



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 651 OF 2012

TERESIA WANJIKU WAINAINA.....1ST PETITIONER

MARTIN MIRURI.....2ND PETITIONER

VERSUS

DORCAS NYOKABI WAINAINA.....1ST RESPONDENT

JULIUS KAMAU WAINAINA.....2ND RESPONDENT

EVA WANJIKU WAINAINA.....3RD RESPONDENT

AND

PANGANI ANIMAL FEEDS LIMITED.....1ST INTERESTED PARTY

KAMUKUNJI BUSINESS CENTRE.....2ND INTERESTED PARTY

RULING

1. Before court for hearing is an application dated 18th March 2019 which seeks for orders that:

- That 1st and 2nd Interested Parties be enjoined to the suit.

- A declaration that the business being carried on in L.R NO. 209/9036 is owned by Kamukunji Business Centre Limited and in L.R. NO. 209/1534 is owned by Pangani Animals Feeds Limited and as such not subject of succession and to be excluded from the management of the Public Trustee.

- A review and or setting aside of Order NO. 6 in the ruling delivered on the 10th day of May, 2018 directing collection of rent from the business in L.R. NO. 209/9036 and L.R. NO. 209/1534 by Lloyd Masika Estate Agents; and

- Costs.

2. The application is predicated on grounds that the businesses being carried on in the said properties are run by Private Limited Liability Company and where the deceased's share was only 50%. Further that the said properties were developed with the joint effort of the deceased and the 1st Petitioner.

3. In her affidavit in support of the application the 1st Petitioner states that the two businesses namely; Kamukunji Business Centre Limited & Pangani Animals Feeds Limited are housed in the two properties and therefore ought to be excluded from the assets as they are owned by the said two companies.

4. The 1st Petitioner stated further that before his death the deceased had converted the businesses that were sole proprietorships into Limited Liability Companies where she was an equal partner.

5. The application was objected to by the Respondents vide an affidavit of Eva Wanjiku Wainaina the 3rd Respondent on grounds that the

deceased was the sole proprietor of the companies and the only registered owner of the properties in question. She questioned the authenticity of certificates showing incorporation of companies after the death of the deceased. She further questioned the shift in evidence of the Petitioners.

6. The issues for determination before court are as follows; -

- a. **Whether to enjoin the named 1st and 2nd Interested Parties to the suit.**
- b. **Whether this court can determine the question of ownership of Land?**
- c. **Whether or not to review the orders of 10th May, 2018.**

7. The named 1st and 2nd Interested Parties until the death of the deceased were business he owned and ran solely, though the widow claims to have been a joint owner. The view of this court is that the two businesses ought and must be included in the list of assets and any claim of partnership should then be proved at the point of distribution of assets. The respondents have challenged the conversion of the sole proprietorship to limited liability companies posthumously. I therefore direct that the two businesses be included as part of assets of the estate. Any claim be proved at the stage of confirmation. I therefore decline the prayer of enjoinder of the two business as interested parties.

8. This court as constituted can only deal with succession matters. A declaration as to ownership of land falls within the realm of the Land and Environment Court. Needless to state that the title documents and the initial petition indicated that the properties do belong solely to the deceased.

9. On the issue of review of the Order of 10th May 2018 the court will look at the genesis of the Order sought to be reviewed in order to arrive at its decision.

Mungai J in her ruling of 10th May 2018 outlined the reason she directed Lloyd Masika to collect the rent from L.R. No. 209/1534 and 209/9036. **Mungai J** noted that the estate has not been distributed despite filing of the application for confirmation since 2015. Further the Administrators were unable to work together which was detrimental to the estate. She further noted that the 2nd house benefited from the proceeds of the estate to the exclusion of the children of the 1st house. In the said order the Judge also noted the claim of ownership of the businesses and the properties by the 1st Administrator. I have equally noted the same and as directed above the issue may be raised as a protest at confirmation.

10. The law on review of court orders is well settled. Order 45 of the Civil Procedure rules sets the parameters for allowing reviews. The Order in Rule 1(1), 2 and 3 states as follows:

“1. Application for review of decree or order

(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 a 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 judgement to the court which passed the decree or made the order without reasonable delay.

(2) To whom applications for review may be made

(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree, or made the order sought to be reviewed.

(2) If the Judge who passed the decree or made the order is attached to the court one is precluded by absence or other cause on his knowledge or could not be produced by him at the time when the decree as passed or the order made, or on account 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 judgement to the court which passed the decree or made the order without reasonable delay.

2. To whom applications for review may be made

(1) An application for review of a decree or order of a court, upon some ground other than the discovery for a period of 3 months that after the application for review is lodged, the application may be heard by such other Judge as the Chief Justice may designate.

3. When court may grant or reject application

(1) Where it appears to the court that there is no sufficient ground for review, it shall dismiss the application.

(2) Where the court is of the opinion that the application for review shall be granted, it shall grant the same provided that no such application shall be granted on the ground of discovery of new matter or even which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without such proof of the allegation.”

11. In the case of **Otieno, Ragot & Co. Advocates vs National Bank of Kenya Civil Appeal No. 60 and 62 of 2017**, the Court of Appeal in the judgement of **Makhandia J** had this 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”.

The Judge went further to state;

“The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.”

12. The application before court is dated 18th March, 2019 and it seeks ostensibly to review an Order of 10th May, 2018, a period of 11 months. This is a considerable delay.

13. Importantly is that the said Order sought to be reviewed was not made on the 10th of May, 2018 as alleged but the 8th of February, 2015. That indeed is several years ago and the delay is considerable.

14. Having stated as above the court has not been informed of any error apparent on the face of the record, or discovery of any new matter or any sufficient and important matter that would allow a review of the said order made way back in 2015. Consequently, the said is prayer equally declined.

15. There is blatant disobedience of the court order by the Petitioners who have repeatedly done so by engaging the court with various applications. It behooves the current Administrator(Public Trustee) who has been unable to discharge his duties and the other beneficiaries to move the court for contempt orders.

DELIVERED AND SIGNED AT NAIROBI THIS 10TH DAY OF JUNE, 2021

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ALI ARONI

JUDGE