REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NUMBER 2059 OF 2008

IN THE MATTER OF THE ESTATE OF MICHAEL KAMAU GACHII (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR REVIEW BY

MARGARET MUTHONI KAMAU..... 1ST APPLICANT/ADMINISTRATOR

AND

JAMES MUTHUI NDERITU.....2ND APPLICANT/ADMINISTRATOR

R U L I N G

Before me is a Chamber Summons dated 25th May 2010 filed by M/s Kamotho, Maiyo & Mbatia Advocates for the applicants **MARGARET MUTHONI KAMAU** and **JAMES MUTHUI NDERITU**. The application was filed under Order 44 Rule 1 of the Civil Procedure Rules (Cap 21 Laws of Kenya), as well as section 47 of the Law of Succession Act (Cap 160 Laws of Kenya).

It seeks the following orders: -

1. That the honourable court be pleased to review part of the ruling of this honourable court made on 19th day of April 2010 on the application for confirmation of grant dated 8th September 2009.

2. That costs of this application be in the cause.

The application has grounds on the face of the Chamber Summons. The grounds are, inter alia, that in a judgment delivered on 19th April 2010 the court issued orders that were contrary to law when it ordered that property held in joint tenancy between the deceased and the widow be held as life interest in trust for the three children in equal shares; that the widow in law had a right of survivorship and was entitled to hold the assets as absolute proprietor as sole owner; and that the orders sought herein were necessary for the ends of justice.

The application was filed with a supporting affidavit sworn by **Margaret Muthoni Kamau** the 1st applicant on 25th May 2010. It was deponed, inter alia, that the two land assets LR No. 7785/640 and LR. No. 7785/644 were held jointly by the deceased and the widow (deponent); that the widow merely disclosed the said assets for purposes of transparency, and not as part of the assets forming the deceased's estate, that the court instructed that further submissions be made with respect to the survivorship on the two properties owned jointly; that the said submissions were filed on 10th March 2010; that the said properties did not form part of the deceased's assets and could only form part of the assets if they were held in the form of tenancy in common.

The applicants also through their counsel filed written submissions on 25th January, 2011. It was contended that the court did not consider the submissions on survivorship filed on 10th March 2010. Reliance was placed on the case of **Bilha Kanyi W/O Geoffrey Gathungu –Vs-Kabuchwa Gathungu – Civil Appeal No. 38 of 2000**, wherein the Court of Appeal allowed an appeal for revision because the Judge did not consider the Limitation of Actions Act in his ruling.

On survivorship rights arising from joint ownership of property several cases were relied upon. The case of **David Njoroge Kimani & Another-Vs-James Mukuha Njau Hc Civil Appeal No. 131 of 1996** where the court stated that joint tenancy could only be severed by assignment, settlement, or charge of one's interest was relied upon. In the present case, it was contended that there was no such severance. Reliance was also placed on the book **Land Law and Conveyancing in Kenya by P L Onalo** wherein the author at pages 19 and 20 stated that the rules of intestacy do not apply to joint tenancy nor could a joint tenant dispose off his interest by will. Reliance was also placed in the case of **Lucy Wanja Irungu-Vs-Kamau Kabugi Thayu Hccc No. 673 of 2004** and **Dominic Kamata Njogu –Vs-Simon Wakaba Hccc No. 289 of 1990** wherein it was held that the surviving joint tenant becomes the exclusive owner.

On orders of the court, the adult child **KEVIN GACHIE** swore an affidavit on 12th October, 2010, which was filed on the same day. It was deponed, inter alia, that the deponent was advised by Mr. Muchigi advocate that in a joint tenancy the legal principle was that the survivor (his mother) would be the sole owner, and that he (the deponent) did not have an objection to the application.

This is an application for review of my ruling dated 19th April 2010. The application was brought under **Order 44 Rule 1 of the Civil Procedure Rules (now replaced)** which provides the parameters under which review of court orders can be granted. The rule provides: -

1(i) 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 of 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 reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable

delay.

2) A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the grounds of such appeal is common to the applicant and the appellant, or when, being respondent he can present to the appellate court the case in which be applied for the review".

Section 47 of the **Law of Succession Act (Cap 160)** on the other hand grants upon this court the power to deal with any application brought in exercise of its powers under the **Law of Succession Act (Cap 160)**.

It is clear from the above provisions relating to revision under Order 44 Rule 1 of the Civil Procedure Rules, that the grounds upon which an application for review can be granted are only three. Firstly, the discovery of new and important matter or evidence which was not within the knowledge of the applicant at the time the order was made. Secondly, when there is a mistake or error apparent on the face of the record. Thirdly, if there is any other sufficient reason.

It is for an applicant to demonstrate the ground or grounds upon which he relies for the request for review, within the above three grounds. The applicants herein seem to rely on the ground of mistake or error on the face of the record. They state that the court did not address the issue of the law of survivorship in joint ownerships, in making the ruling impugned. The applicants also rely on the ground of sufficient reason.

In **National Bank Of Kenya Limited-Vs-Ndungu Njau** – Civil Appeal No. 211 of 1996 – the Court of Appeal stated, inter alia, that: -

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review".

It is clear to me from the above that any erroneous conclusion of a court on the law, whether statutory or otherwise, is not a ground for review. It is, in my view, a ground for appeal.

In coming to this court for review, the applicants' claim that the court failed to consider the law. They rely on the vase of **Bilha Kanyi Gathungu-Vs-Kabuchwa Gathungu** CA No. 38 of 2000 wherein the Court of Appeal stated inter alia: -

"In the instant case, the learned judge cannot be said to have misconstrued the Limitation of Actions Act he simply did not as he should have done, considered it. This is an error or omission on the part of the Judge or other sufficient reason, upon which a revision can be made.

In the result we allow the appeal, set aside the orders made by the Learned Judge in the ruling of 8th November 1999, and substitute therefore the following order that the appellant's Originating Summons is hereby reinstated……"

In the present case, I did order that the administrators address the court on the issue of survivorship in relation to the joint property. Written submissions were filed. In my ruling following the filing of submissions I appreciated that assets were I the joint names of the deceased and the widow. In paragraph 2 of my ruling dated 19th April 2010, I stated: -

"For the interests of the minor children in regard to the entitlement of their late father, I will order that the widow will have a life interest in the said land assets and hold in trust for the children in equal shares"

The above could be a wrong interpretation of the law, but it did not mean that the court did not consider the law. I deed appreciate that he assets were jointly held. In my view, it is a ground for appeal not for revision. It does not fall within the three parameters for consideration in a revision application under Order 44 of the Civil Procedure Rules. Therefore, I do not think that I have the jurisdiction to review the part of the decision (above) complained of. I will therefore decline this application for review. The fact that the adult child has filed an affidavit which does not oppose the application is neither here nor there. The court's orders were clearly stated as being for the interests of minor children, and each of them has a right to give consent when they become adults. The consent of one adult child does not cover the other two minors.

Consequently, I find no merits in this application, and dismiss the same. Costs in the cause.

Dated and delivered at Nairobi this 31st day of March, 2011.

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GEORGE DULU

JUDGE

In the presence of
Mr. Muchigi for the applicants
C Muendo – court
clerk