REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

SUCCESSION CAUSE NO: 1584 OF 2008

IN THE MATTER OF THE ESTATE OF MUSA NG'ANG'A KIMANI (DECEASED)

RULING

Representation to the estate of Musa Ng'ang'a Kimani was on 23rd September 2010 made to Njeri Kinyanjui and Peninah Njoki Njonge.

Mary Njeri Kinyanjui has moved this court by a Motion dated 7th December 2011. She seeks review of the ruling of Karanja J made on 31st October 2011. She limits her application for review to only one asset – Dagoretti/Riruta/961. She would like the ruling of the court of 31st October 2011 reviewed so that it is held that the said property is not yet ready for distribution and, secondly, that the said property should be allocated solely to her given the history of its development and protection.

On the grounds on the face of the application, the applicant claims to be a beneficial owner of part of the said property. She alleges that she resides on the subject property and the said asset was fully developed to its current status by her using her own resources and industry. She asserts that there is a pending court case over the ownership of the said asset between her and other persons. That case is Nairobi HCCC No. 983 of 1996. She complains that Karanja J did not take into account the evidence that she placed before Her Ladyship. She further states that the court erred in finding that the property belonged to the deceased without proof of ownership and she would like the ruling reviewed so as to reflect the true status of ownership in the said property. She complains that the distribution of Dagoretti/Riruta/961 in the manner set out in the court's ruling of 31st October 2011 would expose her to injustice and unfairly enrich her co-administrator and the respondent to this application, Peninah Njoki Njonge. The affidavits of Mary Njeri Kinyanjui in support of the application is along similar lines.

The application was served on Peninah Njoki Njonge and she has filed replies to it. She asserts that the asset in question, Dagoretti/Riruta/961, has always been property of the deceased, and that Mary Njeri Kinyanjui herself recognized it as such in her petition in HCSC No. 1236 of 1989.

I have taken time to go through the record, the written submissions filed by counsel as well as their oral arguments in court. I have noted that the court on 31st October 2011 ruled that Dagoretti/Riruta/Plot No. 961 be shared equally between the two widows of the deceased, that is to say Mary Njeri Kinyanjui and Peninah Njoki Njonge. I have also noted that the Mary Njeri Kinyanjui had petitioned for representation to the estate of the deceased in 1989, and she had listed this asset, describing it as Kawangware No. 961 (Plot No. 961), as part of the assets that the deceased died possessed of. I have read the affidavit of Njeri Kinyanjui sworn on 8th February 2011 in which she depones that Dagoretti/Riruta/961 was registered in the name of the deceased, albeit before Peninah Njoki Njonge was married.

The Motion principally seeks a review of a decision of this court. It is expressed as premised on Order 45 rule 1 of the Civil Procedure Rules. The Law of Succession Act and the subsidiary legislation made under it, the Probate and Administration Rules, do not expressly provide for review of the probate court's orders and decrees. However, rule 63 of the Probate and Administration Rules imports a number of provisions from the Civil Procedure Rules. Among the provisions imported is Order XLIV of the old Civil Procedure Rules. Order XLIV was on review. Order XLIV has been succeeded by Order 45 in the new Civil Procedure Rules. The applicant has therefore properly premised her application on Order 45 of the Civil Procedure Rules.

Order 45 rule 1 provides as follows:-

> ***"(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 other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay".***

From this provision it is clear that an order or decree may be reviewed on three grounds:-

(a) discovery of new and important evidence with was not available at the time the decree was passed or order made,

(b) an error apparent on the face of the record,

(c) any other sufficient reason.

From my understanding of the material placed before me, there is no new evidence or material that has just been discovered and that was not available or could not be discovered at the time the order

complained of was made. There is nothing new. All the facts alluded to relate to material that was before Karanja J – ownership of Dagorretti/Riruta/961, HCCC No. 983 of 1986, the applicant's alleged developments on the said plot, etc. There is therefore no basis upon which this court can review the order made on 31st October 2011 as it relates to Dagorretti/Riruta/961.

Is there an error apparent on the face of the record? None has been demonstrated. Indeed, none has been alleged. I have not either found any other sufficient reason for reviewing the said order, and no attempt has been made to convince me that there is indeed such a reason.

What I read from the grounds set out on the face of the application is that the applicant feels that Karanja J did not take into consideration the evidence that she placed before Her Ladyship. She also complains that Her Ladyship made several errors of judgment – in holding that the property belonged to the deceased without proof, in holding that the applicant had acceded to the claim of ownership by the deceased, in holding that the objection (Peninah Njoki Njonge) had custody of the title document, etc. She also complains that the decision by Karanja J was not fair and just, and that it did not reflect the true ownership position. These are not matters to take into account in a review application. Review is about procedure and other matters that do not go to the substance or merits of the decision. If the grievances of the applicant touch on substance or the merits of the decision, then the applicant ought to challenge the decision by way of appeal. Consequently, for the purposes of the Motion before, the applicant ought to have appealed from the order of Karanja J. The issues she raises in this application cannot be dealt with in a review application.

The Motion dated 7th December 2011 is misconceived. I hereby dismiss it with costs.

DATED, SIGNED and DELIVERED AT NAIROBI THIS 27th DAY OF June 2013.

W.M. Musyoka

JUDGE