REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Succession Cause 164 of 2001

IN THE MATTER OF THE ESTATE OF NJUE EREMANO *ALIAS* NJUE EREMANO M'IRURA DANIEL (DECEASED)

RULING

Japhet Gitari Njue and Seberino Mutegi Njue jointly petitioned for letters of administration in the estate of Njue Eremano alias Njue Eremano M'Irura Daniel, deceased. Grant was issued and was confirmed whereby it was ordered that the two petitioners inherit equally parcels numbers *Karingani/Mugirirwa/409 and 713*. It later transpired in this succession cause that the person alleged to the deceased was very much alive. He (Njue Eremano Murubia and the registered owner of parcels *Karingani/Mugiriwa/409*) filed an objection to the grant. On 15th March 2004 before court, the two petitioners conceded that they had misrepresented to the court that the objector had died. The court proceeded to revoke the grant and to grant leave to the objector who now was alive to file his objection within 14 days and to serve the same upon the petitioners. He failed to do so and this prompted the petitioners to file an application dated 20th April 2004 for the court to restore the orders of the grant of letters of administration in view of the failure by the now living Eremano M'Irura to file objection. That application which essentially sought to review the orders of 15th March 2004 was heard by Justice Sitati and received a terse ruling from her dated 14th November 2005. I can do no better than quote substantially from that ruling as follows:-

"The "deceased" also swore a supporting affidavit and deponed that he only discovered the applicants' fraud when he went to collect his title deeds from the lands office. He deponed further that the applicants did not go through the chief of Mugwe Location before filing the purported succession cause and thus smartly duped everyone along the way by pretending that the "deceased" Njue Eremano M'Irubua was presumed dead. .... The application came up again before Hon. Mr. Justice D.A. Onyancha on the 15.3.2004. No viva voce evidence was adduced but after Njue Eremano M'Irubua informed the court that he was not deceased but alive. He also stated that the applicants herein had feigned his death and obtained the Grant of Letters of Administration in the matter of his estate. Further he stated that applicants had proceeded to share out his two parcels of land aforesaid. The two applicants through the 1st applicant Severino Mutegi Daniel admitted that they had filed the application for grant of letters of administration to the respondent's estate through falsely representing to the court that Njue Eremano M'Irubua was deceased. The parties then agreed to the following consent order:-

1. ***By consent of the petitioners and the objector, the grant of letters of administration dated 12.11.2002 be and is hereby revoked.***

2. Njue Eremano Murubia (sic) to file his objection within 14 days and serve the petitioners within 14 days after such filing.

3. Costs in the cause.

...............He (Japhet Gitari Daniel) proceeded to file his application dated 20.4.2004. The application is for orders:-

1. That the honorouble court be pleased to review or set aside its orders made by court on the 15th day of March 2004.

2. That further the court do find it fit to restore the orders issued for grant of letters of administration dated 12th day of November 2002.

3. That the court to (sic) issue the said letters of administration being no valid objection filed.

.....................In the present case, it is not in dispute that the respondent herein has never died. It follows therefore that letters of administration could not be taken out in respect of the respondent. The applicants as much – all they wanted was to share out the respondent's parcel of land. My finding therefore is that there was fraud in this matter right from the beginning. The court cannot be used by the applicants to perpetrate that fraud against the respondent. I believe that if the respondent had a full appreciation of what he was consenting on 15.3.2005, he would not have entered into the second limb of that consent. Secondly, I believe that if the court fully appreciated the circumstances surrounding this whole cause, the second limb of the consent order recorded on 15.3.2004 would not have been given. The blatant frauds committed by the applicants go to the root of this whole cause. The cause was void abinitio. I would therefore set aside the second limb of the consent order of 15.3.2004, and I do so now without hesitation. .... The applicants, Japhet Gitari Daniel and his brother Severino Mutegi Daniel should be arrested and charged with frauds committed and utterances made by the two of them in connection with this case."

That ruling was delivered on 14th November 2005. Despite its clear content, the petitioners, 3 years later, more specifically on 31st July 2008, filed a Chamber Summons which is before me for consideration. That Chamber Summons seeks the following prayers:-

1. That this Hon. Court be pleased to set aside its orders dated 14th November 2005 to aid justice and avoid injustice and disaster.

2. That this

Hon. Court do issue orders for the respondent and applicant to call their witnesses for the confirmation of the respondents uttering false documents.

3. That the court to order the estate of the deceased Njue Eremano alias Daniel Mbiuki alias Daniel Njue to be distributed to the surviving dependants.

Order XLIV Rule 1 (a) and (b) of the Civil Procedure Rules under which this review application is brought 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 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."

It is clear from that Rule that review is considered when there is discovery of new evidence which was not in the knowledge of the applicant or could not be produced or where there is an error on the face of the record or for any sufficient reason. The principle that governs review under that Rule was considered in the case **National Bank of Kenya Limited Vs. Ndungu Njau** Civil Appeal No. 211 of 1996 (unreported), where the court stated:-

"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 evident 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 the law. Misconstruing a statute or other provisions of law cannot be a ground for review."

The petitioners have not shown discovery of any new evidence or error on the face of the record. They also have certainly not shown any sufficient cause why review should be considered. It is also clear that the petitioner's claim is not in the realm of succession. They allege that Njue Eremano Murubia had their father's land registered in his name. Such a dispute can only be considered in a civil action not in a succession. The petitioner's application also fails for having been brought after inordinate delay. Following the ruling of Justice Sitati extensively quoted in this ruling, and considering the issues that are now being produced in this present application, the avenue that was open to the petitioners was to appeal against that ruling. It was not proper for them to seek the review of that ruling. Accordingly, I find the Chamber Summons dated 29th July 2008 to be incompetent without merit and I dismiss the same with no orders as to costs. Since this cause was dismissed by the ruling of Justice Sitati on 14th November 2005, I order the closure of this file.

Dated and delivered at Meru this 28th day of May 2010.

MARY KASANGO
JUDGE