REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

P&A CAUSE NO. 247 OF 2014

IN THE MATTER OF THE ESTATE OF KIMELO OLE KUYONI (DECEASED)

IN THE MATTER OF AN APPLICATION FOR REVIEW

BETWEEN

SALLY JEMASUNDE.....OBJECTOR/APPLICANT

AND

JANE CHEROTICH TUM.....PETITIONER/RESPONDENT

RULING

[1] The Notice of Motion dated **1 December 2020** was filed herein by the objector pursuant to **Sections 1A, 1B, 3, 3A and 80** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya; Order 45 Rules 1, 2, 3** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that:

[a] Spent

[b] the Court be pleased to review its Ruling and Orders made on **12 May 2020**; and

[c] that the costs of the application be in the cause.

[2] The application was based on the ground that there is an error on the face of the record in the Ruling, particularly as regards the parcel number of the land in question, which was erroneously reflected as **Plateau/Chepkongony Block(Rotunga)58**; yet the correct parcel number of the property is **Plateau/Chepkongony Block 6 (Rotunga)58.** She therefore averred that the digit 6 was erroneously omitted; and therefore that it is impossible to executed the order dated **12 May 2020.** She annexed to her supporting affidavit copies of the Green Card for the property, copies of the Consent for Confirmation and of the Affidavit in Support of Petition for Letters of Administration Intestate to demonstrate that the correct parcel number is **Plateau/Chepkongony Block 6 (Rotunga)58.**

[3] The respondents opposed the application. They relied on their Replying Affidavits sworn on **3 February 2021** and **4 February 2021,** respectively. In her affidavit, the 1st respondent**, Jane Cherotich Tum** averred that the Court only granted the orders prayed for by the applicant; and that the mistake originated from the sloppy manner in which the application was drafted. She further postulated that to grant the order sought would first require that the error in the application itself be cured and fresh orders sought; which has not been done. On his part, the 2nd respondent reiterated the assertion that the error in question is attributable to the applicant herself; and is therefore neither an error on the face of the record or on the part of the Court. The respondents accordingly contended that no justification has been made by the applicant for review; and therefore that her application is an abuse of the court process. They prayed that the said application be dismissed with costs.

[4] The application was canvassed by written submissions pursuant to **Paragraph 6** of the **Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from the Risks associated with the Global Corona Virus Pandemic, Gazette Notice No. 3137 of 20th March 2020**. Thus, the applicant's written submissions were herein filed on **9 April 2021** by **Ms. Akweyu.** She urged the Court to find that there is an error at **Paragraph 15** of the Ruling dated **12 May 2020** in connection with the description of the suit property; and therefore that the error is self-evident and is the sort of error envisaged under **Section 80** of the **Civil Procedure Act**; and **Order 45 Rule 1** of the **Civil Procedure Rules.**

[5] Counsel relied on **Nakuru Industries Limited vs. Sirbrook (K) Limited** [2017] eKLR and **National Bank of Kenya Ltd vs. Ndungu**

Njau, Civil Appeal No. 211 of 1996 as to the proper subjects for review. She also cited **Margaret Mugure Njuguna (suing as the personal representative of the Estate of Dennis Moimbo Ongayo, Deceased) vs. John Ndungu Gatheba** [2018] eKLR for the proposition that, where the error is self-evident, it can also be corrected pursuant to the Slip Rule under **Section 99** of the **Civil Procedure Act;** or on the ground of sufficient reason. In her view therefore, the application is merited and ought to be allowed; and an appropriate order as to costs be made in accord with **Section 27** of the **Civil Procedure Rules.**

[6] Mr. Kariuki, Counsel for the respondents, reiterated the stance that the application is an abuse of the process of the Court; in that it does not meet the threshold for review as provided for in **Section 80** of the **Civil Procedure Act** and **Order 45 Rules 1, 2 and 3** of the **Civil Procedure Rules**. He submitted that, having filed a defective application, it is improper for the Court to be asked to convert that mistake of form to an error on the face of the record. In his view the disease is in the application itself as opposed to the court record or the impugned ruling. He proposed that that disease can only be cured by withdrawing the defective application and filing another one; which has not been done. He accordingly urged for the dismissal of the application dated **1 December 2020.**

[7] I have given due consideration to the application and the affidavits filed herein in respect thereof. I have likewise paid careful attention to the written submissions filed herein by learned counsel. Although the application is expressed to have been brought under **Sections 1A, 1B, 3, 3A and 80** of the **Civil Procedure Act, Rule 63** of the **Probate and Administration Rules** is explicit that:

> **"(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 Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, 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 person shall be those existing and in force immediately prior to the coming into operation of these Rules."**

[8] Accordingly, the pertinent enabling provision is **Order 45 Rules 1, 2 and 3** of the **Civil Procedure Rules**, which have been expressly imported by dint of **Rule 63** aforementioned. **Rule 1** provides that:

> **(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, 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] From the aforesaid provision, a party seeking review is under obligation to demonstrate that:

> **[a]** there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at the material time; or
>
> **[b]** that there is some mistake or error apparent on the face of the record; or
>
> **[c]** that there was any other sufficient reason;

[10] The applicant cited error apparent on the face of the record with reference to **Paragraph 15(a)** of the Court's Ruling dated **12 May 2020**. In the premises, the issue for determination is whether indeed there is an error apparent on the fact of the record. What amounts to an error on the face of the record was discussed by the Court of Appeal in **National Bank of Kenya Limited vs Ndungu Njau (supra).** Here is what the Court of Appeal had to say:

> **"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 a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review."**

[11] Likewise, in **Nyamogo & Nyamogo Advocates vs. Kago** [2001] 1 EA 173 the Court of Appeal held 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 a real distinction between a mere erroneous decision and an error apparent on the face of the 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 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.**

Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal..."

[12] It is manifest therefore that, in both provisions, the applicant must be aggrieved by the determination itself. The applicant herein obtained orders in her favour and is therefore not aggrieved as such from the outcome of the application dated **11 June 2019**. Her grievance was that the suit property was misdescribed by the Court at Paragraph 15(a) of the Ruling dated **12 May 2020** as **Plateau/Chepkongony Block(Rotunga)58** instead of **Plateau/Chepkongony Block 6 (Rotunga)58.** However, as correctly pointed out by counsel for the respondents, the error has its origin in the application dated **11 June 2019** and the orders sought therein by the applicant. Thus, in Prayer (2) of the said application, the applicant's prayer was as follows:

"This Honourable court be pleased to issue orders to preserve the deceased's Estate namely:-

DESCRIPTION OF PROPERTY

1) PLATEAU/CHEPKONGONY BLOCK(ROTUGA)148-152

MEASURING APPROX. 8.69.HA."

[13] The same description was repeated at Paragraphs e), f) and g) of the grounds in support of the application; as well as Paragraphs 8, 9,10, and 11 of the Supporting Affidavit sworn by the applicant on **11 June 2019.** It is clear therefore that the error is not self-evident on the face of the record. It is no wonder then that the applicant now seeks to rely on documents such as a copy of the Green Card, a copies of the Consent to Confirmation of Grant and Affidavit in Support of Petition for Letters of Administration Intestate to bring out the error; an error that emanated from the office of counsel in the drawing of the application dated **11 June 2019.**

[14] As correctly suggested by counsel for the respondents, the applicant ought to have nipped the error in the bud by withdrawing the application dated **11 June 2019** and filing a corrected version thereof before the matter was brought to a conclusion. As matters stand, the Court did not err for it granted the orders sought and in the manner sought by the applicant. It was therefore mischievous for the applicant to blame the Court for the ensuing anomaly, instead of fully owning up to it as had been indicated at paragraph 12 of the Supporting Affidavit, where it was acknowledged that the suit property had been wrongly referred to as **Plateau/Chepkongony Block(Rotunga)58** in the application dated **11 June 2019**.

[15] I note too that the applicant also invoked the Slip Rule as provided for in **Section 99** of the **Civil Procedure Act**, which stipulates that:

"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

[16] Granted that the so called error was due to a typographical mistake on the part of counsel for the applicant, it cannot be said that the Order as stated in Paragraph 15[a] of the Ruling dated **12 May 2020** was due to an accidental slip or omission on the part of the Court, so as to invite the application of the Slip Rule (see **Margaret Mugure Njuguna vs. John Ndungu Gatheba** (supra). Indeed, in the case of **Vallabhdas Karsandas Raniga vs. Mansukhalal Jivraj & others** (1965) EA 700, the East African Court of Appeal held that:

"A slip order will only be made where the court is fully satisfied that it is giving effect to the intentions of the court at the time when the judgment was given, or in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention."

[17] Accordingly, I am far from convinced that the error in issue herein is a mistake apparent on the face of the record or that it is one which can be corrected pursuant to the slip rule. That notwithstanding, a review can also be granted, pursuant to **Order 45 Rule 1(b)** of the **Civil Procedure Rules**, on the ground of sufficient cause. And, it is now settled that the phrase **"sufficient reason"** for purposes of review is analogous to the other reasons set out in **Rule 1(b)** of **Order 45.** Thus, in **Nasibwa Wakenya Moses v University of Nairobi & another** [2019] eKLR

28. An application for review may be allowed on any other "sufficient reason." The phrase *'sufficient reason'* within the meaning of the above rule means *analogous* or *ejusdem generis* to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in *Sadar Mohamed vs Charan Singh and Another*[13] where the court held that:-

"Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."

29. Mulla in the *Code of Civil Procedure*[14] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that *the expression 'any other sufficient reason'...*means *a reason sufficiently analogous to those specified in the rule*. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the rules, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement."

[18] Since the typographical error is now evident; and was conceded to by the respondents, I am satisfied that that is sufficient reason to grant a review of the Ruling dated **12 May 2020**. A perusal of the Supporting Affidavit filed with the instant application shows that the applicant is unable to reap the benefits of the Order issued in her favour unless the suit property is properly described therein. That, to my

mind is sufficient reason for review. Moreover, **Rule 73** of the **Probate and Administration Rules clothes the Court with the necessary power to make such others as would meet the ends of justice, for it provides that**:

> **"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

[19] In the result, the application dated **1 December 2020** is hereby allowed. The ruling of the Court dated **12 May 2020** is hereby reviewed and corrected so as to properly describe the subject property to include digit 6 in the title description in all the relevant paragraphs of the said ruling. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF JUNE 2021

OLGA SEWE

JUDGE