REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.113 OF 1995

IN THE MATTER OF THE ESTATE OF ELIUD NGICHU GITHIRE (DECEASED)

RUTH WANJA OTSYULA…….…….....…….....…….APPLICANT

VERSUS

ARTHUR NDURU GITHIRE.…….…….....…1ST RESPONDENT

BUXTON FARMERS CO. LTD…….....2ND RESPONDENT

R U L I N G

On 16th April 2014, this court delivered a Ruling whereby it held as follows:

> ***"So that this matter can be concluded, this court directs the proceeds of the sale of the said 165 shares be paid equally to the eleven (11) remaining beneficiaries of the deceased excluding the 1st Respondent who has already benefitted. To facilitate the said distribution by the 2nd Respondent, the share certificate illegally transferred to the 1st Respondent is hereby ordered cancelled. The 2nd Respondent is ordered to pay the sums directly to the eleven (11) beneficiaries. The 1st Respondent shall pay the cost of this application. It is so ordered."***

The Applicant was aggrieved by certain aspects of the Ruling. On 29th April 2014, the Applicant moved the court by notice of motion made pursuant to **Rule 63** of the **Probate and Administration Rules** and **Order 45 Rule 1** of the **Civil Procedure Rules** seeking orders of review of this court's said Ruling on the ground that there was an error apparent on the face of the said decision which ought to be rectified. The Applicant's complaint was that instead of directing that the proceeds of the sale of the said 165 shares benefit ten (10) beneficiaries (excluding the widow), the court included the widow as a beneficiary. It was her case that the widow had already benefitted substantially from the estate of the deceased and therefore any further benefit accorded to her would be to the detriment of the other beneficiaries. The Applicant stated that the court committed an error when it directed that the proceeds of the sale of the said shares be shared equally between eleven (11) remaining beneficiaries instead of the ten (10) deserving beneficiaries. The application was opposed by the 1st Respondent. He stated that the court granted the order that was sought by the Applicant in the original application. In the said application, the Applicant had stated that the proceeds of the sale of the said shares should be distributed equally between the eleven (11) beneficiaries excluding the 1st Respondent.

That this court has jurisdiction to review its decision is without doubt. **Rule 63(1)** of the **Probate and Administration Rules** specifically saves the court's jurisdiction under **Order 45** of the **Civil Procedure Rules** to review its decision in succession disputes. **Order 45 Rule 1** of the **Civil Procedure Rules** grants this court jurisdiction to review its decision where the Applicant establishes that there is discovery of new and important matter or evidence which was not within his knowledge at the time the decree or order was passed, or where there is mistake or error apparent on the face of the record or for any other sufficient reasons that may serve the ends of justice. The Applicant's application is predicated on the fact that there exists an error apparent on the face of the record which ought to be rectified by the court. The Applicant correctly, in the view of this court, cited the leading decision of **Nyamogo & Nyamogo**

Advocates –vs- Kago [2001]1EA 173 where the Court of Appeal set out circumstances under which the court may review its decision on the basis that there exists an error apparent on the face of the record:

> ***"An error apparent on the face of the record cannot be defined precisely and 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 is possible. Mere error or wrong view is certainly no ground of a review although it may be for an appeal."***

In the present application, it is the Applicant's case that there is an error apparent on the face of the record because the court directed that the shares that were the subject of the dispute be shared between eleven beneficiaries instead of ten beneficiaries. In response, the 1st Respondent stated that the Applicant had infact applied to the court for the said shares to be distributed between eleven beneficiaries. It was therefore the 1st Respondent's case that the court had actually granted the prayers sought by the Applicant and the same could not therefore be reviewed.

It appears to this court that the dispute between the Applicant and the 1st Respondent is whether indeed there exists an error apparent on the face of the record which ought to be reviewed. This court has perused the original application that resulted in the Ruling that is being sought to be impeached. This court agrees with the 1st Respondent that the Applicant infact sought orders from the court that the 165 shares be applied for the benefit of all beneficiaries (excluding the 1st Respondent) including the widow of the deceased. It is clear from this court's assessment of the record that there is no error apparent on the face of the record because the court granted the Applicant the prayers that she sought in her application. As held in the above cited case, where an Applicant pleads for review of a decision of the court on the basis that there is an error apparent on the face of the record, that error must ***"stare one in the face"*** and must be so clear that ***"there could reasonably be no two opinions"*** about it. The Applicant has not established, to the satisfaction of this court, that there is an error apparent on the face of the record that requires the intervention of this court.

In the premises therefore, the application filed by the Applicant on 29th April 2014 lacks merit and is hereby dismissed with costs. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF OCTOBER 2014

L. KIMARU

JUDGE