



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CIVIL APPEAL NO.8 OF 2019

IBRAHIM MOHAMED LEO.....1ST APPELLANT/RESPONDENT

MARIAM MOHAMED LEO.....2ND APPELLANT/RESPONDENT

VERSUS

SALAT MOHAMED.....1ST RESPONDENT/APPLICANT

SALAD MOHAMED.....2ND RESPONDENT/APPLICANT

ISAAK HASSAN.....3RD RESPONDENT/APPLICANT

WATO DARCHE.....4TH RESPONDENT/APPLICANT

MOHAMMED ISAACK.....5TH RESPONDENT/APPLICANT

RULING

1. The Respondents/Applicants and the appellants/respondents have an appeal pending before this court. The applicants have filed an application dated 5th November 2020 seeking for orders that:

(1) Spent

(2) That the Honourable court be pleased to issue an order to review, vary and/or set aside the orders issued by the Honourable Court on 23rd September 2020 and in particular the directive number 3 requiring the filing of valuation report of the estate and all those properties that were sold.

(3) That the costs of this application be in the cause.

2. The grounds in support of the application are that this court (Chitembwe J.) in a ruling delivered on the 23rd September 2020 made an order requiring that-

“each party files its own valuation report of the estate including all those properties that were sold”.

3. The Applicants contend that the said order was not in line with the lower court`s order which order was to the effect that-

“..the remaining parcels of land at Manyatta Burji and that of Mado Adi be valued and the valuation report be presented in this court..”

4. The applicants argue that the order of the High Court includes valuation of property of the estate that has already been sold which order was at variance with the order that was made by the Kadhi`s Court. That the High Court order is an apparent error on the face of the record which ought to be corrected by review or setting it aside.

5. The application was made under the provisions of sections 1A and 1B, 3A and sections 63(e) and 80 of the Civil Procedure Act together with Orders 45 and Order 51 Rule 1 of the Civil Procedure Rules. It was supported by the affidavit of the 5th Applicant, **Mohamed Isaack**.

6. The application was opposed by the Appellants/Respondents through the replying affidavit of the 1st Respondent, **Ibrahim Mohamed Leo**. The gist of his response is that they, the applicants, in their appeal to this court, are challenging the decision of the Kadhi for failing to include some of the properties that were sold to third parties as forming part of the estate. That the order of the Honourable Judge was not an error on the face of the record as it deliberately expanded the order of the Kadhi to include not only the properties as determined by the Kadhi but all other properties of the estate that were sold. That the order was meant to ascertain the actual status of all the properties of the estate and their value for just determination of the appeal. That it is mischievous and dishonest for the applicants to read an error where none exists on the face of the record.

Submissions –

7. The Applicants were represented by the firm of **Hashim & Lesaigor Associates Advocates** while the Respondents were represented by the firm of **Maingi Kamau & Co Advocates**.

8. The advocates for the Applicants submitted that the application is properly before court under the cited provisions of the Civil Procedure Act and Civil Procedure Rules. That Order 45 of the Civil Procedure Rules lays down the grounds under which an application for review may be made which are:

a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or

b) On account of some mistake or error apparent on the face of the record or

c) For any other sufficient reason save that the application has to be made without unreasonable delay.

9. The advocates submitted that the order of the Honourable Judge was an error apparent on the face of the record. They cited the case of **Muyodi v Industrial and Commercial Development Corporation & Another** (2006) 1 EA 243 where the Court of Appeal described an error apparent on the face of the record as follows:

“In Nyamogo & Nyamogo –vs- Kigo (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 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”.

10. It was submitted that the Learned Judge`s direction that the properties that were sold be valued was an error apparent on the face of the record in that the judgment of the Honourable Kadhi on which the Honourable Judge premised his ruling excluded the properties that were sold and were not part of the estate.

11. In their submissions the advocates for the Respondents stated that amongst the issues in contestation in the appeal are the properties which should or should not form part of the estate of the deceased herein and the issues of alleged sale of part of the estate. That the respondent had in their application dated 22nd July 2020 further sought in prayer (3) of the notice of motion that:

“ That this honourable court be pleased to extend time within which the applicants/ appellants can file and serve their submissions on the appeal therein and further grant any other orders as the court may deem fit/necessary towards hearing and determination on merit of the appeal herein.”

12. Therefore, that the order of the court in ordering a valuation of all the deceased`s property was necessary during the hearing of the appeal because should it be determined that part of the estate had been sold to third parties by some of the beneficiaries, the value of such properties will be deducted from such beneficiaries` share of the estate. That in the premises the orders were proper and as such there is no error apparent on the face of the record.

Determination –

13. The appeal by the Appellants/Respondents in this matter is challenging the decision of the Honourable Kadhi at Moyale on the following grounds:

(1) The Hon. Learned Kadhi erred in law and fact by holding the deceased plots at Manyatta Burji sold by the 1st respondent to 2nd, 3rd, 4th and 5th respondent were sold regularly.

(2) The Hon. Learned Kadhi erred in law and fact in ignoring the fact that the said parcel formed part of the deceased estate which the 1st respondent intermeddled with by selling.

(3) The Hon. Learned Kadhi erred in law and fact by holding that by registering their perceived parcels in their names and

were paying for the ground rent they were entitled to legal possession notwithstanding that the 1st respondent illegally sold the same.

14. The instant application was provoked by the orders of Chitembwe J. who *Suo muto* and before the appeal was heard, made an order for all the property of the deceased to be valued including those that were sold. The applicants in their application argue that the order was irregular in that it was not part of the application that was before the court in the application dated 22/7/2020 and was at variance with the order of the Honourable Kadhi.

15. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions of the respective advocates for the parties. The High Court has wide powers under section 78(1) of the Civil Procedure Act when determining an appeal that has been placed before it. The section provides that:

78 (1) Powers of appellant court

Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –

- a) to determine a case finally;**
- b) to remand a case;**
- c) to frame issues and refer them for trial;**
- d) to take additional evidence or to require the evidence to be taken.**
- e) To order a new trial**

16. In my considered view, the order of the High Court in requesting for a valuation report for all the properties of the deceased including those that had been sold amounted to an order of taking additional evidence in the case which was within the mandate of the court. There is no doubt that the order was made pursuant to prayer 3 of the notice of motion that requested the court to-

“...grant any other orders as the court may deem fit/necessary towards hearing and determination on merit of the appeal.”

17. The court had the power to make any orders that were necessary towards the just determination of the appeal. The submission that the court had no basis of issuing the orders is not legally tenable. The orders were made consciously and deliberately. It would appear that in the mind of the court the order was necessary so as to determine with finality the issues that were pending before the court. I agree with the submission by the respondent that it is dishonest for the applicants to paint the order as an error. The applicants are reading an error where none exists. The learned Judge was not bound to go by the orders of the Kadhi. The argument that the Judge's order was at variance with the Kadhi's order is misplaced.

18. The upshot is that the application dated 5th November 2020 is lacking in merit and is accordingly dismissed with costs to the Appellants/Respondents.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MARSABIT THIS 8TH DAY OF JULY 2021.

JESSE N. NJAGI

JUDGE

In the presence of:

Mr. Behailu for Respondents/Applicants

N/A for Appellants/Respondents

Parties:

Respondents/Applicants:- Absent

Appellants/Respondents:- Absent

Court Assistant:- Barako

30 days R/A.