REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 133 OF 1998

IN THE MATTER OF THE ESTATE OF JOHANA TATEI KAGIKI (DECEASED)

ABIGAEL WANJIRU TATEI…......…....…….……………………APPLICANT

VERSUS

1. **MARGARET NJERI WANJIKU**
2. **DAVID MWANGI TATEI…………...........…………….….RESPONDENTS**

RULING

The deceased, Johana Tatei Kagiki died on 20th August, 1981 at the age of 80; at the time of his demise, he was domiciled in Kenya and resided in the then Murang'a District.

A certificate of confirmation grant dated 3rd June, 2010 shows that grant of letters of administration intestate for the deceased's estate was made to the respondents.

The record shows that prior to its confirmation, the applicant protested against the confirmation of the grant. The protest was scheduled to be heard on 3rd June, 2010. On the material day, Mr Kimani for the protestor told the court that the protestor was sick and senile while her son who was her key witness was held at King'ong'o prison as a murder suspect. Mr. Mbuthia for the petitioners opposed the application for adjournment on the ground that the protestor's counsel had been served early enough to prepare for the prosecution of the protest.

For the reasons given in its ruling, this court (Sergon, J) rejected the application for adjournment and directed the matter to proceed for hearing as earlier scheduled. Since the protestor's counsel did not have witness to call, counsel for petitioners applied to have the protest dismissed and the grant confirmed. The court allowed the application, dismissed the protest and confirmed the grant.

By a summons in general form dated 1st July, 2010 and filed in court the same date, the protestor sought for review of the order dismissing the protest and confirming the grant and also sought for reinstatement of the protest against the confirmation of grant. The summons is stated to have been brought under **rules 49, 63(1) and 73** of the **Probate and Administration Rules**.

It is this summons that is the subject of this ruling.

In the affidavit sworn in support of the summons, the applicant deposed that she was aged 95 and that she was in court on the material day. She also said that she had other witnesses at home but who were ready to testify on her behalf; as for her son who was also one of her witnesses, he was alleged to be in custody

at King'ong'o prison.

The applicant also deposed that she was not aware of what transpired in court on 3rd June, 2010 when her protest came up for hearing and that it is only later that she learnt that it had been dismissed. She faulted her advocate who was then on record for the dismissal of the protest.

The petitioners opposed the application and filed a replying affidavit in that regard on 22nd December, 2010; they asked the court to consider that as at the time the protest was dismissed and the grant confirmed, the cause had been in court for 28 years and it is only meet and just that litigation must come to an end.

Altough the summons was filed way back in 2010, it is only in July, 2014 that parties took directions on its hearing; they agreed to have the summons disposed of by way of written submissions and directions were taken accordingly.

Rule 63 of the **Probate and Administration Rules** which the applicant invoked allows the application of **Order XLIV** of the **Civil Procedure Rules (now Order 45 of the Civil Procedure Rules 2010)** in proceedings initiated under the Probate and Administration Rules. This means that applications for review can be made in succession causes the same way they are made in civil proceedings initiated under the civil procedure rules; in the same breath, an application for review of an order or decree in a succession cause is subject to the same threshold to a similar application made in the context of the civil proceedings under the Civil procedure Act and the rules thereunder. It follows that an applicant for review of an order made in succession proceedings must satisfy the conditions for such review as prescribed by **Order 45** of the **Civil Procedure Rules.** That order states:-

> ***1. (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.***

According to this rule the conditions or the grounds upon which an application for review may be made are:-

a) a discovery of a new and important matter of evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the material time; or

b) there is a mistake or error apparent on the face of the record; or

c) for any other sufficient reason.

Any of the three grounds is sufficient for an application for review by an applicant who considers himself aggrieved by a decree or order.

The pertinent question, therefore, is whether the applicant has demonstrated in her summons any of the forgoing grounds as to warrant an order for review of the order made on 3rd June, 2010. To answer this question it is necessary to consider the grounds upon which the summons is said to be based; these grounds have been outlined on the face of the summons as follows:-

"1. The applicant's affidavit of protest to the confirmation of grant was dismissed on 3rd June, 2010 because she did not adduce evidence to support her case.

2. That as a result, the Honourable Court confirmed the grant as per the summons for confirmation of grant filed by the deceased respondent.

3. That the applicant herein was in court on that day but her advocates failed her terribly.

4. That in view of the age and ill-health of the applicant, the advocates should have asked the court to rely on her evidence in the affidavit of protest if she was unable to testify or to call any other evidence.

5. That the effect of the order is to deprive the applicant of her husband's only asset and vest it on a stranger.

6. That in the interest of justice the Honourable Court should set aside its orders and reinstate her affidavit of protest for the same to be considered before the grant is confirmed."

The affidavit in support of the summons reiterates the same grounds though it also appears to argue the protest and contest the distribution of the estate.

It is apparent from these grounds that there is no suggestion that after the order was made there was a discovery of a new and important matter of evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by her at the time the order was made; neither is there any claim of a mistake or error apparent on the face of the record.

The only other ground that the court is left to grapple with is whether, in the absence of the first two grounds, there is any other sufficient reason that would justify the review of this court's order.

The first three grounds upon which the summons is stated to be based merely narrate the historical background of the summons; in the fourth ground, the applicant states what her counsel should have done but which apparently he did not do. I understand her to be questioning his competence and in her view, he ought to have asked the court to determine her protest on the basis of her affidavit of protest on record, now that she could not testify.

Regardless of whether the applicant's counsel was competent or not, the record shows that on 12th July, 2006, parties agreed to have the protest disposed of by way of oral evidence and an order was issued to that effect; as at 3rd June, 2010 when it came up for hearing, that order had neither been varied nor set aside and no attempt had been made to either vary it or set is aside, for whatever reason. To ask the court to rely on the affidavit on record as the applicant suggests would have been contrary to the directions given on the hearing of the protest.

The applicant laments in the fifth ground that the effect of the order dismissing the protest and confirming the grant was to disinherit her and so for the sake of justice, so I understand her, she proceeds to argue in the sixth ground that it is only fair that the court should vacate the dismissal order and reinstate her affidavit of protest.

I understand these two grounds to be questioning the legal validity of the dismissal order rather seeking to review it on any of the grounds known in law. If I am correct then the proper course the applicant ought to have assumed is to lodge an appeal in the Court of Appeal which only could determine the kind of question that the applicant has posed; it is not a question that can properly be resolved through an application for review under **Order 45** (then **Order XLIV**) of the **Civil Procedure Rules**. Again I take it that, going by the reasons given for the impugned order, the learned judge must have considered the circumstances of the case and the applicable law; it is not enough that I may probably adopt a position different from that adopted by my learned brother. The Court of Appeal deliberated on this point in **National Bank of Kenya Ltd versus Njau (1995-1998) 2EA 249 (CAK)**; at page 253 of the judgment,

the Court said:-

> ***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 of 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 the law cannot be a ground for review. (Underlining mine)***

In view of the law that I have attempted to set out including the decision I have cited, it is apparent that apart from the absence of anything to demonstrate that fresh evidence has been discovered or that there is an error on that face of the record there is also nothing to suggest that any other sufficient reason exists that would merit a review of the order made on 3rd June, 2010. Where no ground for review exists, as is the case here, I can do no better than fall back on **subrule 3(1)** of **Order 45** that enjoins the court to dismiss the application for review in such circumstances; for clarity purposes, that subrule states:-

> ***3. (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.***

Though it may not make any difference, I must mention here that besides being deficient on merits the summons itself was incompetent from the very outset. Having invoked **Order 45** of the **Civil Procedure Rules** the applicant ought to have gone the full hog and exhibited in her summons the order she sought to be reviewed; she didn't and this omission is fatal to an application for review. In **Gulamhussein Mulla Jivanji & Another versus Ebrahim Mulla Jivanji & Another 1929-1930 KLR (Vol XII) 41** at pages 44-45 the Court of Appeal for Eastern Africa addressed this issue and said (per Pickering C.J):-

> ***Apart from any consideration whether the course adopted by the learned Judge in relation to the ex parte order of the 8th July, 1930, was or was not well founded, the question emerges as to the precise character of the grievance which must be experienced by a person applying for a review of judgment under Order XLII. A person applying for a review under that Order must be "aggrieved by a decree or order." The words "decree" and "order" are here used in the sense set out in the definitions in section 2 of the Civil Procedure Ordinance. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should be for review of the judgment upon which it is based. But, in my opinion, however aggrieved a person may be at the various expressions contained in a judgment or even at the various rulings embodied therein, unless that person is aggrieved at the formal decree or the formal order based upon judgment as a whole, that person cannot under Order XLII appear before the Judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The ratio decidendi expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to the suit. In these proceedings no resultant decree on the 29th August, 1930, had yet come into existence. Indeed no attempt to draw up any has yet been made. It is the duty of a party who wishes to appeal against, or apply for review of a decree or order to move the Court to draw up and issue the formal decree or order. (Underlying mine)***

It follows that from whichever angle one looks at the applicant's summons, it was destined to fail; I would, accordingly, dismiss the summons dated 1st July, 2010. Parties will bear their own costs. Orders accordingly.

Dated, signed and delivered in open court this 31st July, 2015

Ngaah Jairus

JUDGE