In re Estate of Tapoya Amuruk Silaure (Deceased) (Succession Cause 194 of 2004) [2024] KEHC 8870 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8870 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

SUCCESSION CAUSE 194 OF 2004

AC MRIMA, J

JULY 25, 2024

IN THE MATTER OF: THE ESTATE OF TAPOYA AMURUK SILAURE [DECEASED]

BETWEEN

JOHN PKIYACH TAPOYA ..... APPLICANT

AND

JOYCE KIMOMWOR TAPOYO ..... PROTESTOR

AND

JAMES MUSA TAPOYA ..... ADMINISTRATOR

RULING

Introduction

1. On 17th May, 2023, this Court delivered a judgment in this matter. The judgment was on the distribution of the net estate of the deceased herein. By then, the Applicant was represented by the firm of Messrs. Jason Kimani & Co. Advocates.

2. So far, the judgment has not been appealed against, stayed, set-aside and/or varied.

3. On 13th October 2023, the Applicant herein appointed the firm of Messrs. Teti & Co. Advocates in place of his former Counsel.

4. The Applicant's Counsel then filed an evenly dated application by way of a Summons under a certificate of urgency.

5. The application was heard, inter partes, hence, this ruling.

The application:

6. The application sought the following orders: -

1. That .....

2. That .....

3. That .....

4. That .....

5. That .....

7. The application was supported by the Applicant's affidavit sworn on 12th October, 2023.

8. The application was opposed by the Protestor through a Replying Affidavit she swore on 9th November, 2023.

9. On Court's directions, the application was heard by way of written submissions. Booth parties duly file their submissions. They also referred to several decisions in support of their rival positions, a result of which this Court remains grateful to the Counsel's industry.

Analysis:

10. As the application seeks to review of the judgment in place, a look at the law on review follows.

11. Review entails a Court making a departure from its earlier finding on an issue. A Court may do so on its own motion or upon application by a party. Review is discretionary.

12. In exercising such discretion, the Court must abide by the principles established for the exercise of such powers either by the law or settled judicial precedents.

13. The power of review in the High Court is anchored in the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya and the *Civil Procedure Rules, 2010*.

14. Section 80 of the *Civil Procedure Act* provides as follows: -

> 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.

15. Order 45 Rule 1 of the *Civil Procedure Rules, 2010* further provides for review in the following manner: -

> 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 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.

16. Courts have severally dealt with the issue of review. The Supreme Court in Application No. 8 of 2017, *Parliamentary Service Commission -vs- Martin Nyaga Wambora & others* [2018] eKLR, quoted with approval the findings of the East Africa Court of Appeal in *Mbogo and Another -vs- Shah* [1968] EA, upon establishing the following principles: -

> (31) Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:
>
> i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
>
> ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
>
> iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
>
> iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
>
> v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
>
> vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
>
> a. as a result, a wrong decision was arrived at; or
>
> b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

17. The Court of Appeal in Civil Appeal No. 2111 of 1996, *National Bank of Kenya vs. Ndungu Njau* observed as follows in respect of reviews applications: -

> A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law.

18. The import of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* was considered by the High Court in Miscellaneous Application 317 of 2018, *Republic -vs- Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR. Upon considering comparative jurisprudence, the Court crystallized the principles for consideration in reviewing its own decisions as follows:

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

19. Returning to the case at hand, the Applicant relied mainly on two grounds. One was the ground of discovery of new evidence and the other was that the application for confirmation that resulted the impugned judgement ought to have, instead, been heard by way of viva voce evidence.

20. The Court will now deal with first ground.

21. According to Order 45 of the *Civil Procedure Rules*, for the ground of discovery of new evidence to succeed, the Applicant must demonstrate that '... 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 made...'

22. The above requirement can be equated to the evidence referred to as 'new and compelling evidence' in Article 50(6) of the *Constitution*. Speaking of such evidence, the Supreme Court in *Col. Tom Martins Kibisu vs. Republic* Petition No. 3 of 2014 (2014) eKLR presented itself thus: -

(42) We are in agreement with the Court of Appeal that under Article 50(6), "new and compelling evidence" means "evidence which was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial"; and "compelling evidence" implies "evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict." A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, a prima facie, material to, or capable of affecting or varying the subject charges; the criminal trial process, the conviction entered; or the sentence passed against the accused person.

23. In this case, the new evidence is that the Applicant was not in possession of the original minutes in which the deceased had sub-divided the land known as West Pokot/Siyoi 'A'/4244 among his four sons.

24. This Court will now subject the Applicant's new evidence to the foregoing criterion.

25. The judgment rendered on 17th May, 2023 dealt comprehensively with the issue of the minutes. That was because, the Applicant had then produced a copy of the said minutes. It is, however, important to note that this Court did not reject the minutes on the sole ground that they were copies. Instead, the Court ventured into the heart of the minutes at length and even considered the details thereof and the alleged distribution therein.

26. Having considered the minutes in light of the other evidence then on record and the law, the Court then declined to accept the alleged proposed distribution of the parcel of land in the minutes as a lawful manner in which the estate of the deceased ought to devolve.

27. To this Court, therefore, the whole issue of the veracity and the probative value of the minutes was already dealt in the judgment. The issues now raised by the Applicant were already determined by this Court. It is, hence, certain that no meaningful purpose is likely to be achieved even if the original minutes are to be admitted in evidence.

28. The ground of discovery of new evidence, hence, suffers a false start and is for rejection.

29. This Court will now deal with the second ground.

30. The ground was that the hearing of the confirmation application ought to have been heard by way of viva voce evidence where the Applicant would have been accorded an opportunity to call witnesses and to produce other documents.

31. The ground falls within the purview of Order 45 Rule 1 of the *Civil Procedure Rules*. Therefore, the expression "any other sufficient reason" has to be interpreted in the light of other specified grounds. That is in tandem with the ejus dem generis rule.

32. In this matter, the Applicant contended that his former Advocates opted to deal with the confirmation application by way of reliance on the affidavit evidence and written submissions instead of viva voce evidence. As a result, he was denied an opportunity to ventilate the issues on the distribution of the land, to produce documents in evidence and to call witnesses.

33. The Applicant, therefore, took issue with the manner in which the confirmation proceedings were undertaken. Whereas he contended that he would have produced documents and called witnesses, the documents and the witnesses were not disclosed. To this Court, maybe the document referred to were the minutes.

34. On the issue of witnesses, this Court takes the position that the hearing of an application by way of written submissions does not ipso facto deny a party the opportunity to avail witness evidence. I say

so because a party has the discretion to file as many affidavits as it pleases once confronted with an application. There is no legal bar restricting the filing of responses to only the parties in the matter. Once all the responses are duly filed, the Court then gives directions on the hearing of the application.

35. Based on the nature of the evidence on record, an application may be heard by way of written submissions or viva voce evidence and/or both.

36. In the matter at hand, the Applicant did not file any other disposition apart from by himself. That was the like position with the other party.

37. On the basis of the evidence at hand and their nature, Counsel for the Applicant opted to, rightly so, vary the earlier directions on the hearing of the confirmation application from oral evidence to reliance on affidavit evidence and written evidence. That was on 25th October, 2022. The other party did not object to the variation and this Court allowed the application.

38. Therefore, for the Applicant to allege that he had wanted to adduce witness evidence and produce documents which were not disclosed not only in the instant application, but even in the confirmation application, is to a large extent, and with utmost respect to parties and Counsel, taking the Court for a ride. A party must disclose the nature of evidence it intends to call in an application for review. That evidence must then be brought within the confines of the law. Only then may a Court exercise its discretion in favour of an Applicant. That was not the case in this matter.

39. The upshot is that the second ground also fails.

40. Having found as much, this Court additionally notes that this matter has been in Court since 2004. That is for the last 20 years. Further, the impugned judgment has by now been fully implemented. The Court shares the position that litigation must at a point come to an end.

41. It is now the finding and holding of this Court that the application is unsuccessful.

Disposition:

42. As I come to the end of this ruling, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

43. Deriving from the above, the following final orders do hereby issue: -

    a. The Summons dated 12th October 2023 is hereby dismissed.

    b. The Applicant shall bear the costs of the application.

    c. Leave to appeal, if need be, is hereby granted.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS ...25TH ..... DAY OF JULY, 2024.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

No appearance for Mr. Teti, Learned Counsel for the Applicant.

Mr. Onyancha, Learned Counsel for the Respondent/Protestor/Objector.

Chemosop/Duke – Court Assistants.