



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 455 OF 1999

RITA WALIA.....APPLICANT

VERSUS

ANIL WALIA.....PLAINTIFF/RESPONDENT

AND

VIJAY VIR SINGH.....1ST DEFENDANT/RESPONDENT

ST. ANN GIRLS SEC. SCHOOL LTD.....2ND DEFENDANT/RESPONDENT

AND

PINE BREEZE HOSPITAL LTD.....1ST OBJECTOR/RESPONDENT

ST. MICHAELS HIGH SCH. LTD.....2ND OBJECTOR/RESPONDENT

SABRINA SINGH WALIA.....3RD OBJECTOR/RESPONDENT

SHEENA SINGH WALIA.....4TH OBJECTOR/RESPONDENT

GURPRATAP SINGH WALIA.....5TH OBJECTOR/RESPONDENT

RULING

By a notice of motion dated 26th March, 2013 the applicant sought the following orders:-

- a. That this honourable court may be pleased to review its ruling/order delivered on the 29th September, 2012 directing that the applicant and one Vijay Walia do pay the auctioneer's costs.
- b. That the costs of this application be provided for.

The grounds for the application were set out on the face of the motion and in the affidavit of **Rita Walia** sworn on 26th March, 2013 in support thereof. The applicant stated that she was condemned to pay the auctioneer's costs despite the fact that she was not a party to the proceedings therefore she was

condemned unheard. She states that the proceedings herein concern the execution of a decree against the estate of the deceased. Therefore expenses incurred in so far as the deceased's estate is concerned ought to be borne by the estate and not the executor or trustee. She stated further that following execution of the decree directing the sale of shares owned by the deceased, the estate has nothing left to pay the auctioneer's fees.

The Plaintiff /Respondent vide grounds of opposition dated 16th April, 2013 contended that; the application is unsustainable and should be dismissed and/or struck out and is even *ex debito justitiae*; that there is no sufficient evidence placed before this court to warrant the grant of the orders sought; that the application has been brought with undue delay; that the application is *res judicata* as the arguments raised in the application were raised and canvassed and duly considered by the court when it delivered its ruling.

I have considered the application and the submissions by both counsel.

The application is brought pursuant to **Order 45 Rule 1**. The grounds for review are set out under the said **Order** as follows:-

1. **mistake or error apparent on the face of the record;**
2. **discovery of new and important matter or evidence which after this exercise of due diligence, was not within or could not be produced by him at the time the decree was passed;**
3. **for any other sufficient reason;**
4. **the application shall be made within unreasonable delay.**

Mr. Kusilah, counsel for the applicant urged that Rita Walia is not a party to the proceedings but was introduced to the proceedings due to involvement of Vijay Walia and that this was an oversight on the part of the court to order that she pays the costs of the auctioneer. It was further urged that the applicant could only pay from the resources of the deceased's estate.

In the application dated 13/4/2011, the applicant had specifically sought an order for payment of the auctioneer charges and costs by Rita Walia and Vijay Kant Walia. The court after considering all the issues before it, allowed the application and also observed that there had been no objection raised by Rita Walia and Vijay Walia on the prayer for payment of auctioneer's costs and the prayer was therefore allowed. The applicant had an opportunity to raise all these issues that she purports to raise at this stage, that is, that she is not a claimant in the proceedings. Counsel urged the application on her behalf and she was therefore heard. The allegation that the applicant was condemned unheard is untenable. In any event, as regards to whether Rita is or is not a party to this proceedings, by application dated 23/6/2010. She applied to take over as administrator of the 1st defendant Vijay Mr. Singh who was deceased. By the ruling dated 20/7/2010 J Maraga allowed the application whereby the applicant became the legal representative of the deceased. The applicant is a party to this suit by virtue of being the administrator of the estate and any costs to be paid are in her capacity as administrator.

The application is premised on the ground that there is an error apparent on the face of the record. The Court of Appeal in the case of **Nyamogo & Nyamogo Advocate v Kogo CA 322/00** held as follows as respects what constitutes an error on the face of the record.

“There is a real distinction between the mere erroneous decisions and an error apparent on the face of the record. Where the error on a substantial point of law stares one in the face, and there could reasonably be no two options, 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 points where there may conceivably be two opinion, can hardly be said to be an error on the face of the record. ... a mere error or wrong view is certainly no ground for a review although it may be for an appeal”

Arguments were made that the issue before me. There was no contest as to the payment of the charges/costs by the applicant. If the applicant was dissatisfied with that finding, her recourse is to appeal against that said order.

The court can also review its own orders if sufficient cause is shown. The applicants were specific as to why they wanted the order reviewed on the basis of an error. They have not demonstrated that there are any other reasons that should prompt the court to order a review of its order.

The order sought to be reviewed was issued on 29/4/2012. The instant application was not filed till 26/3/2013 about a year later. No explanation has been given for the delay. In the cases of **James Kingaru & 17 Others v Kangeri** and **Kenfreight E.A. Ltd v Star East Africa Co. Ltd (2002) 2 KLR 783**, the courts found a delay of 4 months and 3 months respectively, to be inordinate. Of course the court would consider the special circumstances of every case, if an explanation for the delay is given. The applicant did not offer an explanation for the delay. I find that there has been unexplained inordinate delay in bringing this application.

In the end, I find no merit in the application. As seen from the record, there has been a tendency by the applicants applying tactics meant to delay the determination of this matter. This application is but one of them. It is dismissed with the applicant bearing the costs.

DATED and DELIVERED this 27th day of September, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Kisila for the applicant

Mr. Kibet for the defendant/respondent

Kennedy – Court Clerk