



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. E009 OF 2020

ACHIENG AJWALA.....APPELLANT

VERSUS

CAREN AUMA OTIENO.....1ST RESPONDENT

MARTIN OROME OGUNDO.....2ND RESPONDENT

(An appeal against the Ruling delivered by Hon. J.O. Ong'ondo, SPM

virtually on the 11th June 2020 in Siaya PM's Court, Succession Cause No.32 of 2017)

JUDGMENT

1. The background to this appeal is that the appellant herein **ACHIENG AJWALA** filed an application for review before the trial court, under Order 45 rule 1 of the Civil Procedure Rules seeking the trial court to wholly or partially review its orders of 2nd August 2018 regarding distribution of the deceased's estate claiming that the trial court ought to have proceeded and distributed the estate between the deceased's two houses in favour of the appellant, his son and other beneficiaries.

2. In dismissing the application, the trial court in its ruling rendered on 11th June, 2020 held that the appellant had failed to demonstrate what error there was on record to warrant the court reviewing its order and as such, the appellant did not merit the relief sought.

3. Aggrieved by the ruling dismissing the application for review, the appellant filed this appeal vide a Memorandum of Appeal dated 9.3.2021 setting out the following grounds:

a) *The process used in the distribution of the estate was wrought with mistakes.*

b) *That the learned magistrate erred in law and in fact by failing to consider the applicant's Notice of Motion application for review on merit.*

c) *The learned magistrate failed to exercise his discretion judiciously under the review application.*

d) *The learned magistrate in all circumstances of the facts in support of the applicant's review application, his finding was in support of the applicant's motion and as such there was no basis from departing from the same.*

4. The appeal was canvassed by way of written submissions.

5. The appellant submitted that the trial court's rejecting to consider the appellant's application before it on the ground that it was initiated under Order 45 of the Civil Procedure Rules was an omission as the application was properly before it as the power to review court orders in succession matters is premised under rule 63 of the Probate and Administration rules that imports Order 45 (1) (b) of the Civil Procedure Rules into applicability in succession matters.

6. Reliance was placed on the case of **John Mundi Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another [2016] eKLR** that provided for the importation of Order 45 of the Civil Procedure Rules for review in succession proceedings.

7. It was further submitted that upon being confronted with the appellant's application, the trial court was obligated to consider the trial record before it in whole so as to make an informed finding.

8. It was submitted that though the appellant had not applied for summons for confirmation of grant, upon being included by rectification, the

court failed to follow the procedure laid down in section 39 of the Succession Act on the mode of distribution to be adopted.

9. The appellant submitted that being the brother to the deceased David Obuolo Miruka who was succeeding the estate of their deceased brother Pius Ogweno Ajwala, it was desirable that the estate of the deceased be distributed in the proposed ratio of 1:1 and not in the manner the trial court had done.

10. It was further submitted that in confirming the grant, the trial court failed to abide by section 71 of the Law of Succession Act that provides that at the confirmation application, a court is called upon to confirm the appointment of the administrator and the distribution of the estate, which it did not and thus warranted review.

11. The Respondents did not file any submissions and neither did they participate in this appeal despite service of the record of appeal and Mention and hearing Notices upon them.

Analysis and Determination

12. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence adduced in the trial court to a fresh and exhaustive scrutiny before drawing its own conclusion from that analysis bearing in mind that the court did not have an opportunity to hear the witnesses first hand. See the Court of Appeal case of **Elizabeth Njambi Kimemia v Florence Ngina Banga [2018] eKLR**.

13. I have perused the pleadings herein as well as those before the trial court. In my view, the issue for determination before this court is whether the application for review dated 11th May 2020 filed by the appellant before the trial court was merited.

14. The appellant's application before the trial court sought orders for review, vary or setting aside of the ruling delivered on 2nd August 2018 in the Certificate of confirmation of grant and Schedule of distribution and its ruling of 31st April 2020. The appellant also urged that upon the setting aside of the aforesaid orders, the trial court do order that the land parcel No South Gem/Ndori/1200 measuring approximately 2.59 ha be shared in two house units ration 1:1 in favour of Achieng Ajwala and his son Jecton Orome Ochieng and the other beneficiaries (Paul Oloo Obuolo, Joseph Onyango Obuolo, James Odhaimbo Obuolo, Jared Ajwala Obuolo, Alfred Otieno Obuolo, Brian Omondi, Steve Otieno Odhiambo, David Omondi Orwa and Japheth Ouma Obuolo).

15. The application was premised on the grounds, among others that the appellant was not listed as a beneficiary of the deceased's estate despite the fact that he was a biological brother of the deceased, **Pius Ogweno Ajwala** and an uncle to the beneficiaries therein whose father, his other brother had since passed away. The appellant's further ground was that he was desirous of having the deceased's estate distributed in the ratio 1:1 to involve him and his son on one hand and the other beneficiaries who were children of his other deceased brother on the other.

16. The appellant reiterated his averments as stated above in the supporting affidavit to the application for review which affidavit was sworn on 10th May 2020.

17. The ruling that the appellant sought to have reviewed by the trial court is the one that rectified a grant that had been previously issued to the beneficiaries therein to include the appellant in the list and a schedule of the distribution of the estate of the deceased Pius Ogweno Ajwala comprising Land Parcel No. South Gem/Ndori/1200.

18. The question therefore is whether the trial court erred in failing to grant the appellant orders of review as prayed based on his application dated 11th May 2020.

19. In considering instances of review, a probate court is governed by Rule 63 of the Probate and Administration Rules, which provides that:

"63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

(1) Save as is in 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 Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

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

20. In *John Mundia Njoroge (supra)* the court cited Rule 63 of the Probate and Administration Rules, and stated as follows:

"As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules."

21. From the above, it follows that any party seeking review of orders in a probate and succession matter, is bound by the provisions of Order 45 of the Civil Procedure Rules.

22. Order 45 of the civil Procedure Rules stipulates that:

“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 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.

(2) ...”

23. The provisions of Order 45 of the civil Procedure Rules gives three circumstances under which an order for review can be made. In such instances, an applicant must demonstrate to the court that there has been 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. Secondly, a party will succeed in an application for review where he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is that an applicant must demonstrate that he has any other sufficient reason for seeking such review.

24. I have perused the trial court record. The appellant did not and has not proved the existence of or discovery of any new and important matter or evidence to warrant review of the court’s orders. Neither did he demonstrate any mistake or error on the face of the record. He neither showed and or demonstrated to the trial court or this court that there was any sufficient reason to warrant the court exercising its discretion and allowing the review as prayed. I say so because on perusing the ruling in question, the trial court clearly identified and recognized the appellant as a genuine beneficiary of the estate of his late brother and therefore the idea of his son also being listed as a beneficiary does not arise. In addition, the other beneficiaries who are listed are the sons of the appellant’s deceased brother David Obuolo who was also a brother to the deceased Pius Ogweno Ajwala. It cannot therefore be that the appellant and his son or sons must both be listed as beneficiaries since the appellant is already listed as a surviving brother to the deceased Pius Ogweno while the sons of the late David Obuolo were listed on behalf of the estate of their late father.

25. Accordingly, I find and hold that the trial court was right in dismissing the appellant’s application for review dated 11th May 2019 which was brought belatedly late and with no reasons given for the delay.

26. Even so, I shall proceed to determine whether the distribution of the deceased’s estate should be in the ratio of 1:1 as between the appellant and his son vis-à-vis the deceased’s nephews, as is advanced in this appeal and before the trial court.

27. In this regard, this court is guided by Section 39 of the Law of Succession Act which provides situations where the deceased has left no surviving spouse or children. The section provides that:

“(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

(2) (a) father; or if dead

(3) (b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none;

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares. (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

28. The applicable provision is section 39 (1) (c) which provides for distribution of the deceased’s estate in equal measures between the deceased’s siblings and his nephews or nieces. The provision does not contemplate distribution in ratios as is contemplated under Section 40 of the Act that addresses the case of a polygamist where the deceased had several wives at some stage of his life.

29. Accordingly, the deceased’s estate herein would be distributed in accordance with section 39(1) of the Law of Succession Act as already done, in equal shares between the appellant herein and the deceased’s other brother’s children whose father is David Ogweno, who is also deceased and as was done in the ruling of the trial court made on 30th April 2020. Provisions of section 39(1) (c) of the Act are clear-“ **c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares;**”. The section uses the terms **and**, between

brothers and sisters **and any** child ...meaning, the children of the deceased brothers and sisters are entitled to inherit in equal shares with their surviving uncles or aunts.

30. The trial court also made it clear and rightly so that an administrator of an estate has no power or authority to pass any title to any other person before confirmation of the grant. It appears, in this case, and from the application dated 19th September, 2018 that the appellant is insisting on the 1:1 ratio and inclusion of his son and other persons as independent beneficiaries because he subdivided the land and transferred titles to third parties which titles were later cancelled by the trial court. That is not permissible in law. The appellant should pursue his share only from the cancelled titles.

31. In the end, I find the appeal herein devoid of merit. It is hereby dismissed with an order that each party do bear their own costs.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 1ST DAY OF FEBRUARY, 2022

R.E. ABURILI

JUDGE