



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 989 OF 1994

AND

IN THE MATTER OF THE ESTATE OF PHILISILAH WAMBAKI KIGURU (DECEASED)

MARGARET NG'ENDO.....APPLICANT

-VERSUS-

FRANCIS MBURU ROBI.....RESPONDENT

RULING

1. This application is brought by Summons dated 28th February, 2012 and is taken under **Section 47** of the Law of Succession Act and Rules 45, 49, 73 of the Probate and Administration Rules and all other enabling provisions of the law. In it the Applicant seeks two principal orders - that the Orders made on the 23rd December 1998 and issued on 29th December 1998 and all consequential orders there from be set aside and/or be reviewed forthwith and that all persons intermeddling with the deceased's properties namely, Ruiru/Ruiru East Block 2/4960, 908, 909 and 469 be evicted.
2. The application is supported by the annexed affidavit of Margaret Ngendo Wambaki, the Applicant herein, sworn on 28th February, 2012 and is based on the grounds specified therein. The salient grounds are that the grant in the cause has been confirmed after the court heard the parties; that the confirmed grant cannot be executed due to fraudulent activities of one of the Administrators, namely Teresia Wanjiku Wambaka, and that appropriate orders need to be made by this court to ensure that the terms of the confirmed grant are fulfilled.
3. Opposing the application, the Respondent filed a replying affidavit sworn on 16th May, 2012. In that affidavit the deponent contends that the application does not lie and is an afterthought since the applicant knew that he got the property through the right legal channel; that the said Applicant was all aware that the property LR. No. Ruiru East Block 2/4960 had been sold to him through a court order and it was part of the applicant's evidence before Koome J; that he does not own the properties described in paragraph 4 as LR. No. Ruiru/Ruiru East Block 2/908, 909 and 469 and that he does not know the owners. He further avers that the contents of paragraphs 5, 6, 7, 8, 9, 10 and 11(a) to (e) are sensational statements meant only to ridicule and embarrass the judges who were involved in the legal process that saw him get a title after rescuing a daughter of the deceased whose children were held in a hospital after discharge on account of medical bills.
4. Counsel for the respective parties filed their written submissions. The applicant filed in her

submission on 17th May, 2012 and the Respondent filed his submission on 1st October, 2012. The Applicant submitted that the application dated 23rd December, 1998 sought to dispose of a capital asset, and capital assets in succession proceedings can only be distributed/sold in intestacy once the parties either consent or in dispute, they have been heard and a ruling/judgment made; that the Judge being aware that the petition was contentious could not have ordered the property to be disposed of without hearing all the parties involved including the protestor; further that the petitioner's counsel deliberately misled the Judge by informing him that the petitioner was the daughter and only child of the deceased which he knew to be untrue as the deceased had other dependants ; it was her submission that the court had on 30th November, 1998 ordered that the issue of distribution of the estate be resolved by way of viva voce evidence, and that the counsel for the petitioner deliberately failed to bring this information to the Court's attention when he sought to have the orders of 29th December, 1998; she contends that the orders were obtained fraudulently by making false statements and by concealing from the court material information, she submitted that the Orders were obtained un procedurally, and that the petitioner had also quietly sold other part of the estate to third parties to the detriment of the protestor.

5. On his part the Respondent, submitted that the application for review is supposed to be made without any undue delay but the Summons dated 28th February, 2012 were filed after 13 years, and that the same should be dismissed for the unexplained delay; he contended that the applicant complains of fraudulent activities of one of the administrators but the respondent is an interested party not an administrator. He submitted that fraud is a criminal act which is the preserve of criminal court not a succession cause; further that the eviction orders being sought are never available in a succession cause and in any event the applicant has failed to annex any evidence to show that those properties mentioned in prayer 3 of the Summons form part of the estate and who occupies those properties; that the affidavit of Margaret Ngendo does not annex any document to demonstrate that any of her children are in any school or college and that it contains mere averments. Further, he submitted that there is nothing to review since the Honourable Court sanctioned the sale of L.R. Ruiru/Ruiru/East Block 2/4960 and in her Judgment Hon. Lady Justice Koome noted that the sale was indeed done through a court order. He contended that the application for review is premised on discovery of new evidence or mistake or error on the face of the record but the applicant has not even attempted to demonstrate new evidence and how it was discovered. It was further submitted that the application for review has failed to disclose proper provisions of law under which the review is sought and that none of the cited provisions can enable the court to review any orders. Finally, the Respondent submitted that the filing of the review application after 13 years is an abuse of the court process.
6. After having carefully considered the application, the affidavits on record and the submissions by counsel for the respective parties, I take the view that the main issue for determination is a review of the order made on 23rd December, 1998.
7. I note that the application herein was brought under **Section 47** of the Law of Succession Act and Rules 45, 49, 73 of the Probate and Administration Rules. The said **Section 47** of the Law of Succession Act invokes the jurisdiction of the Court to entertain any application and determine any dispute under the Act. However, Rule 45 of the Probate and Administration Rules deals with applications under **Section 26** of the Act which in essence deal with provision for dependants not adequately provided for by will or on intestacy. Further, Rule 49 provides that:

“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a Summons supported if necessary by affidavit.”

8. The above cited provisions of the law do not deal with review of court orders. I agree with the Respondent's submission that the application for review has failed to disclose proper provisions of law under which the review is sought. What then is the fate of the application herein? Indeed, **Rule 63(1)** of the **Probate and Administration Rules** donates to this court jurisdiction to apply

the **Civil Procedure Rules** of review in succession matters. The said **Order 45 Rule 1(a)** and (b) of the **Civil Procedure Rules**, provides that:

“(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,*
 - c. *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.”*
9. In view of the above provision, this court has power to review any decree or order if there is discovery of a new and important matter of evidence which was not produced at the time the decree was passed or if there is some mistake or error apparent on the face of the record or for any sufficient reason and the application has been made without unreasonable delay.
10. I agree with the Respondent that the Applicant has not demonstrated that there was discovery of new evidence and because of that therefore, the application has failed to meet the threshold for a review. Furthermore, the law requires that application be made without unreasonable delay. I find that filing application after almost 14 years to be unreasonable delay. The applicant has not explained why it took her that long. This is clearly inordinate delay, and I fully agree with the Respondent’s submission that the application is an afterthought.
11. The upshot of the above is that this court cannot exercise its jurisdiction under **Rule 63(1)** of the **Probate and Administration Rules** in view of the Applicant’s unexplained inordinate delay. The application dated 28th February 2012 is hereby dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 21st DAY OF March, 2014.

W. MUSYOKA

JUDGE