



SUCCESSION

· Application of review.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCC. CAUSE NO. 456 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE M'KENYA NJAGI (DECEASED)

JOHN NJAGI DAN PETITIONER

VERSUS

OBJECTOR	JULIUS MUNENE DAN 1ST
OBJECTOR	CIAMBAKA DAN 2ND
OBJECTOR	MBAKA DAN 3RD
OBJECTOR	NYAGA DAN 4TH
5TH OBJECTOR	KARIGA DAN
6TH OBJECTOR	MUTEGI DAN
7TH OBJECTOR	GITARI DAN
8TH OBJECTOR	KAARI DAN
9TH OBJECTOR	KANYUA DAN
10TH OBJECTOR	KAGENDO DAN

RULING

The petition for grant of letters of administration intestate in this cause was filed by John Njagi Dan (John). He did not file a consent of the other beneficiaries permitting him to file that petition. This was because all the beneficiaries refused to sign the consent. John cited all the beneficiaries of the estate and a memorandum of appearance was filed by the firm of Kiautha Arithi Advocates for all the beneficiaries. Julius Munene Dan (Julius) one of those beneficiaries filed an affidavit stating that John had filed the

petition secretly without notice to the other beneficiaries. The matter came before court on 18th December 2009 for the hearing of an application dated 26th October 2009. That application was filed by John. John by that application was seeking that the grant in this cause be issued to all the beneficiaries of the estate who in total are eleven. When the matter appeared before court, the court recorded that it was incompetent. Learned counsel Mr. Kiambi appearing for John agreed with that observation and requested that it be marked as withdrawn. The proceedings show the following order was made:-

“Matter is marked withdrawn. This file should henceforth be closed.”

That order is now the subject of a Chamber Summons dated 25th March 2010. It seeks review of the order of 18th December 2009 to the extent that the court order the file be closed. The application is opposed on the basis that once the file was ordered by the court to be closed, the citation given by John became spent. Order 45 rule 1 (1) of the Civil Procedure Rules 2010 is the rule that deals with review. That rule provides as follows:-

“45 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 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 unreasonable delay.”

There cannot have been a basis for ordering the file to be closed when what was being considered was the Chamber Summons dated 26th October 2009. I find that there is therefore sufficient reason as per order 45 rule 1 (1) to order review of this court’s order of 18th December 2009. It is also in my view that there is an error on the face of the record. This is because even if the court was of the view that the summons dated 26th October 2009 was incompetent the succession cause would still remain pending and the file should not have been ordered to be closed. It is for that reason that I grant the following orders:-

- 1. That the order made on 18th December 2009 is hereby reviewed and set aside.***
- 2. An order is issued that the Chamber Summons dated 26th October 2009 be marked as withdrawn with no orders as to costs.***
- 3. There shall be no orders as to costs in respect of the Chamber Summons dated 25th March 2010.***
- 4. This court directs that the petition filed by John Njagi Dan be gazetted forthwith once payment for gazettelement is made by the said John Njagi Dan.***

Dated, signed and delivered at Meru this 13th day of April 2011.

**MARY KASANGO
JUDGE**