REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 35 OF 2000

IN THE MATTER OF THE ESTATE OF NJIRAINI GAKUYA MARIRA – DECEASED

NEWTON WANJOHI MWAI ....APPLICANT

VERSUS

EPHANTUS NGARI NJIRAINI...PETITIONER

RULING

The subject matter of this ruling is the Summons (General Form) dated 17th December 2009 in which **Newton Wanjohi Mwai**, the applicant herein, sought for the following orders:

1. That this application be certified urgent. Its service be dispensed with in the first instance and prayer No. 2 herein be heard exparte due to its urgency.

2. That this honourable court be pleased to stay execution of the grant confirmed on 9/11/2001 pending the hearing and determination of prayer No. 3 and 4.

3. That this honourable court be pleased to review and set aside ruling delivered on 15/5/2009.

4. That applicant application for revocation dated 23/12/2003 be allowed.

5. That the costs of this application be provided for.

The aforesaid application is supported by two affidavits sworn by the applicant. **Ephantus Ngari Njiraini**, the Respondent herein, filed the Replying Affidavit he swore to oppose the summons. When the Summons came up for interpartes hearing, the learned counsels appearing in the matter recorded a consent order to have the application disposed of by written submissions.

I have considered the grounds set out on the face of the Summons plus the facts deponed in the affidavits filed for and against the application. I have further considered the written submissions filed by both sides. Before delving deeper into the merits or otherwise of the summons, let me set out in brief the history leading to the filing of this application. The Respondent herein i.e. Ephantus Ngari Njiraini, was granted letters of administration in respect of the Estate of Njiraini Gakuya Marira, deceased, on 29th September 2000. The aforesaid grant was confirmed on 9th November 2001. The Applicant herein applied for the aforesaid grant to be revoked vide the Summons dated 23rd January 2003. The application was opposed by the Respondent herein. The Summons for revocation of grant was heard and dismissed by the Hon. Lady Justice Kasango. The Applicant is now before this court seeking to have the dismissal order reviewed, set aside and substituted with an order revoking the grant.

Having set out in brief, the history behind this summons, let me now address my mind to the application for review. It is the submission of the applicant that since the date of the dismissal of his application new and important evidence which was not within his knowledge hence was not availed to court. The Applicant has alleged that he discovered that proceedings relating to the Estate of Njiraini Gakuya deceased was filed vide <u>**Nyeri H.C. Misc. App. No. 73 of 1982.**</u> It is said the aforesaid proceedings were referred to the arbitration of a panel of elders. It is alleged that the panel of elders returned a verdict sharing the Estate as follows:

(i) Stanley Njiraini (represented by Jemimah Gachui Mwai), to get 2 acres to be excised from **L.R. NO. MUTIRA/KATHARE/27.**

(ii) The remainder of the aforesaid land to be shared in equal measure between Ephantus Ngari, Peter Kangangi Njiraini and Charles Ndege Njiraini.

The Applicant averred that he had not obtained the proceedings and award of the elders by the time of arguing the application for revocation of grant. The Applicant was of the view that had the proceedings before the elders and the subsequent award been availed to the court, the same could have guided the honourable judge to arrive at a different verdict from that of 14th May 2009. It is said that the court file and that of the Applicant's advocate disappeared mysteriously after the reading of the award. In response to the Applicant's assertion, the Respondent was of the view that there was no evidence that neither the court file nor that of the applicant's advocate went missing. It is argued that there was no note or letter from the court that the file went missing. The Respondent further argued that there is no evidence that the Applicant's advocate file disappeared from the offices of M/S Kiura Advocates.

The second ground argued by the Applicant is that there is an error apparent on the face of record in that the beneficiaries did not sign the consent form contrary to the provisions of the Law of Succession Act. It is also alleged that the beneficiaries did not attend court during the hearing of the Summons for Confirmation of grant. There is an allegation that Lady Justice Kasango erred when she dwelt on the distribution of the deceased's Estate on an application for revocation of grant. The respondent is of the view that there is no error apparent on the face of record neither was there any discovery of new evidence which were not considered by Lady Justice Kasango.

Having set out the rival arguments, let me now address my mind to the applicable principles in applications for review. The application dated 17th December 2009 is premised on the provisions of *rules, 49, 63* and *73* of the Probate and Administration Rules. Under *rule 63* of the Probate and Administration Rules, the provisions of *Order XLIV* of the Civil Procedures is stated to be applicable to succession matters. Under the Civil Procedure Rules *Order XLIV rule 1(1)* there are three grounds upon which a review may be sought: <u>First</u>, where there is new and important matter or evidence which after due

diligence was not within the knowledge of an applicant at the time of the decree. Secondly, where there is a mistake or error apparent on the face of the record. Thirdly, for any other sufficient reason.

The application before this court is based on the first and second grounds. Let me start by considering the second principle as applied to this application. I have already stated that the Applicant has averred that there is an error apparent on the face of record in that it is alleged that Lady Justice Kasango proceeded to confirm the grant yet all the beneficiaries did not sign the consent form nor did they attend court on the date the grant was confirmed. It is alleged that the honourable judge distributed the deceased's Estate in an application for revocation. I have also stated that the respondent rejected the applicant's allegations. The Respondent was of the view that the failure by the beneficiaries to sign the consent form did not necessarily lead to a finding that the grant should be revoked. The Respondent was of the view that the ground was that for appeal instead of a review. I have carefully considered the rival submissions over this ground. The judgment sought to be set aside by way of review is that delivered by the Honourable Mr. Justice Makhandia on behalf of Lady Justice Kasango on 14th May 2009. The aforesaid judgment was the outcome of the Summons For Revocation of Grant dated 23rd December 2003. The judgment of Lady Justice Kasango clearly shows that the basis of the summons was that the grant was obtained by fraudulent means. It was alleged that the Petitioner made a false statement and that he concealed certain material facts. I have looked at the affidavit filed in support of the aforesaid summons. Newton Wanjohi Mwai, the applicant herein, deponed in paragraph 2(a) (i) of the affidavit sworn on 9th January 2004 that Ephantus Ngari Njiraini, the respondent herein, did not disclose to the court the names of all the beneficiaries who are entitled to share the Estate of the deceased. In paragraph 2(b) of the aforesaid affidavit, the Applicant further deponed that the consent for letters of administration were signed by only one of the beneficiaries i.e. Peter Kangangi Njiraini without the knowledge and authority of other beneficiaries. Lady Justice Kasango considered the aforesaid issues and came to the following conclusion at pages 10-11 of her judgment in part as follows:

"The Application for revocation is based primarily on two grounds:

Firstly, is that the Petitioner did not obtain consent to petition from the beneficiaries and only obtained such consent from Peter.......................... ....

.. In our case the grant was issued under orders of a High court Judge Hon. Mr. Justice Juma (as he then was)...

This court as it is well known cannot sit on appeal against an order of another High Court Judge.

..
..

In my view it is therefore arguable that the failure to get all the beneficiaries to sign a consent does not necessarily lead to a finding that the grant will be revoked."

It is obvious from what I have enumerated hereinabove that there is no error apparent on record. The issue was raised, argued and determined. Such an issue cannot be re-argued via an application for review. If the Applicants are not happy with the decision of Lady Justice Kasango, they had the option to appeal against it. The Applicant seems to argue that the court arrived at an erroneous finding of the evidence and law. The Court of Appeal expressed itself in **NYAMOGO & NYAMOGO ADVOCATES =VS= KOGO E.A. [2001] 173** at page 174-5 in part as follows:

"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 was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

As was said in the <u>A.I.R. Commentaries on the code of Civil Procedure by Chitaley and Rao</u> (4th ed.) vol. 3 at 3227: "A point which may be good ground of appeal may not be a ground for an application for review. Thus an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal."

It is obvious from the above decision that this application must fail on the second ground.

Let me now turn my attention to the first ground. It is said by the applicant that the court was not given the benefit of the proceedings in **Nyeri H.C. Misc. application No. 73 of 1982**. I have perused the application for revocation of grant dated 23rd December 2003 plus the supporting affidavit of the applicant sworn on 9th January 2004. In Paragraph 2(a) (iv) of the Supporting Affidavit sworn on 9th January 2004, the applicant averred that the Respondent had failed to disclose that the subject matter of the Estate was substantially in issue in **Nyeri H.C. Misc. Application No. 73 of 1982** between the parties and that he had taken a new cause and or abandoned the same without informing him. Can it be said that the Applicant was unable to tender the proceedings and the decision in the aforesaid matter to the court presided over by Lady Justice Kasango? I do not think so. If the court file was missing the applicant could have raised that issue before the Deputy Registrar of this court or before the trial Judge. He could have also deponed about it in his initial affidavit. The applicant's conduct do not satisfy the conditions required in the first principle. There is no evidence that the Applicant applied due diligence to secure the proceedings and judgment relating to Nyeri H.C. Misc. Application No. 73 of 1982. The truth of the matter is that the Applicant mentioned substantially in his affidavit the existence of **<u>Nyeri H.C. Misc. Application No. 73 of 1982.</u>** The unfortunate thing is that he did not mention about the aforesaid case in his evidence when called upon to testify before Lady Justice Kasango on 14th October 2008. In the end I am not convinced that the Applicant has satisfied the conditions to establish the first principle.

In the final analysis, I see no merit in the Application for review. The same is dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 20th day of May 2011.

J. K. SERGON

<u>JUDGE</u>

In open court in the absence of learned advocates and parties with notice.