

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1327 OF 2010

IN THE MATTER OF THE ESTATE OF BRYAN WALTER SHEPARD (DECEASED)

RULING

1. The Motion dated 9th September 2014 is for review of orders made by Kimaru J. on a judgment delivered on 5th April 2014. It also seeks stay of the said judgment.
2. In the judgment, the court allowed an application for reasonable provision out of the estate of the deceased under Section 26 of the Law of Succession Act, Cap 160, Laws of Kenya. In exercise of the discretion extended to it by Section 27 of the Act, the court ordered payment of a lump sum of Kshs. 50,000,000.00 to the respondent in the instant application by the applicant out of the estate of the deceased.
3. The applicant herein argues that there is an error apparent on the face of the record in the sense that the estate of the deceased was not so valuable or vast to the extent of paying the amount of Kshs. 50,000,000.00 to the respondent. She argues that it was erroneous for the court to estimate that the estate was worth Kshs. 1,000,000,000.00 or thereabout. She has endeavoured in her affidavit to demonstrate that the estate is not worth that much, for some of the assets listed in the schedule did not belong to the deceased as at the date of his death.
4. On her part, the respondent has cited various assets of high value to demonstrate that the estate can absorb the payment ordered of Kshs. 50,000,000.00. In any event, she argues, this court is being invited to sit on appeal on its own determination of 5th April 2014.
5. The Motion is premised on Order 45(e) of the Civil Procedure Rules, which purportedly provides for review of orders and decrees of the court. The review provisions in the Civil Procedure Rules are among the provisions of that legislation that have been imported into probate practice by Rule 63 of the Probate and Administration Rules.
6. Review premised on Order 45 rule 1 can be grounded on either errors apparent on the face of the record, discovery of new and important matter, that was not available at the time of the trial or any other sufficient reason. The applicant grounds her application on error or mistake apparent on the face of the record.
7. The error that she allegedly identifies is the opinion of the court that the value of the estate was in the region of Kshs. 1,000,000,000.00. She argues that the estate was worth much less. She, however, has not gone on to demonstrate the worth of the assets that she says form the bulk of the estate. All she has done is to remove certain items from the schedule of assets on the grounds that they no longer form part of the estate for various reasons, and explain that value of other assets is unknown on account of her having written to the persons or entities holding the assets and failing to get replies from them.
8. For the purpose of determining applications founded on Section 26 of the Act, the court is enjoined to take into account the circumstances set out in Section 28 of the Act. These include the nature and amount of the deceased's property. This is what Koome J. in *In the matter of the Estate of James Ngengi Muigai Nairobi HCSC No. 523 of 1996*. referred to as the vastness or extent of the estate.

9. The respondent in her affidavit sworn on 21st January 2011 in support of her application under Section 26 of even date, put the value or extent or worth of the estate of the deceased at Kshs. 1,000,000,000.00. The applicant in her affidavit in reply sworn on 13th May 2011, did not respond at all to paragraph 16 of the respondent's affidavit which had raised or addressed the issue of the worth of the estate. She did not in her entire reply say anything at all about the total value of the estate yet, for applications under Section 26 of the Act, the value or worth of the estate was critical. In fact, it is the one most significant factors for the court to consider. The applicant did not place any figure before the court and the court had no option but to work with the figure presented to it by the respondent.

10. To my mind, the applicant has not demonstrated that there is an error apparent on the face of the record to bring this matter within the ambit of Order 45 rule 1 of the Civil Procedure Rules. I do not find basis upon which I can grant the orders sought in the application dated 9th September 2014. I find the application to be without merit. The same is hereby dismissed. The respondent shall have the costs. The temporary stay orders made on 11th September 2014 are accordingly discharged. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF SEPTEMBER, 2015.

W. MUSYOKA

JUDGE