IN THE MATTER OF THE ESTATE OF KITILI NYAMU KIKWATU

AND

FLORENCE MUMO KITILI...PETITIONER

(Being an application for review of earlier orders made on 15/10/1998)

RULING OF THE COURT

1. The applicant's application is the chamber Summons dated 8/11/2001 seeking orders that:-

a. The orders issued by Honourable Justice Mwera on the 18th day of October 1998 be hereby reviewed and set aside;

b. Costs of this application be provided for.

The application which is brought under Order XIV Rule 1(1) (a) and (b) of the Civil Procedure Rules (C.P.R) and section 3A of the Civil Procedure Act is premised on the ground that there was a glaring, error apparent on the face of the record.

2. In his Supporting Affidavit sworn on 14/11/2001 Mr. Benard Muteti Mungata, advocate for the applicant says that ever since the case was lodged in court, no interim letters of administration have ever been issued, and therefore that none of the parties herein have been legally mandated to administer the deceased's estate; that despite the aforesaid position, the petitioners/applicants proceeded to file an application dated 22/08/1996 for an injunction through their former advocates and that the said application was dismissed on the ground that the applicant was found not to be a wife of the deceased person.
3. Mr. Mungata also says that by the time of both of filing the application dated 22/08/1196 and the ruling therein, the applicant had no locus standi to bring the application aforesaid and therefore that the orders of 18/10/1998 could not have been issued if the issue of capacity of the parties had been brought to the attention of the court. Mr. Mungata also said that failure to bring to the attention of the court the fact that the parties lacked capacity to bring the application before court was a grave error on the face of the record and that on that basis, the court should be persuaded to review the orders issued on 15/10/1998 and to set them aside.
4. Before considering the grounds raised in opposition to the applicant's Chamber Summons it is helpful to revisit the application that gave rise to the ruling dated 18/10/1998. The application in controversy is the Chamber Summons dated 22/08/1996 brought under Order 39 Rules 1, 2, 3 and 9 of the Civil Procedure Rules (CPR) and Section 3A of the Civil Procedure Act, Cap 21. The application was filed by Mumo Kitili against Muloka Kitili and David Kitili. The application sought the following orders:-
    a. That the respondents, his servants and/or agents be restrained by an order of this Honourable Court from evicting the applicant, and/or interfering in any manner, and/or intermeddling with the assets of the estate of the deceased **Kitili Nyamu Kikwatu** pending the sharing of the properties of the estate of the deceased.
    b. That this Honourable Court do order the District Commissioner Central Division to be furnished with a copy containing all assets of the estate and do share the same among the

applicant and the respondent.

c. Alternatively this court do grant any other orders regarding the estate, that it deems fit and just.
d. Cost of this application be cost in cause (sic)

5. The affidavit in support was sworn by **Florence Mumo Kitili** in which she said that she was the applicant in the cause and therefore competent to swear the affidavit; that she had applied for Letters of Administration on 20/06/1996, and that she obtained a limited grant to the said estate, but the Annexture marked "FMKI" which she said was the limited grant was actually the Certificate of Death No.275421 issued on 6/06/1996 in respect of Kitili Nyamu Kikwatu who died on 7/03/1996. She also said at paragraph 9 of her said affidavit that on several occasions the respondent had been threatening to evict her and to demolish the houses that were left for her by the deceased, and further that the respondent was also threatening to evict her as per annexture "FMK2".
6. That application was opposed on the ground that the applicant had not been declared an administrator of the deceased's estate and that the application was thus misconceived, bad in law and without substance as the applicant was neither a dependant nor heir to the estate of the deceased. The application was also opposed on the ground that the cause had been filed without the consent of the respondent.
7. The application however proceeded by way of viva voce evidence. The main issue in dispute was whether Florence Mumo Kitili was the wife to the deceased, Kitili Nyamu Kikwatu. My brother Judge, Honourable J.W. Mwera found that according to the evidence that was laid before him, the deceased had only one wife by the name Kalondu and that after Kalondu died, the deceased did not remarry. He therefore concluded that Florence Mumo Kitili was not the deceased's wife. The court also concluded that the orders of injunction could not issue on the ground that Mumo did not have the Letters of Administration which she alleged she had to the estate of the deceased.
8. The above is the background to the present application which is opposed. The Grounds of Opposition were filed by the firm of Makau & Company Advocates and pointed out largely that the application was misconceived, bad in law and did not comply with Order 44 Rule 1(1) of the C.P.R. which states:-

"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 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 the 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."**

9. The application is also opposed on the grounds that the delay in bringing the application was inordinate i.e that an application filed on 14/11/2001 can not be said to have been brought without unreasonable delay when it seeks to review an order made on 15/10/1998; that the application was based on non-existent orders sought to be reviewed; that the applicant filed the application in dispute when she had no capacity to do so, and finally that the applicant's application was scandalous, frivolous and vexatious and that it was otherwise an abuse of the due process of the court.
10. At the hearing hereof, Mr. Mungata for the applicant reiterated the averments in his affidavit in support of the application and also said that the reason for the delay in bringing the application by the applicant was laxity on the part of the applicants former counsel and urged the court to find that the delay was excusable. He also submitted that the application could not have been prosecuted earlier because Hon Mr. Justice Mwera was transferred from Machakos before the application could be heard. Mr. Mungata cited the following two authorities for the count's guidance:-

(i) **Kithoi -vs- Kioko [1982) KLR 177** in which the Court of Appeal held that:-

"**The Civil Procedure Rules Order XLIV demands, inter alia, that an application for review must be based on the discovery of new and important evidence which was not within the applicant's 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. The application for review must strictly prove the grounds for review on the ground of mistake or error apparent on the face of the record, failing which the application will not be granted.**"

ii) **Nyamogo and Nyamogo Advocates –vs- Kogo –** Court of Appeal

C.A. [2001] 1 E.A. 173 in which the court expounded on the factors to be considered in applications for review; inter alia, whether an erroneous decision constitutes an error on the face of the record sufficient to permit review.

11. For his part, Mr. J.A. Makau argued that the applicant was not entitled to the orders sought on the grounds that the decree sought to be reviewed has not been extracted by the applicant and attached to the application. Mr.Makau relied on **Protein and Fruits Processor Ltd -v- Credit Bank Ltd & 2 Others[2004] 2 KLR 409** in which the court held that the plaintiff's application, was procedurally fatal as he had failed to discharge his onus to extract a decree to be reviewed and to annex a copy of it. Mr. Makau also submitted that the applicant's application was not brought without undue delay. Mr. Mungata admitted that the application was filed three years after the date of the decree which the applicant has asked this court to review, but he contended that the delay was caused by the applicant's former advocate and that the consequences thereof should not be visited upon the applicant.
12. Mr. Makau also submitted that there is no error apparent on the face of the record. The point raised by Mr. Mungata was that it was not brought to the attention of the court at the time of passing the decree that neither of the parties had the legal capacity to bring the application; but Mr.Makau submitted that this was the very issue that the learned judge dealt with before he eventually dismissed the application for injunction on 15/10/1998.
13. I have carefully considered the submissions placed before me on whether or not the orders sought herein should be granted. I have concluded that the applicant cannot get the orders she seeks for the reasons, first, that this application was brought some three years after the date of the decree which the applicant seeks to review. I do not think that the 3 year period was not unreasonable delay. Further, the said delay has not been explained. Mr. Mungata said that the delay was caused by applicant's former advocate. If this allegation was true, the court would have expected the applicant to swear her own affidavit and explain in detail how her former advocate had caused the delay. Having failed to swear and file such an affidavit, I agree with Mr. Makau that the delay in bringing this application was unreasonable, and attributable to the applicant herself. The application must fail.
14. Secondly, the applicant failed to extract the decree and/or order which she wishes to have reviewed and to annex it to the application. Mr. Mungata submitted that since the ruling is typed and is on the court file, it is available for the court to see. I must point out here that it is not the duty of this court to prepare the applicant's pleadings. Every litigant is duty bound to place before the court all evidence and documents that may be required in support of his/her case. In the result the, the applicant's application is found to be fatally defective for failure to extract and annex the decree/order that is sought to be reviewed and set aside.
15. Thirdly and more importantly, the court is not persuaded that there is any error, leave alone a grave error, on the face of the record that would warrant the review of the order of 15/10/1998. Mr. Mungata contended that the court was not seized of the fact that the applicant therein was not possessed of the legal capacity to bring the application. From the ruling of the Honourable Judge, this averment by Mr. Mungata could not be further from the truth. That issue came up and the court found that the orders of injunction could not issue because Mumo the 2nd applicant herein, had no limited grant to administer the estate of the deceased.
16. In the result, I find and hold that there was no error apparent on the face of the record at the time

when the decree was passed. The learned judge was seized of all the facts that he required to make a finding as to the validity of the application for injunction and determined that issue judicially on the basis of the facts that were placed before him. As the Court said in the **Nyamogo and Nyamogo case (above) at page 174-**

“**An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature and it must be left to be determined judicially on the face of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record.”**

17. In the present case, the purported error can only be established by a long drawn process of reasoning. That was in fact the reason why the application for injunction had to proceed by way of viva voce evidence.
18. In the result, I find that the applicant’s application lacks merit. The same is dismissed with costs to the respondents
19. Orders accordingly.

Dated and delivered at Machakos this 29th day of November, 2007

R.N. SITATI

JUDGE