



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 203 of 1987

**IN THE MATTER OF THE ESTATE OF JUSTUS EZEKIEL MBOGO –
(DECEASED)**

RULING

I have before me an application filed by way of Chamber Summons dated 28th May, 2007, which is premised under Rules 49, 63 and 73 of Probate and Administration Rules, Order XLIV Rules 1 and 2 of Civil Procedure Rules and all enabling provisions of the Law.

In short it seeks orders that the judgment of this court delivered on 12th March, 1998 be reviewed, varied and/or set aside together with all the consequential orders.

It is supported by the grounds set forth on the face thereof and on the supporting affidavit of Ann Micere Mbogo the substituted Administratrix of the estate of the deceased sworn on 28th May, 2007.

The main points on which the judgment is sought to be reviewed is that the original administratrix, who was the mother of the applicant herein, was illiterate and she did require legal guidance when she put in the names of one Thomas Kanake Gwandaru who was neither a beneficiary nor an objector (*sic*). None of the children gave his/her consent to the confirmation and further avers that attendance of all the beneficiaries at the time of confirmation which is a legal requirement, was overlooked or ignored by the court.

According to the Applicant, the said factors were errors apparent on the face of the record and the mistake can be rectified through review as the confirmation was ordered without consent of the beneficiaries.

In paragraph 14 of the supporting affidavit, it is averred that in the year 1999 the previous deceased Administratrix met with a serious road accident and till her death, was incapacitated, and hence it was not possible to file the application earlier. The medical report is attached and it is observed therein that after mobilization she could walk with crutches and no explanation is given on why similar application was not made during her life time basing on her physical disability. The judgment was delivered on 12th March, 1998 and the accident occurred on 3rd July, 1999, after lapse of a year and three months.

It is trite law that in explaining the delay, a general averment is not sufficient. It must be supported by detailed reasons of the delay to enable the court to exercise its discretion, although unfettered.

Rule 1 of Order XLIV stipulates that a person, who is aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or from a decree or order from which no appeal is allowed, can file an application for review on any of the grounds mentioned in the said Rule.

I do note that the applicant has not obtained any decree or order as per the judgment under question. The wordings of Rule 1 above mentioned is very specific. The review application can only be filed after the decree or order is extracted. It is trite law that the court cannot decipher on which part of the judgment the review is made and thus an application filed without the decree or order having been obtained is incompetent and I do find so.

Even if I am wrong on the aforesaid findings, I do agree with the submissions made by the learned counsel of the Respondent, that the application is incompetent on the ground that the Judgment (*sic*) to be reviewed was made by Kuloba J on the application by a son of the deceased Administratrix and after considering all the issues, which are now raised in the application, the findings were made and orders given. The said judgment can only be challenged by way of an appeal as this court having concurrent jurisdiction, cannot sit on an appeal against the same.

I also note that a further order was made by Hon. Bosire J (as he was) directing the Registrar of the High Court to execute the Documents of transfer.

None of the grounds availed under Order XLIV Rule of Civil Procedure Rules is put forth before me to enable me exercise my unfettered discretion under Section 80 of the Civil Procedure Act.

Those grounds provided in Rule 1, or XLIV of Civil Procedure Rules are:

1. Discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him,
2. Some mistake or error apparent on the face of the record, or
3. Any other sufficient reason.

The mistake and error, even if any, while considering points of law is not, in my view, covered under the said legal provision. I say so, because, if I would determine a point of law, which I am asked to do, then I would be sitting over an appeal, and I do not have that jurisdiction.

The upshot of all the above is that I am not satisfied that the applicant has proved the case of review before me.

Thus the summons dated 28th May, 2007 is dismissed with costs.

Dated and signed at Nairobi this 22nd day of July, 2008.

K.H. RAWAL

JUDGE

22.7.08