REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Succession Cause 335 of 1994

IN THE MATTER OF THE ESTATE OF M'IKUNYUA NJIRU (DECEASED)

RULING

The applicant herein filed a petition for letters of administration intestate on 24th October, 1994 in respect of the estate of M'Ikunyua Njiru (the deceased).

An application for a temporary grant was made on 15th May 1995. The respondent filed grounds of opposition on 19th June 1996, early one year after the temporary grant had been issued on 10th July 1995.

Subsequently, on 22nd March 1996 the respondent filed an application by way of chamber summons seeking that the confirmation of the grant and distribution of the estate of the deceased be stayed until the respondent is included as one of the beneficiaries of the estate of the deceased. The respondent's claim was based on the fact that he had purchased part of parcel of land No.MWIMBI/MIRUGI/897 forming part of the deceased's estate. Etyang, J delivered a ruling on 16th July 1996 in which he allowed the application, ordering a stay of confirmation of the grant and distribution of the estate pending the determination of the respondent's claim.

That ruling is the subject of the instant application, in which the applicant is praying that the court reviews and sets aside those orders on the ground that there is an error or mistake apparent on the face of the record. It is the contention of the applicant that the order was premised on the existence of an application for confirmation of the grant, yet there was no such application pending when the order was made. That after the order was made the respondent filed CMCC No. 908 of 1996 in the subordinate court and obtained exparte orders allowing him to be included as a beneficiary of the estate of the deceased.

The High Court subsequently found that the subordinate court had no legal basis to make those orders. The respondent has filed a replying affidavit to the instant application in which he argues that there is no error or mistake apparent on the face of the record as orders of stay were made validly and on merit. That the applicant is guilty of inordinate delay. That review is not available to the applicant and finally that the present application is *res judicata* another application culminating with a ruling delivered on 19th December 1997.

I have duly considered the rital submissions and my view of the matter is as follows:- It is nearly thirteen (13) years since the petition herein was filed. No steps, apart from the application for stay under reference and CMCC No. 908 of 1996, have been taken to finalize the matter and distribute the estate. This delay has been caused by the order of stay now being sought to be reviewed or set aside.

The application for review is expressed to be brought under Section 63(1) of the Law of Succession Act

and Order 44 of the Civil Procedure Rules. Section 63(1) of the Law of Succession Act does not exist. Section 63 is not relevant to this application as it deals with grant of administration to universal or residuary legatee.

Is Order 44 of the Civil Procedure Rules applicable in matters under the Law of Succession Act? Yes. It is one of the provisions expressly stipulated in Rule 63(1) of the Probate and Administration Rules to be applicable in the those rules. The conditions to be satisfied under Order 44 of the Civil Procedure Rules before an order or a decree can be reviewed are:-

(i) The order or decree sought to be reviewed must be one from which an appeal is allowed as of right but from which no appeal has been preferred, or one from which no appeal is allowed.

(ii) The applicant must demonstrate that he has discovered new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced when the order was made, or

(iii) That some mistake or error is apparent on the face of the record, or

(iv) The court may review an order for any other sufficient reason.

It is also a condition for review under Order 44 Rule 1(1) aforesaid that:-

"***Any person considering himself aggrieved:-***

(a) **……..**

(b) **…….**

…….*may apply for a review of judgment to the court which passed the decree or made the order <u>without unreasonable delay.</u>"*

With regard to the first condition it suffices to state that no appeal has been preferred against the order of stay. The application has been brought specifically under the third condition, namely that there is some mistake or error apparent on the face of the record.

The mistake or error, according to the applicant is that the order of stay was issued, so to speak, in a vacuum as the application for confirmation of the grant sought to be stayed and indeed stayed had not been filed. The applicant herein was represented when the application dated 21st March 1996 was canvassed. The application brought by way of chamber summons did not state the statutory provision under which it was made. It ought to have been based on the inherent provisions of the Law of Succession Act and Rule 73 of the Probate and Administration Rules as there is no specific provision, either in the Act itself or the rules, for stay.

Etyang, J found that the respondent had made a sufficient case to warrant his exercise of discretion in the favour of the respondent. It is common ground that the applicant had obtained temporary grant. The next stage was to apply for its confirmation.

I understand the order of stay granted by Etyang J in a wide sense to mean stay of proceedings. Indeed it was an order to stay confirmation and distribution of the estate. The orders issued in my view are not amenable to review or setting aside on the basis of an error or mistake apparent on the face of the record. ***Mulla on the Indian Code of Procedure,*** 13th Edn. Page 1672 identifies what constitutes an error on the face of the record in the following words:-

"……***it can be said of an error that is apparent on the face of the record when it is obvious and self evident and does not require an elaborate argument to be established."***

I need not say any more. The order cannot even be reviewed under the ground "for any other sufficient reason". I see no other sufficient reason, although I sympathize that the matter has taken this long. There are of course ways of dealing with the issue of delay other than by way of review.

The final ground is whether the application for review has been brought timeously. The decision being challenged was made on 16th July 1996. It is being challenge in this application brought on 16th April 2007, a period of a whole eleven (11) years. The order sought is not available. The application is dismissed with costs.

Dated and delivered at Meru this 6th . day of June 2008.

W. OUKO

JUDGE