDENT

TWAHIR OMAR MOHAMED..... 3RD RESPONDENT

ABDALLA OMAR MOHAMED..... 4TH RESPONDENT

MOHIDIN OMAR MOHAMED..... 5TH RESPONDENT

SAID OMAR MOHAMED..... 6TH RESPONDENT

MANTHURA OMAR MOHAMED..... 7TH RESPONDENT

UMI OMAR MOHAMED..... 8TH RESPONDENT

TEBA OMAR MOHAMED..... 9TH RESPONDENT

HAFSWA OMAR MOHAMED..... 10TH RESPONDENT

KHADIJA OMAR MOHAMED..... 11TH RESPONDENT

RULING

1. The deceased to whose estate the proceedings herein relate is Mohamed Omar Mohamed Hatimy, who died on 4.11.00 at Al Noor Specialist Hospital, Makkah, Sausi Arabia. The deceased died intestate and was survived by six sons and five daughters, the Respondents herein. Grant of Letters of Administration in respect of the estate of the deceased was issued to the Public Trustee on 12.1.06.

2. On 17.5.06, the Public Trustee filed the Originating Summons herein seeking determination as to whether the Public Trustee can approve the sale of and transfer of some properties forming part of the estate of the deceased to the 1st and 2nd Respondents as follows:

- a) Title No. Mombasa/Block XVII/721 to the 1st Respondent;
- b) Title No. Mombasa/Block XVII/502 to the 2nd Respondent;
- c) Title No. Malindi/402 to the 1st and 2nd Respondent;

3. In a Ruling delivered on 29.11.10, Ibrahim, J (as he then was) found that the Public Trustee was biased in favour of the 1st and 2nd Respondents to the prejudice of the interests of majority of the other beneficiaries who are in the majority. In dismissing the Originating Summons the Court held that the Public Trustee was “in clear breach of his obligation and duty to act fairly and impartially and is not entitled to prosecute the application. The Court must stop this abuse of power and duties”.

4. The 1st Respondent/Applicant filed the instant Application seeking review of the said Ruling of Ibrahim, J., on the ground that there was an error apparent on the face of the record. The 1st Respondent/Applicant claims that the learned Judge erroneously found that the Public Trustee was biased and that he did not consider the material evidence placed before him. That the learned Judge at the hearing directed that he be addressed on points of law and that he disregarded material facts including the sale agreements between the 1st and 2nd Respondents and the deceased.

5. On the learned Judge’s finding that there was apparent bias on the part of the Public Trustee who ought not to have made a value judgement on the validity and enforceability of the sale agreements, it was submitted for the 1st Respondent/Applicant that the Public Trustee was not biased. It was argued that the record is clear that there were duly executed sale agreements between the deceased and the 1st and 2nd Respondents. That due consideration was paid and that ownership of the said properties passed to the 1st and 2nd Respondents. That the Public Trustee exercised his powers in accordance with the wishes of the parties to the sale agreements and was therefore not biased. The 1st Respondent/Applicant cited Civil Appeal No. 211 of 1996, National Bank of Kenya versus Ndungu Njau to buttress his submission.

6. It was further submitted for the 1st Respondent/Applicant that the learned Judge disregarded the parties’ submissions on facts and ruled on points of law only thereby denying the parties a chance to argue the case on factual and evidential material necessary in the circumstances of the case. It is the 1st Respondent/Applicant’s submission that there was an error apparent on the face of the record thus warranting a review of the Ruling.

7. For the 5th, 8th, 10th and 11th Respondents, it was submitted that there is no error on the face of the record. That the learned Judge had considered the Public Trustee as custodian of the estate of the deceased. That the learned Judge had found that the Public Trustee was biased by siding with two beneficiaries and could therefore not undertake his work impartially. It was further argued that the Ruling is not amenable to review as there is no error apparent on the record. The case of National Bank of Kenya versus Ndungu Njau Civil Appeal No. 211 of 1996, was cited to buttress the submissions.

8. For the 6th, 7th and 9th Respondents, it was submitted that the application does not disclose any error apparent on the face of the record. That the threshold for review has not therefore been met and they prayed that the Application being devoid of merit be dismissed with costs to the Respondents.

9. I have considered the Application as well as the submissions by counsel on behalf of the parties. The grounds upon which an application for review ought to be based are clearly set out in Order 45 Rule 1(1) of the Civil Procedure Rules which provides:

“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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

10. The Application for review herein is grounded on what the 1st Respondent/Applicant claims to be an error apparent on the face of the record. The error he claims is apparent on the face of the record, is that having directed at the hearing that he be addressed on points of law, the learned Judge had disregarded material facts including the sale agreements between the 1st and 2nd Respondents and the deceased. The learned Judge also erroneously found that the Public Trustee was biased.

11. In Anthony Gachara Ayub v Francis Mahinda Thinwa [2014] eKLR the Court of Appeal had this to say concerning error on the face of the record:

“In the case of Draft and Develop Engineers Limited – v- National Water Conservation and Pipeline Corporation, Civil Case No. 11 of 2011, the High Court correctly stated that:

“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 opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record... ”.

12. There is no error on a substantial point of law herein where there could reasonably be no two opinions. The alleged error is one which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions. This can hardly be said to be an error apparent on the face of the record.

13. This reasoning is also found in National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR cited by the 1st Respondent/Applicant and 5th, 8th, 10th, and 11th Respondents, Kwach R.O, Akiwumi A. M & Pall G. S, JJA stated:-

“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.”

14. In the instant case, the error referred to by the 1st Respondent/Applicant would require an elaborate argument to be established. The alleged misapprehension or disregard by the judge of the facts cannot be a ground for review.

15. The court of Appeal went on to state:

“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”.

16. It is the view of this Court that the matters in dispute herein were fully canvassed before the learned Judge who then made a conscious decision on the matters in controversy. For this Court to be asked to review the Ruling by looking at the facts herein as proposed by the 1st Respondent/Applicant would be tantamount to sitting in appeal on a decision of a judge of coordinate jurisdiction which is not permissible in law. Asking this review Court to go into the evidence, evaluate and analyse the same is not for a review court but an appellate court.

17. In the result I find that the Applicant has not demonstrated to this Court sufficient grounds to warrant the review of the ruling of Ibrahim, J. delivered on 29.11.10. Consequently, the Application dated 3.11.11 is hereby dismissed. This being a family matter, there shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 16th June, 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the 1st Respondent/Applicant**

..... **for the 2nd Respondent**

..... **for the 5th, 8th, 10th and 11th Respondents**

..... **for the 3rd, 6th, 7th and 9th Respondents**

..... **Court Assistant**