



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 580 of 1991

PETER SIRO NYARIKI ANGWENYI..... APPLICANT

VERSUS

SUSAN NJERI ANGWENYI..... RESPONDENT

RULING

This Ruling relates to summons dated 15.02.08 applying for review of this court's Ruling delivered on 05.02.08. The application was stated to be brought under sections 3A and 80 of the Civil Procedure Act, Cap.21; Order XLIV rule 1 of the Civil Procedure Rules; and rule 49 of the Probate & Administration Rules (made under the Law of Succession Act, Cap.160). In the summons, the applicant also seeks an injunction restraining the executrix/respondent from dealing with the deceased's estate in any manner whatsoever. The applicant also asks for costs of the summons.

The grounds upon which the application is based are:-

- a) That the applicant has discovered new and important matters which, after the exercise of due diligence, were not within his knowledge or could not be produced when the orders were issued.
- b) That the orders are no longer tenable in the light of the developments in the matter since the said orders were issued.
- c) That it is in the interest of justice that the orders issued on 05.02.08 be reviewed and set aside.

The application is supported by the applicant's affidavit sworn on 15.02.08.

At the hearing of the application on 19.06.08, the applicant was represented by learned counsel Mr C.O. Kenyariri while the respondent was represented by learned counsel, Mr J.W. Okwach.

The application, the grounds upon which it is based and the affidavit evidence relied on are matters of record. Respondent's counsel opposed the application. The opposition is also a matter of record.

I have duly considered the rival arguments of the parties. With regard to ground (a), applicant's counsel pointed out that this court had in its Ruling of 05.02.08 said that there was no evidence before it of the death of Onyiego Ogwora Siro and that the interest of the applicant was dependent on evidence of death of the said Onyiego Ogwora Siro. Applicant's counsel contended that Onyiego Ogwora Siro's death certificate was in the possession of the respondent who took out letters of administration of the said Onyiego Ogwora Siro's estate. Applicant's counsel said that the grant of those letters of administration is

being contested; that the applicant herein got the death certificate in High Court Succession Cause No.1464 of 1999 which has been transferred to Kisii for determination; and that the applicant herein got the said certificate subsequent to the Ruling now sought to be reviewed. It was applicant's counsel's submission that now that the applicant has the death certificate, whose photocopy was annexed as 'PSNA 2' to applicant's supporting affidavit sworn on 15.02.08, he is entitled to have the Ruling of 05.02.08 reviewed.

Two legal provisions specific to review were cited, i.e. section 80 of the Civil Procedure Act and Order XLIV rule 1 of the Civil Procedure Rules.

Section 80 of the Civil Procedure Act provides:

'80. Any person who considers himself aggrieved –

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.'

Order XLIV rule 1 is in similar vein but it is more elaborate. It provides:

'1. (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 referred; 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 the 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.

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

Note is hereby made that section 80 of the Civil Procedure Act which is parent to Order XLIV rule 1 gives the court from which review is sought, discretion whether to exercise its power of review or not as it may think fit.

The application now under consideration averred that the applicant has discovered new and important matters which, even after exercise of due diligence, were not within his knowledge or could not be produced when the orders sought to be reviewed were issued. The death certificate of Onyiego Ogwora shows that the certificate was given on 08.04.93 and establishes that the death occurred on 22.08.91. The summons dated 30.10.06 subject matter of this court's Ruling now sought to be reviewed was filed by the applicant. Ground (iv) of the applicant's grounds for bringing the application states that all beneficiaries were of majority age. He is one of the beneficiaries. Having been of mature age at the time of filing his application, what efforts did he make to obtain the evidence of Onyiego Ogwora's death he now seeks to rely on as a basis for the subject review? Other than a statement by his counsel made from the Bar that the applicant got the death certificate in High Court Succession Cause No.1464 of 1999 after this court's Ruling of 05.02.08, the applicant has not furnished evidence of requisite efforts made by him to obtain

evidence of Onyiego Ogwora's death or to avail such evidence before this court prior to 05.02.08. There is no evidence of exercise by the applicant of due diligence in order to obtain and avail evidence of Onyiego Ogwora's death.

In view of the above shortcomings, I hold that the applicant has not satisfied the requirements of Order OLIV rule 1 such as to bring ground (a) in his summons dated 15.02.08 within the requisite parameters to make it a valid ground for review. The said ground fails.

Under ground (b), the applicant averred that the orders issued by this court on 05.02.08 are no longer tenable in the light of developments in the matter since the said orders were issued. A careful examination of the arguments advanced by the applicant in support of his application in this regard reveals that the applicant actually re-argued his previous summons dated 30.10.06, the bulk of whose prayers were not granted by this court vide its Ruling of 05.02.08. It seems to me that the present application is grounded more on the applicant's fundamental disagreement with this court's Ruling of 05.02.08 rather than on events subsequent to the delivery of the Ruling. I hold that it would be better for the applicant's grievances to be addressed through appeal to a higher court than review by this court. This holding also applies to ground (c).

For all the foregoing reasons, the applicant's summons dated 15.02.08 is hereby disallowed.

Costs in the cause.

Orders accordingly.

Dated at Nairobi this 25th day of July, 2008.

B.P. KUBO

JUDGE