



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

Succession Cause 3154 of 2003

**IN THE MATTER OF THE ESTATE OF THE LATE JAMES WAITHAKA KINYANJUI
(DECEASED)**

RULING

Before me is an application by way of Summons dated 14th November 2006 filed by A.M. Mugwuku & Company advocates on behalf of the applicant NANCY NYAMBURA GIKAMA. The application is purported to be brought under Rules 59, 63 and 73 of the Probate & Administration Rules and Order 44 Rules 1 and 2 (of the Civil Procedure Rules), Section 82 of the Law of Succession Act, and Rule 41 of the Probate and Administration Rules. It seeks for the following orders, that –

- (i) The application be certified urgent.
- (ii) This Honourable court be pleased to grant temporary stay of the orders and/or Judgment dated and delivered on 31st October 2006 pending the hearing of this summons inter-partes,
- (iii) This Honourable court be pleased to review and/or set aside the judgment dated 31st October, 2006 and delivered herein on 31st October 2006 together with all consequential orders and/or decree or certificate of confirmation arising therefrom.
- (iv) This Honourable court be pleased to issue or give such further relief or directions as may be appropriate in the circumstances.

The application has grounds on the face of the Summons. It is also supported by the affidavit of the applicant NANCY NYAMBURA GIKAMA sworn on 14th November 2006.

This application came before me on 14th November 2006. I certified it as urgent. I however declined to grant any interim orders. I ordered that respondent be served. After service the respondent filed a replying affidavit and a notice of preliminary objection. I directed that the preliminary objection, be argued in the main application.

At the hearing of the application, Mr. Muriuki appeared for the applicant while Mr. Njuguna appeared for the respondent.

Learned counsel for the applicant Mr. Muriuki submitted that the applicant wanted a review or setting aside of the judgment. He argued that the judgment was obtained by misrepresentation of material facts.

He contended that the court was misled into believing that there was a consent between the applicant and the respondent regarding the rightful beneficiaries, as well as the right shares for distribution of the assets. It was his position that there was no such consent.

He submitted secondly, that the applicant was not aware of the purported consent, and she only became aware of the alleged consent after judgment.

He further submitted that there were errors on the face of the record, and there was no record of the purported consent having been recorded by the court. It was his contention that such constituted an error on the face of the record.

He sought to rely on the supporting affidavit, especially paragraphs 5, 6 and 7. He also sought to rely on rule 73 of the Probate and Administration rules.

Mr. Njuguna, learned counsel for the respondent, opposed the application. He submitted that under Order 44 of the Civil Procedure Rules, the applicant was required to annex a decree, which was not annexed. Consequently, the application was incompetent.

Mr. Njuguna's second point was that since judgment had already been delivered, the new counsel for the applicant had to seek leave of the court under Order 3 rule 9A of the Civil Procedure Rules, before coming on record. No such leave was obtained. Therefore M/S A.M. Mugwaku & Company advocates were not properly on record. He sought to rely on the ruling of the court of Appeal in Nairobi Civil Application No. 253 of 2003 JOAN YATICH KILELE –vs- MAJOR GENERAL LAZARUS SUMBEIYO & OTHERS.

He also submitted that the application had no merits. The beneficiaries who shared in the distribution of the estate were disclosed in the initial petition. There was no information given in the application that there was a new beneficiary. He contended that the distribution of assets in the judgment, was not based on an alleged consent.

He submitted also that lack of instructions to counsel on the consent did not constitute a ground for review. In any event the applicant had always been present throughout in court. He sought to rely on the Court of Appeal Case of FRANCIS ORIGO & ANOTHER –vs- JACOB KUMALI MUNGALA – Eldoret Civil Appeal No. 149 of 2001 on the grounds on which a judgment may be reviewed by the court.

In a brief reply, Mr. Muriuki submitted that Order 44 of the Civil Procedure Rules did not require a decree to be annexed to the application. He contended that the case of JOAN YATICH KILELE –vs- MAJOR GENERAL LERARUS SUMBEIYO was on appeals to the Court of Appeal and had nothing to do with review of judgments. He submitted that Order 3 rule 9 of the Civil Procedure Rules did not apply to succession matters, and sought to rely on rule 63 of the Probate & Administration Rules.

I have considered the application, the submissions of counsel for both sides and the authorities cited to me.

I will first of all deal with the issue as to whether the application is incompetent, as no decree was annexed. It is not in dispute that no decree was annexed to the application. This application was brought under Order 44 rules 1 and 2 of the Civil Procedure Rules. Mr. Njuguna has argued that a decree needs to be annexed, while Mr. Muriuki has argued that the annexing of a decree is not a legal requirement.

Order 44 of the Civil Procedure Rules allows a person who considers himself aggrieved by a decree or order, from which an appeal has not been preferred or from which an appeal is not allowed, to apply for review. Nowhere in the order is it stated that an applicant for the review of a court's decision to be reviewed has to file the decree or Order to be reviewed. I have not been referred to any court case that says that the decree or order has to be filed with the application. It is therefore my humble view that there was no need for the applicant herein to file the decree on order to be reviewed. I find that the application is not incompetent by virtue of the applicant failing to file the decree or order to be reviewed.

The second issue that I have to consider is whether counsel for the applicant is not properly on record. Counsel for the respondent has relied on Order 3 rule 9A of the Civil Procedure Rules, which provides –

“9A. When there is a change of advocates, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record”

Counsel for the applicant acknowledges this requirement under the Civil Procedure Act (Cap. 21). He has however argued that the requirement does not apply to Probate and Administration proceedings. He relies on rule 63 of the Probate and Administration Rules which provides –

“63 (1) Save as is the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order V, X, XI, XV, XVII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules shall apply so far as relevant to proceeding under these Rules

(2) Subject to the provisions of this Act and of the Rules and of any amendments thereto the practice and procedure in matters arising hereunder in relation to intestate and testamentary succession and administration of estates of deceased persons shall be those existing and in force immediately prior to the coming in operation of these Rules”

The Law of Succession Act (Cap.160) provides for the Procedure to be followed in probate and administration matters, except where it specially applies the Civil Procedure rules. There are provisions and forms on how to appoint advocates, such as Form 63. Order 3 of the Civil Procedure Rules is not applicable to probate and administration proceedings in terms of rule 63 of the Probate & Administration Rules. Therefore, in my humble view, Order 3 Rule 9A of the Civil Procedure does not apply to probate and administration proceedings. It follows therefore that failure of the applicant’s counsel to obtain leave of the court to come on record after judgment was delivered does not mean that the said advocate is improperly on record. The case of YATICH KILELE –vs- MAJOR GENERAL LAZARUS SUMBEIYO cited on this point is therefore not applicable. That case relates to proceedings under the Civil Procedure Act (Cap. 21) and not cases under the Law of Succession Act (Cap. 160).

I now turn to the considerations for review. The application was brought under the provisions of Order 44 rule 1 of the Civil Procedure Rules which 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 be produced by him at the time when the decree was passed or the order was 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”.

The judgment herein was delivered on 31st October 2006. This application was filed on 15th November 2006. That was of period of 15 days. I find that there was not unreasonable delay in filing this application.

Though the applicant seems to be relying on alleged misrepresentation to the court by his former counsel, clearly is not a reason for review as envisaged by Order 44. An advocate is an agent of a litigant and binds his client. Secondly, though the applicant says that the advocate entered into a consent, my decision of 31st October 2006 was not based on any consent but on consideration of the opposing

proposed modes of distribution and applying the law on the facts of the case as disclosed to me. I accepted the mode of distribution proposed by counsel for the objectors, because I thought that it was more in line with the law. That is also not a basis for review.

Though the applicant holds that there are new matters that she has discovered, no new matter or information has been placed before me that was not there at the time of the judgment. There is no allegation of a new asset, or new beneficiaries, or any other new matter. The submissions of her counsel were on record before the judgment was given. The applicant has not established any new matter or material to persuade me to exercise my discretion for review in her favour.

The applicant also claims that there are errors on the face of the record. Again, she does not point or highlight those particular errors. She seems to think that an erroneous conclusion of law or evidence is an error or mistake on the face of the record. That cannot be so. I only need to echo what the court of Appeal stated in the case of FRANCIS ORIGO & ANOTHER –vs- JACOB KUMALI MUNGALA – Eldoret Civil Appeal No. 149 of 2001 in which the Court of Appeal had this to say –

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal”.

Clearly from the above, if I erred in the way I applied the law or my interpretation and application of the facts, that is a ground for appeal, but not a basis for review of my judgments.

I find no facts placed before me that can persuade me to exercise my discretion to review my decision. This application therefore will fail and I have to dismiss the same.

Consequently, I dismiss this application, with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 14th day of March 2007

George Dulu

Judge

In the presence of –

Mr. Mugukwu for the applicant.

Mr. Owuor holding brief for Mr. Njuguna for the respondent.