



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 578 of 1999

IN THE MATTER OF THE ESTATE OF ALLAN NGUGI MUCHAI (DECEASED)

RULING

Two applications were argued before me as follows:

- 1) summons for Review brought under rules 63 of the P & A rules and under Order XLIV rr 1,2,3 & 6 of the Civil Procedure Rules, dated 11th February 2005.
- 2) Summons for production of accounts by the Administrators brought under Section 83 and 95 of the Law of Succession Act dated 24th December 2004.

I shall consider each application separately as the issues raised are different.

Summons for Review dated 11th February 2005

The petitioners sought for the order of review of the order made by this court on 15th October 2004. They also sought for an order that this matter be reheard denovo through viva voce evidence.

The petitioners considering themselves aggrieved by the judgment of this court promptly filed a Notice of Appeal on 28th October 2004 in the Court of Appeal against the judgment of this court of 15th October 2004.

The provisions of Order 44 1(1) of the Civil Procedure Rules provides:

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 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 an 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 order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”

Counsel for the petitioners argued that the fact that there is a Notice of Appeal, that in itself does not bar

them from pursuing the review application and in any event they do not wish to pursue the Appeal as no appeal in any case is allowed under the Law of Succession Act.

The application was presented on three main grounds, mainly:

a) That there are errors or mistakes apparent on the face of record.

In regard to this ground, counsel argued that, the application by the respondents dated 8th May 2003 was irregularly introduced without the leave of the court.

Secondly no directions were given as to its hearing and determination.

Thirdly the issues raised in that application were sufficiently covered by the ruling of Rawal J dated 4th September 2001 whereby the court made a finding that S N G the mother of the respondents was not a wife of deceased.

The second ground of the application for review was;

b) That the parties have 'discovered new and important matter'

This was probably the thrust of the application as counsel for the petitioner argued that the judgment failed to take cognizance of the fact that the deceased was a Trustee of his family in respect of all the deceased properties listed under paragraph 2 of the supporting affidavit by John Kimani Muchai the petitioner herein.

According to the petitioners the deceased was their Trustee and he held the properties in Trust of all his brothers and sisters.

The third ground has to do with an oral will, whereby the deceased is supposed to have bequeathed all his properties and shares to the petitioner's son one MICHAEL MWANGI KIMANI.

There were other grounds that were raised which can appropriately be tackled in an appeal as I consider it inappropriate to sit on my own judgment.

This application was opposed by the respondents, who relied on the grounds of objection on matters of law as well as a replying affidavit by Lucy Wairimu Ngugi. Counsel for the respondent submitted that the application is bad in law and offends the provisions of order 44 Rule 1 of the Civil Procedure Rule.

The petitioner having opted to file an appeal, the remedy of review is not available to them.

In the alternative and assuming that no appeal is allowed, there is no "new and important" matter which was not available to the petitioners. It is the petitioner who filed the petition for Letters of Administration and listed all the deceased assets in Form P & A 5. there is no indication that the property was held by the deceased in Trust for his family. The attempt to declare the entire assets of the deceased as liabilities is an attempt to defeat the course of justice.

Thirdly the issue of an oral will should be disregarded as the petitioners are the parents of Michael Mwangi Kimani and since they were aware of the oral will, they had a duty to petition for the grant of Letter of Administration of an oral will.

In the circumstances the respondent asked the court to dismiss the summons.

I have considered all the relevant materials that was placed before me, to begin with, I wish to make reference to a decision of the Court of Appeal in the case of **MAKHAGU VS KIBWANA E.A. L.R. 1995 – 1998** whereby the Court of Appeal held as follows:

“Under Section 47 of the Law of Succession Act (Chapter 160), the High Court has jurisdiction on hearing any application to pronounce decrees or orders. Any order made under this Section was appealable under Section 66 of the Civil Procedure Act either as of right if it fell within the ambit of Section 75 of the Civil Procedure Act or by leave of the Court if it did not. The order dismissing the application in this case was not covered by Section 75 of the Civil Procedure Act and was therefore only appealable by leave of the court”

In my humble view, and understanding of the above Court of Appeal decision, orders and decrees pronounced under the Law of Succession are appealable with the leave of the court. This perhaps explains why there are numerous decisions of the Court of Appeal arising out of the High Court decisions on the Law of Succession.

Similarly, I have looked at the decision in **ABASI BALINDA VS FREDRICK KANGWAMU & ANOTHER (1963)** whereby the court held that;

“a point which may be a good ground of appeal may not be a ground for an application for review and an erroneous view of evidence of Law is not a ground for review though it may be a good ground for an appeal”

I have also had the advantage of considering a similar decision in Civil Appeal No. 10 of 1980 at Eldoret the case of Francis Origo and Another vs Jacob Kumali Mugla the Ruling of A. Visram (Commissioner of Assize) (as he then was) and I entirely agree with his holding that

“an erroneous conclusion of law, or evidence, is no ground for review”

In this regard it is my humble view that the applicant’s complaints as listed in the application whereby they seek to set aside the judgment are appropriate for an appeal not review.

On the issue of whether the applicant can file an application for review notwithstanding the Notice of the Appeal, my humble understanding of the provisions of Order XLIV Rule (1), the applicant cannot file an appeal and at the same time pursue the application for review, he has to choose one avenue and follow it to the logical conclusion.

In this case since the applicant chose to file an appeal, the avenue for review should not be available to him.

On the other issues of new and important evidence regarding the assets of the deceased which were supposed to have been held in trust, I am of the view that this is not information that the petitioners could not obtain if they exercised due diligence, this information was indeed within their knowledge when they filed this petition. They listed all the assets and no liabilities. There was no indication in the petition that this property was held in trust.

In the application for confirmation the petitioners sought for an order vesting all the properties in their joint names. If indeed there was a share of the property that did not belong to the deceased the petitioners should have invoked the provisions of order 41 Rule (3) of the P & A rules to have the shares held in Trust determined. Failure to file an application to determine their beneficial interest or the issues of Trust, or even to bring the matter to the attention of the court how can the court be blamed for failing to consider the issue of Trust.

The records clearly show that the application by the respondents was served upon the petitioners and directions were settled by consent on how the court should proceed to determine both the summons and the affidavit of protest to the summons for confirmation.

In view of the above, I am of the humble view that the Summons for review should fail. I think it is unprocedural for a party to seek to fill the gaps in their cases after judgment by bringing an application for review under the guise of discovery of new and important matter or evidence. The word “discover”

according to Oxford dictionary means “to invent or find something not known before”

In the circumstances, I hereby disallow the application for review and dismiss it with costs.

It is so ordered.

Ruling read and signed on 15th April, 2005.

MARTHA KOOME

JUDGE