REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 8 OF 2012

IN THE MATTER OF THE ESTATE OF SAID RAJAB (DECEASED)

BETWEEN

SALLEH KIBET SAID.....1ST PETITIONER/RESPONDENT

ISAAC MELLY.....2ND PETIIONER/RESPONDENT

VERSUS

IDD KIPKORIR SAID.....OBJECTOR/APPLICANT

RULING

The Objector herein Idd Kipkorir Said has moved the court to review its ruling delivered on 2nd May, 2013. The application dated 17th May, 2013 is brought under Order 45 Rule 1 of the Civil Procedure Rules, 2010 read with Rules 63 (1) and 73 of the Probate and Administration Rules, Chapter 160 of the Laws of Kenya.

Upon reviewing the said ruling, the Applicant asks the court to reinstate for hearing Summons for Revocations of Grant dated 28th February, 2012.

The main grounds upon which the application is brought is that at the time the ruling of 2nd May, 2013 was delivered, the court indicated that the Objector had not filed his submissions, a position that was not true. According to the Applicant, he filed his submissions on 15th January, 2013 and it is not clear how his submissions were removed from the court file. This mischief stood to benefit the Petitioners only.

The Applicant further argues that no amount of consent of the parties can give a court jurisdiction when the court had no jurisdiction in the first place as the Honourable Kadhi did by alienating capital asset (land) in the absence of a confirmed grant.

He argues that a grant cannot issue in a civil suit when the formal process to procure the grant has been commenced.

And finally, it is the Applicant's view that there is an error apparent on the face of the record that requires to be reviewed.

The Application is supported by the Affidavit of the Applicant, Iddi Kipkorir Said sworn on 17th May, 2013 which emphasizes the issues raised by the grounds in support of the application.

In opposing the application, the 1st Petitioner Swaleh Kibet Said swore a Replying Affidavit on 20th September, 2013. The same was filed on 23rd September 2013.

In a nutshell, the Petitioner argued that, whether or not the Objector's submissions were not in the court file at the time of writing the ruling, did not affect the outcome of the said ruling as was noted by the presiding Judge, thus;

> ***"As I write this ruling, I have not yet been furnished with any written submissions filed on behalf of the Objector. However, the lack of the same does not in any way affect the outcome of the ruling as the affidavits in support of and opposition to the application suffice in enabling me arrive at an informed decision."***

As such, the Applicant has not demonstrated that there is an error on the face of the record to warrant the review of the ruling. In any case, the issues at hand for determination in that ruling were legal and not factual, which regard the presiding judge gave to and addressed.

The Petitioners also argue that the Objector benefited from the alleged fraudulent grant which was entered by consent of the parties including himself and his application is thus baseless. They urge the court to dismiss the same.

In the oral submissions made before me on 17th March, 2014, learned counsel for the Applicant, Mr. C. F. Otieno submitted that he filed written submissions on 15th January, 2013 and it is possible that someone deliberately plucked them from the court file. A copy of the filing receipt was exhibited as annexture IKS 3.

Mr. Otieno submitted that the Kadhi Court had no jurisdiction to deal with the matter before it, and in any event, the grant was issued within a civil suit. He cited Section 5 of the Kadhi's Court Act which prohibited the Kadhi from dealing with the matter before him. That, although Section 48 (2) of the Law of Succession Act was amended by Act No. 21 of 1990 providing the jurisdiction of the Kadhi's Court to extend to matters of inheritance in accordance with the Muslim Law, if this amendment is read together with sub-sections (2) and (3) of the Section 48 of the Act, then the Kadhi's Court can only deal with the distribution of an estate, but all other aspects of a grant ought to be dealt with in accordance with the Law of Succession Act.

Mr. Otieno further submitted that an appeal is not an option to the instant application taking into account that the court did not have an opportunity to consider the Objector's submissions.

Mr. Otieno cited the case of **ALLARAKHIA -VS- AGA KHAN (1969) E.A, 613 (HCT)** to emphasize that no amount of consent can confer jurisdiction to a court that had no jurisdiction to act in a matter in the first place.

Learned Counsel Mr. Chanzu submitted on behalf of the Petitioners. He submitted that the issues raised by the Objector, being legal, were Resjudicata. This is in view of the fact that the application was determined based on the applicable law.

He submitted that the Applicant had been availed two opportunities to file his submissions but had declined, and so the court had no option but to write the ruling, the absence of the Applicant's submissions notwithstanding.

Further, it was submitted that the Applicant was a direct beneficiary of the consent Order in the Kadhi's Court Case No. 3 of 1993. He was a signatory to the consent in which he benefited to the tune of Kshs 150,000/=. The property has since changed hands and any order of review made would be in vain. That therefore, the only option that lies for the Applicant is to appeal against the ruling.

In rejoinder, Mr. C. F. Otieno submitted that even if the subject property may have changed hands, the Objector/Applicant did not participate in its sale. He stated that an appeal in the Court of Appeal would

not be entertained without the submissions in the court file. He further submitted that it was irrelevant that the property had changed hands. What was important was whether the deceased's property was dealt with in accordance with the law. He refuted that the issues raised are Re-judicata. His plea is that the court should re-look at the application afresh considering that some materials were not considered as at the time the ruling was made.

Order 45 Rule 1 (1) (b) spells out the circumstances under which an order for review can be sought. It reads as follows:-

> ***" 1. (1) Any person considering himself aggrieved.***
>
> ***(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 reasonable delay."***

Rule 3 (1) of the same order on the other hand states;

> ***" Where it appears to the court that there is no sufficient ground for a review, it shall dismiss the application."***

This latter rule stipulates that the power of granting an order for review is purely discretionary. As such, a Judge must critically analyze the issues before hand before granting the order.

Under Rule 1(1) (b), any of the three factors ought to be considered; one, the discovery of new and important evidence; two, account of some mistake or error apparent on the face of the record; and three, account of any other sufficient reason.

The Applicant also cited Rules 63 (1) and 73 of the Probate and Administration Rules as being applicable to the application.

Rule 63 (1) provides for the procedure under which the application shall be filed.

Rule 73 provides for the inherent powers of the court in the words that, ***"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".*** This rule donates to the court the wide discretion to grant any orders as would be necessary in the interest of justice.

Having considered the application in its entirely together with the respective submissions, I conclude that this application is brought on account of one main ground, that is, that there is an error apparent on the face of the record. This error being that the Applicant had filed his submissions well within time, but by the time of writing the ruling, the submissions, through a mischief were plucked out from the court file. That had the court considered these submissions, it would have arrived at a different finding.

The submissions alleged to have been filed are annexed to the Supporting Affidavit of the Applicant as annexture **'1KS 2'.** They were purportedly filed on 15th January, 2013. A copy of the court filing fee receipt is marked annexture **'IKS3'.**

At page 3 of the ruling sought to be reviewed, the court noted as follows;

> ***"When parties came for directions before me, I gave orders that the application be disposed of by way of affidavits. The matter was to be canvassed on 17th December, 2012. On the 17th December, 2012 counsel for the respective parties opted, in addition to file written submissions.***

> ***It was noted that only the Petitioner's Counsel had by that morning filed the written submissions. The Objector's Counsel was to thereafter file his and both counsel were to return to court on 25th February, 2013 to highlight the submissions. On 25th February, 2013, Counsel for the Objector, Mr. Otieno informed the court that he too had filed his written submissions. Although I did not see the written submissions, I was of the impression that possibly Mr. Otieno would hand them over to the court later. As I write this ruling, I have not yet been furnished with any written submissions filed on behalf of the Objector. However, the lack of the same does not in any way affect the outcome of the ruling as the affidavits in support of and opposition to the application suffice in enabling me arrive at an informed decision. Having said so, I take the following view."***

Effectively, the decision the court came up with was majorly founded on the affidavits and annextures filed in support of, and opposition to, the application. The aspect raised by the Applicant that the Kadhi Court could not determine an issue related to inheritance in a civil suit was reflected in paragraph 2 (d) of the supporting affidavit in that application. Thus, the fact that I indicated in the ruling that I had given regard to all the issues raised in the affidavits, if I granted the orders sought, I would be sitting in an appeal against a decision of a concurrent jurisdiction. I buttress this conclusion in view of the fact that submissions are not intended to introduce facts that were not raised in the pleadings, and in this case, in the affidavits. They are intended to emphasize facts, issues and the law canvassed in the pleadings and affidavits. The Objector having already drawn to the attention of the court the fact that the Kadhi's court had no jurisdiction in the Supporting Affidavit, and the court having noted in its ruling that it had considered sufficiently the issues raised in the respective affidavits, it follows that the absence of the written submissions notwithstanding, the proper finding was arrived at by the court.

Furthermore, the Applicant has failed to demonstrate that the error on the record is glaringly open that it can be seen without having to look for it. It is not enough for the Applicant to state that he is not satisfied with the decision. He must point out the mistake that exists in the ruling that requires a review. It must be observed that the ruling was determined on points of law, and facts of law cannot change even if the application was heard over and over again.

Besides, the fact that the court did not mention the words "jurisdiction of the Kadhi's Court" in the ruling does not, per se, constitute a mistake on the face of the record. Even if the Applicant's submissions were on the file, the court would still have arrived at the same decision, as matters before that court related to issues of inheritance whose jurisdiction is conferred to the Court by Sections 2 (3) and (4), 48 (2) of the law of Succession Act and Sections 5 and 8 of the Kadhi's Courts Act, Cap 11, Laws of Kenya. Incidentally therefore, the Applicant has misconceived the interpretation of Section 5 of the Kadhi's Court's Act. What was in issue for determination was reason(s) why the grant ought to be revoked. This is well spelt out under Section 76 of the Law of Succession Act. The court gave due regard and consideration to this law in arriving at the decision it did.

And as was held by the Court of Appeal in **NATIONAL BANK OF KENYA -VS- NDUNGU (1997) e (KLR, Court of Appeal at Nairobi, Civil Appeal No. 211 of 1996** ***"misconstruing a statute or other provision of law cannot be a ground for review"***.

The Court of Appeal went on to observe that;

> ***"In the instant case the matters in dispute had been fully canvassed before 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 ….."***

In view of the above decision, I would be perturbed if the court (myself) had failed to consider the grounds on which a grant can be revoked in law vis a vis the evidence on record. And as I observed, sufficient material was already on record in the affidavits filed both in support of, and opposition to, the application which enable me arrive at a concise decision. I cannot over emphasize this fact.

Further, as was held in the case of **PETER CHESHE & ANOTHER -VS- NICON HOTELS LTD & ANOTEHR, APPEAL NO. C/A/A/83/M/98** ***".....an error on the face of the record is one that can be corrected under the slip rule whose jurisdiction is limited to correcting errors, mistakes or omissions in the ruling or Judgment and does not permit granting orders not made or extending the scope of the ruling."***

The contrary is the effect if I were to allow the orders sought. I would open up a padoras box inviting consideration for issues which would not affect the outcome of the application for revocation of the grant. The law is strict on what ought to be considered in an application of that nature, which I believe the court restricted itself to.

Moreso, the fact that the court did not rely on the Applicant's submissions does not necessarily mean that the ruling delivered by the court is a product of a mistake, omission, commission or an error in any way. The ruling was founded on facts exhibited by affidavits on record and principles of law which, in my view are within the knowledge of the court and the court is conversant and cognizant of the same. The view arrived at may be wrong and that is why the option for an aggrieved party is to appeal.

I do not therefore find the authority cited by counsel for the Applicant - **ALLARAKHIA -VS- AGA KHAN (1969) E.A, 613 (HCT)** suitable for comparison with the instant application.

In the end, the Objector's application dated 17th May, 2013 is hereby dismissed with costs to the Respondents.

DATED and **DELIVERED** at **ELDORET** this 31st day of July, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Miss Oduor holding brief for C. F. Otieno for the Objector/Applicant

Mr. Z. K. Yego Advocate for the Petitioners/Respondents