REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Hon. D. K. Kemei - J

SUCCESSION CAUSE NO.462 OF 2014

IN THE MATTER OF THE ESTATE OF KYENGO KIILU NGUNGI *alias* KYENGO KIILU (DECEASED)

BONIFACE MULI MWEU.....PETITIONER/APPLICANT

-VERSUS-

MUTIE KIILU.....OBJECTOR/RESPONDENT

RULING

1. The Applicant filed a summons dated 15.2.2021 that was brought under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules seeking the following orders;

a) Spent

b) Spent

c) Spent

d) That this Honorable court be pleased to review and or set aside the orders made on 9.2.2021.

e) That the costs do abide in the application.

2. The application was grounded on the grounds set out on the face of the notice of motion; that there is an error apparent on the face of the ruling dated 9.2.2021 as there are two sets of agreements in respect of the entire parcel 103 (the suit land), one agreement in 1968 and the other in 1980; that the applicant has been in occupation of the suit land since 1980. To counsel, going for another confirmation would be an academic exercise as the respondent was served with court process and he had not raised his claim for the 18 ½ acres of land within the time he filed the application for revocation of grant.

3. In the supporting affidavit of Boniface Muli Mweu deponed on 15.2.2021, the deponent took issue with the acreage that he bought as he had bought the land totaling 37 acres in 2 phases that was in 1968 and in 1980. The deponent lamented that the respondent belatedly raised a claim to 18 ½ acres of land in his submissions that were filed on 4.2.2020 and 14.2.2020 therefore submissions are not evidence of his claim. It was the averment of the deponent that it is fair that the orders made on 9.2.2021 be reviewed in the interests of justice.

4. I have noted the notice of appeal dated 15.2.2021 filed on 16.2.2021 by the Petitioner/Applicant which is an indication of an intention to appeal to the Court of Appeal.

5. In reply to the application, the objector/respondent vide affidavit dated 1.3.2021 deponed that the applicant never presented evidence to prove that he purchased the parcel of land Makueni/Kalawa/103. It was pointed out that there was no error apparent on the court record as this court was very clear in ordering a fresh application for confirmation of grant to enable the applicant file a protest if need be so that his claim to be included as a beneficiary to the estate of the deceased may be considered at the time of confirmation of grant. It was averred that the instant application could not deal with the issue of purchase of the suit land.

6. In rejoinder, the applicant vide affidavit deponed on 4.5.2021 averred that the respondent has never challenged the sale agreements that the applicant has. It was added that the applicant came to court to get the title deed and therefore this court should relook at the agreements and find that he is entitled to the entire land.

7. The court directed the parties to file and exchange submissions.

8. The applicant vide submissions filed on 15.6.2021 by J.M. Tamata & Co Advocates submitted that the court rightly found that the applicant was a purchaser and has an interest in the estate. The court was urged to find that the applicant owns the entire land.

9. Counsel for the Respondents vide written submissions filed on 1.4.2021, in placing reliance on the case of **In Re Estate of Livingstone M'mungania (deceased) (2018) eKLR** submitted that there was no error apparent on the record as the orders of this court were clear. The court was urged to dismiss the application for review

10. I have considered the application and the submissions and find the following issues necessary for determination: -

i. Whether the applicant has met the threshold for grant of review orders.

ii. Whether there are justifiable reason has been given to set aside the ruling of the court dated 9.2.2021.

iii. What orders may the court grant?

11. In respect of the 1st issue, it is trite law that just like the right of appeal, an order in review is a creature of statute which must be provided for expressly. In considering an application for review, a court exercises its discretion judiciously as was held in the case of **Abdul Jafar Devji v Ali RMS Devji [1958] EA 558**. The law under which review is provided is rule 63 of the Probate and Administration Rules, Section 80 of the Civil Procedure Rules and Order 45 of the Civil Procedure Rules.

12. Order 45 of the Civil Procedure Rules states 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 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.

13. In order for this application for Review to succeed, the Applicant must convince the court that it went into error in making the decision that it did. The record speaks to the fact that the respondent, Mutie Kiilu filed summons for revocation of grant that were issued to the applicant herein, Boniface Muli Mweu and this court revoked the grant as well as ordered status quo orders in respect of the suit land.

14. The applicant appears to rely on the ground that there is a mistake or error apparent on the face of the record. It was the argument of the applicant that the trial court went into error in revoking the grant and yet he had purchased the suit land as evidenced by the sale agreements annexed to the submissions. He was of the view that this court went into error in failing to consider that evidence that was on record and therefore went into error. An error apparent on the face of the record was defined in **Batuk K. Vyas v Surat Municipality AIR (1953) Bom 133** thus:

"***No error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it...***"

15. In making an examination as to whether there is an error apparent on the face of the record, the court must be quick to draw a parallel between a decision that is merely erroneous in nature and an error that is self-evident on the face of it. A review application must confine itself to the scope and ambit of Order 45 rule 1 lest it mutates into an appeal. A misdirection by a judicial officer on a matter of law cannot be said to be an error apparent on the face of the record.

16. In the case of **Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173** the court defined an error apparent on the face record, thus:

"***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 even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.***"

17. In the instant case therefore, I am not convinced that there is an error apparent on the face of the record in this case. What is being raised by learned counsel for the applicant touches on the standard of proof and this court made a decision based on what evidence was available on record and in view of the requirements under section 76 of the Law of Succession Act. I must quickly add that whether or not there were sale agreements is of no bearing on the final orders of the court as the concern of the court was whether or not the requirements of section 76 of the Law of Succession Act had been fulfilled to warrant revocation of the grant that was issued to the applicant. I have seen the notice of appeal and in my considered view the applicant is at liberty to finalize his appeal against the decision in the court of appeal where he has filed a notice. This court had already discharged its functions and pronounced itself on the merits of the application for revocation of grant

after considering the evidence.

18. I also find that there is no other sufficient reason to warrant review. I decline to grant the first limb of prayer 4 of the application.

19. The 2nd limb of Prayer 4 in the application seeks that the ruling of the court be set aside. I draw wisdom from the case of **Remco Limited v Mistry Jadva Parbat & Co Ltd & 2 Others, (2002) 1 EA 233** where it was observed that the Court has discretion to set aside a regular judgment upon such terms that are just.

20. I am persuaded that the applicant had every opportunity to participate in the application by presenting evidence, and opted not to. The applicant in this application seeks to avail new evidence yet he had the opportunity to present the hearing of the application for revocation of grant. If he had all along the documents then that is a matter which was with his knowledge even during the hearing of the matter and hence the same is now not a new matter that escaped his knowledge even with due diligence. The applicant has already filed a notice of appeal indicating an intention to appeal against the decision of this court and therefore he is inviting concurrent handling of the same matter in two courts and in view of the hierarchy of courts, I decline such invitation. I associate myself with the finding in **Charles Ratemo Nyamweya v Joyce Bochere Nyamweya & 8 Others (2016) eKLR** and hold that the applicant by his conduct of having the same matter in two different courts in total disregard of the hierarchy of the court system is undeserving of the order sought to set aside the ruling of the court. He still has a chance to air his grievances before the court of appeal where his appeal is pending. In the premises, prayers 4 in the application must fail.

21. In light of the foregoing observations, it is my finding that the petitioner's application dated 15/2/2021 lacks merit. The same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 14TH DAY OF JULY, 2021.

D. K. KEMEI

JUDGE