



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI
MILIMANI LAW COURTS - FAMILY DIVISION
SUCCESSION CAUSE NO. 407 OF 1997

IN THE MATTER OF THE ESTATE OF LAZARO KINUTHIA ICHIGO (DECEASED)

BETWEEN

JOHN GICHUHI KINUTHIA 1ST APPLICANT
PATRICK KAGOIYA KINUTHIA 2ND APPLICANT
MARY WANYUA ICHIGO 3RD APPLICANT

RULING

INTRODUCTION

The facts giving rise to the present Application are largely undisputed. On 6th July, 2015, this Court made certain orders whose effect was rectifying the Grant of Confirmation dated 29th January, 2013, pertaining to the deceased's Estate. Aggrieved by the said decision, the Applicants have filed the present Summons Application dated 5th March, 2015 seeking to have the same reviewed. The Applicants seek the following orders:

(1) ...

(2) *That this Honourable Court be pleased to stay the orders made on 6th February, 2015.*

(3) *That this Honourable Court be pleased to set aside and/or review its orders issued on 6th February, 2015.*

THE APPLICANTS' CASE

In his Affidavit sworn on 5th March, 2015, in support of the Application, the Applicant stated that in rectifying the Grant and re-distribution the Estate, the Court did not sufficiently cater for the interests of all other beneficiaries and that the parcel of land known as Plot No. 28 Limuru town was ordered to be surveyed within 30 days of the Judgment, sold and the resulting proceeds distributed equally within amongst the following eight daughters of the deceased, namely,

(1) Mary Wangari Kihika

- (2) Mary Wairimu
- (3) Teresia Mukuhi
- (4) The children of Rosemary Mukhui
- (5) Rahab Njeri
- (6) Margaret Njeri Njenga
- (7) Veronica Wambui Ichigo
- (8) Jane Wairimu Kimani.

Accordingly, that in ordering the subdivision and sale of the property among the beneficiaries, the Court did not take into account the fact that other beneficiaries may not be sufficiently taken care of given that the said parcel of land may have been valued prior to the issuance of the Court order and as such, if the valuation of the plot is not done prior to the re-distribution as directed, some beneficiaries may end benefiting more than others.

The Applicants contended further that that if the said orders are not stayed and set aside, they together with other beneficiaries stand to suffer immensely as the plot will be subdivided and sold without ascertaining the correct value of what each of the beneficiaries will get in distribution.

In his Further Affidavit sworn on 6th June, 2016, the 1st Applicant stated that the Court ordered that the plot be sold and distributed amongst eight daughters of the deceased whereas only four daughters had not been catered for in the initial grant and further that the Court also directed that land parcel No. Kijabe/Kijabe Block 1/2379 be distributed equally among the eight sons of the deceased without naming them and therefore creating confusion.

DETERMINATION

The key issue for determination is whether this Court should set aside or review its Orders made on 6th February, 2015. In that regard, this Court is vested with the powers to review and/or set aside its orders when the circumstances justify.

Order 45 Rule 1 of the **Civil Procedure Rules** grants this Court the powers to review its decision in the following terms:

(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.

(2) ...

The present Application is largely uncontested. The key ground invoked by the Applicants is that there is

an error apparent on the face of the record. The key grievance of the Applicants being that the distribution ordered by the Court left out some of the beneficiaries and that some of the beneficiaries were not sufficiently catered for. On that basis, the Applicants argued that there is an error apparent on the face of the record. In that regard, there is no definition of the phrase ‘error apparent on the face of the record’ but I can do no better than to reiterate the holding in the case of **DRAFT AND DEVELOP ENGINEERS LIMITED VS NATIONAL WATER CONSERVATION AND PIPELINE CORPORATION, CIVIL CASE NO. 11 OF 2011**, where the High Court 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. 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”.

Similarly, in **NATIONAL BANK OF KENYA LIMITED VS NDUNGU NJAU, CIVIL APPEAL NO. 211 OF 1996 (UNREPORTED)** it was stated that:

“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. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More 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 ground for review.”

“... 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.”

The Court is duty-bound to examine the context of each case in order to determine whether it is a mere erroneous decision or an error apparent on the record.

In the circumstances of this case, this Court, in its Judgment of 6th July, 2015, rendered the position thus:

“Taking the above provisions of the law into consideration, the Court finds that the Applicant [Mary Wangari Kihika] and four of her sisters, whose mother (who predeceased the deceased) was married to the deceased under a system of law that permits polygamy, are entitled to the net intestate estate as one house comprising five units. This is supported by the fact that the Respondents do not contest that these are the daughters of the deceased. The Court also finds that the Applicant and her sisters did not receive any previous gifts or benefits from the suit estate prior to the deceased’s death. In contrast, the Respondents and other dependants, on their own admission and on the strength of the evidence on the Court’s record, received portions of that parcel of land known as Limuru Plot No. 28. This property as well as other properties from which the Respondents and other dependants have been drawing rental income and other benefits needs to be taken into account in determining the share of the net intestate estate...”

Among the orders that this Court granted included:

“(b) The Court order of 29th January, 2013 by Kimaru J. is amended in light of new facts that have since come to light, in particular, the exclusion of the family of the Applicant from benefiting from the deceased’s estate. This was due to the failure by the Respondents to disclose to the Court the fact that they are children of the deceased. That order is hereby amended to include the family of the Applicant as beneficiaries of the deceased’s estate.

(d)The parcel of land known as Plot No. 28 Limuru Town shall be surveyed within 30 days of this judgment, sold and the resulting proceeds distributed equally among the following eight daughters of the deceased;

- 1) Mary Wangari Kihika***
- 2) Mary Wairimu***
- 3) Teresia Mukuhi***
- 4) The children of Rosemary Mukuhi (deceased)***
- 5) Rahab Njeri***
- 6) Margaret Njeri Njenga***
- 7) Veronica Wambui Gichigo***
- 8) Jane Wairimu Gichigo”***

On 28th June 2016 Mr. Wachira learned Counsel for the Applicants informed this Court that the application filed and argued that culminated to this Court's judgment of 6th February 2015 was based on concealed facts and fabricated facts that the Applicants were children of another wife of the deceased who was not disclosed and the Applicants as her children were not consulted and their consents obtained in these Succession proceedings. The truth was and is that the Applicants had not been left out of these proceedings and they are daughters of the deceased in the various houses of the deceased.

On the hearing date Counsel for the Applicants paraded and identified each member of the family and wrote down their names a copy of the list was given to this court and forms part of the Court record.

Based on the materials, now before this Court, it is in the interest of justice that the above judgment be reviewed, as the Court is now apprised of the true facts of the matter. The Court notes that there is an error apparent on the face of the record as to the fact that there was misrepresentation to the Court, by Mary Wangari Kihika, in regard to the daughters entitled to shares in the property known as Plot No. 28 Limuru Town. Mary Wangari Kihika, in her Application, had misrepresented to the Court that she, together with her sisters, were members of a separate house.

The Court is thus satisfied that the Applicants have made out a case to warrant a review pursuant to **Order 45 of the Civil Procedure Rules.**

DISPOSITION

In light of the above findings:

- 1) The Court reinstates the orders of 29th January, 2013 by Hon. Justice Kimaru which were to the effect that Plot No. 28 Limuru Town is to be valued and sold and the proceeds to be distributed equally among the sons as listed in the Court proceedings and orders and include**

the three daughters, Margaret Njeri Njenga, Veronica Wambui Gichigo and Jane Wairimu Gichigo.

2) This Court sets aside the Judgment of 6th February 2015 as it was based on concealed material facts that have been clarified and rectified.

3) Let each Party bear its own costs to this Application.

DATED AT NAIROBI THIS 31ST DAY OF OCTOBER, 2016

M. W. MUIGAI

JUDGE

In presence of:-

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