REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 1028 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE MAGENDA GICHANE-DECEASED

Priscillah Waigumo Magenda & Others........…………………......................Petitioners

Versus

Sarah Wanjiku Nyaguthii & 2 Others …………..………................................Respondent

RULING

On 24th September 2015, this honourable court allowed the application dated 14th September 2015 filed by **Sarah Wanjiku Nyaguthii** and granted temporary orders that the Manger, Gathuthi Tea Factory be retrained from releasing the proceeds of Tea sale of the applicants herein (then respondents in the said application) being tea growers numbers **44, 14** and **49** respectively for **45** days pending *inter partes* hearing on 12th November 2015. The court directed that the said application be served upon the applicants for *inter partes* hearing on the said date and on 12th November 2015, the applicants in the present application though served did not attend court. The affidavit of service filed on 17th October confirmed they had all been served and the court was satisfied that they were duly served and proceeded to hear the application their absence not withstanding as the law provides and allowed the application dated 14th July 2015 in terms of prayers **1** and **2** of the said application, thus essentially confirming the interim orders made earlier. The court ordered that the said orders are do remain in force until the grant herein is confirmed. The applicants now seek to "*Review, rescind, lift, vary and or set aside the said orders."*

Interestingly the applicants do not dispute that they were served with the application in question. Curiously, there is no explanation why they did not attend court on the date the said application came up for hearing. The law allows a party to proceed *ex- parte* if the opposite party is properly served and does not attend and the court is satisfied that service was effected. To set aside an *ex- parte* order, the applicant is required to satisfy the court that the orders in question were granted irregularly and also explain the reasons for failing to attend court or offer such grounds as may be reasonably necessary to enable the court to set aside or vary the orders in question. I am afraid, the applicants have not disputed service nor have they explained why they did not attend court nor have they alleged or proved that the orders were granted irregularly or ought not to have been granted at all. The applicants have no alleged or proved that had they been present, the outcome of the application could have been different.

The applicant also seeks to review the orders in question. The provisions of the Civil Procedure Act[1] and the Civil Procedure Rules apply, and the probate court exercises jurisdiction under them, only to such extent as may be allowed by the Law of Succession Act[2] and the Probate and Administration Rules.[3]

Clearly, Order **45** relating to review is one of the Civil Procedure Rules imported into succession practice

by Rule **63** of the Probate and Administration Rules.[4] However, the application must meet the substantive requirements of an application brought for review set out in Order **45** of the Civil Procedure Rules.[5] Thus, the crucial issue that falls for determination is whether or not the application meets the threshold laid down under Order 45 of the Civil Procedure Rules, 2010 to warrant this court to allow it.

This necessitates a close examination of Order **45** Rule **1** of the Civil Procedure Rules, 2010. The said rule in my view restricts the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds; **(a)** discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; **(b)** on account of some mistake or error apparent on the face of the record, or **(c)** for any other *sufficient reason* and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

I also find useful guidance in the decision of **Kwach, Lakha** and **O'kubasu JJA** in the case of *Tokesi Mambili and others vs Simion Litsanga*[6] where they held as follows:-

i. *In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added).*

I find nothing in the material presented before me to show that there has been discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicants at the time the orders in question were made. Further, there is nothing to show that there is an error on the face on the record of the court which warrants to be corrected by this court. I am not persuaded that the reasons offered amount to *'sufficient reason'* within the meaning of the rules cited above.

In conclusion, I find that no new matter or evidence has been brought out which is completely new and was not within the knowledge of the applicants or could not have come to their knowledge even after exercising due diligence nor am I persuaded that sufficient cause has been shown to warrant this court to review the orders in question and the application dated 18th April 2016 lacks merits and the same cannot succeed.

However, I realize the need and urgency to bring this succession cause to a close so as to effectively determine the dispute between the parties and in this regard I order as follows:-

a. ***That*** *the application dated 18th April 2016 be and is hereby dismissed with no orders as to costs.*

b. ***That*** *the application for confirmation of letters of administration dated 24th March 2016 be listed for hearing within* ***60 days from the date of this ruling****.*

c. ***That*** *any party desiring to oppose the said application is hereby ordered to file and serve his/her affidavit of protest* ***within 14 days*** *from the date of this ruling.*

d. *No orders as to costs.*

Right of appeal **30** days

Signed, Delivered and dated at Nyeri this **16th** day of **June** 2016

John M. Mativo

Judge

[1] Supra

[2] Ibid

[3] Supra Note 12

[4] See W. M. Musyoka, Law of Succession, law Africa, at page 191.

[5] Ibid, at page 191

[6]C A 90 of 2001 – Kisumu