In re Estate of Jecinter Njoki Okoth (Deceased) (Succession Cause 9 of 2018) [2024] KEHC 15977 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15977 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

SUCCESSION CAUSE 9 OF 2018

SM GITHINJI, J

DECEMBER 17, 2024

BETWEEN

SIMON HAROLD SHIELS ..... PETITIONER

AND

MARY AKINYI OKOTH ..... 1ST RESPONDENT

ANTHONY OTIENO OKOTH ..... 2ND RESPONDENT

RULING

1 For determination is the is the Application by the Respondents dated 25th October 2024 seeking the following orders;

1. Spent.
2. That this honourable court be pleased to review its ruling delivered on the 23rd day of October 2024 and set aside or stay all consequential orders arising from thereto.
3. That pending the hearing and determination of instant application, this honourable court be pleased to stay the execution of the eviction order delivered on the 23rd day of October 2024 together with all the consequential orders arising from thereto.
4. That costs of the application be provided for.

2 The Application is founded on the grounds set out on its face and on the supporting affidavit of Anthony Otieno Okoth the 2nd Applicant who deponed that the court delivered a ruling on 23rd October 2024 citing that they had failed and/or neglected to file a response and submissions in the matter and proceeded to make an arbitrary ruling to their detriment with the effect of evicting them from an asset listed under the estate of the deceased. It was stated that they had filed their responses and submissions both dated 4th March 2024 on 16th May 2024 as captured in the CTS. Further, the court pronounced itself on matters the litigants did not move the court to.

3 In response, the Petitioner filed a replying affidavit stating that the Applicants' application does not meet the criteria set out in Order 45. That failure of the court to consider the Applicants' submissions is not a ground for review as submissions are not evidence.

Disposition

4 The Application was canvased by way of written submissions. I have considered the submissions as well as the authorities relied upon. For determination is whether the orders for review and stay of execution as sought are merited.

5 Review is provided for under "Section 80 which provides that;

> " Any person who considers himself aggrieved; -
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> 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."

6 Section 63 (e)

> In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

7 Order 45, rule 1. Application for review of decree or order.

> " 1. Any person considering himself aggrieved—
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> (1) (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) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

8 Therefore, Order 45 of the *Civil Procedure Rules*, 2010 is very explicit that a court can only review its orders if the following grounds exist: -

a. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

b. There was a mistake or error apparent on the face of the record; or

c. There were other sufficient reasons; and

d. The application must have been made without undue delay.

9 The pertinent issue for determination herein, therefore, is whether the Applicant has established any of the above grounds to warrant an order of review.

10 In *Muyodi vs. Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

> " In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that 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 facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a 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 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view and is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."(emphasis mine)"

11 On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in Pancras T. Swai v Kenya Breweries Limited [2014] eKLR held that:

> " In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review.

12 The court stated: -

> " our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."

13 We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.

14 We think *Bennett J was correct in Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557* when he held that:

> " a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal"

15 The Applicants' basis for review is that the court erroneously indicated that they had not filed their submissions and response to the application which was not the case. On 08.04.24, counsel for the Applicants had indicated to the court that he had challenges with the filing portal and as such was given time to file. On 08.07.24, he indicated that he had filed his submissions and if they were not on the file the same could be placed. However, I do note that with technology there might be glitches and the reason as to why the response and submissions were not on record at the time of writing the ruling dated 23.10.24. Notwithstanding, from my disposition, I observed that the ruling was on merit and did not entirely depend on submissions. This in my view does not raise an error apparent on the face of record.

16 The second issue raised for review is that the court addressed itself on issues that the litigants did not move the court to. This couldn't be further from the truth. From the proceedings, it was clear that the application to be decided was the one dated 15th June 2022 which the court confined itself to. Thus, I find that the order for review fails for want of merit.

17 Having found that the order for review fails, the order for stay also automatically fails. Consequently, the application is hereby dismissed for lack of merit with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17TH DAY OF DECEMBER, 2024.

.....

S.M. GITHINJI

JUDGE

In the presence of; -

1. Dr. Khaminwa for the Petitioner

2. 2nd Respondent present (lawyer absent)