



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO 329 OF 2018
IN THE MATTER OF THE ESTATE OF JOHN MWAURA NDUNGU
ALIAS JOHN MWAURA NDUNG’U(DECEASED)

RULING

Notice of Motion

This Application dated 21st October, 2020 is brought under Certificate of Urgency by Esther Nguhi Ndung’u and Peter Muturi Ndung’u by way of Notice of Motion brought under Order 45 of the Civil Procedure Rules, 2010, Section 3 (1), 56 and 62 of the Trustees Act, Cap 167 and sections 1A, 1B, 3A and 80 of the Civil Procedure Act seeking the following orders:

1. That this matter be certified urgent and the requirement of notice to parties be dispensed with.
2. That this court be pleased to affix an early inter-parties hearing date as a matter of urgency for the review application as this Honorable court may direct.
3. That the Honourable court be pleased to review, vary and/or set aside the orders emanating from the ruling delivered on 21st September, 2020 confirming the grant in accordance with the Will dated 1st August, 2017.
4. That this Honourable court be pleased to allow the Summons for Confirmation dated 4th June, 2020 as prayed.
5. That this Honourable Court be pleased to grant such other directions as it may deem fit, to give effect to the justice of the matter herein.
6. That the cost of this application be in the cause.

The Application is supported by an affidavit sworn by Esther Nguhi Ndung’u dated 21st October, 2020 where she states that she is the Applicant and co – executor of the estate of John Mwaura Ndung’u to which this matter relates. That she swears this affidavit with the authority and on behalf of the co -executor Peter Muturi Ndungu and all beneficiaries of the estate. That she was the sole wife and mother to all named children as per the Will dated 1st August, 2017 and the Grant of Probate was issued jointly to herself and her son Peter Muturi Ndungu on 13th July, 2018. That in the Will dated 1st August, 2017 the deceased bequeathed the full estate in the first instance to her. That she renounced her legacy in the estate and offered it for absolute distribution to her children as per the attached Deed of Family Arrangement dated 12th June, 2020. That the above-mentioned Deed was filed in court and is a true record of the mutual agreement of all beneficiaries on the distribution of the Estate. That on 21st September, 2020 the Honourable Court gave its ruling on the summons for confirmation of Grant dated 4th June, 2020 effectively disallowing the same as prayed and instead confirming the grant in accordance with the Will dated 1st August, 2017. That upon advice by her counsel and perusal of the ruling it became apparent that certain pleadings were not brought to the attention of the Honourable court, having been filed through the e-filing system. That as a result of the exclusion of the submissions dated 21st July, 2020 the Honourable court was denied the opportunity to review all evidence that was relevant to this matter.

She further states that there is an error apparent on the face of the record, particularly that the Will dated 1st August, 2017 was rendered partially inoperative by her renunciation of the legacy and in turn the Ruling as delivered is also inoperative. That there will be no prejudice occasioned to any beneficiary of the Estate but rather all beneficiaries support this review application and the confirmation of Grant in accordance with paragraphs 3 and 4 of the summons. That there are sufficient and compelling reasons to warrant the review and setting aside of the orders of this court dated 21st September, 2020.

Submissions

This court directed on 19th May, 2021 that the Notice of Motion be disposed of by way of written submissions upon which directions the Applicant filed written submissions dated 11th June 2021. In her submissions she has identified two issues for determination as follows:

1. Whether the Applicants have reached the threshold for review of the ruling dated 21st September, 2020.
2. Whether this court can grant the request to confirm the grant per the Deed of Family Arrangement and Beneficiaries Agreement dated 12th June, 2020.

On the first issue the Applicant relied on the Law under Section 80 of the Civil Procedure Act on grounds for review and Order 45 Rule 1 of the Civil Procedure Rules which 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.

She submitted that there was mistake or error apparent on the face of the record to necessitate a review. She relied on the case of **Joseph Kiprepeli Lotukei -vs- Stephen Toroitich Korkou (2021) eKLR** where the court held that ***lack of submissions which later turned out to have been filed is an error on the face of the record and also that the same may also be deemed a sufficient reason under Order 45 1(c) of the Civil Procedure Rules.***

It was her submission that upon perusal of the Ruling of the Honourable court it was apparent that certain pleadings in the file were not brought to the attention of this court therefore rendering the ruling without full facts of the case. That if the submissions filed through e-filing had been considered they would have altered this court's earlier determination. That in **Civil Appeal No. 211 of 1996 National Bank of Kenya -vs- Ndungu Njau** which was quoted with approval in case of **Grace Akinyi -vs- Galdys Kemunto Obiri & Another (2016) eKLR**, ***"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 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 proceeds on an incorrect expansion of the law."***

It was her argument that the error or omission in this matter was self-evident and demonstrated at paragraph 3 of the Ruling by Honourable Justice Onyiego that the court only referred to having considered the Application and the Supporting Affidavit and having made its ruling based on the foregoing pleadings only. That the Honourable Judge was not privy to the submissions- a matter he confirmed in open court at the time of delivering the ruling. That there is need to review the impugned orders of this Honourable court owing to the fact that the Will was rendered partially inoperative by her renunciation which led all beneficiaries to enter into Deed of Family Agreement on the mode of distribution of the estate. She also submitted that the Application for review was brought without unreasonable delay, that the Ruling was delivered on 21st September, 2020 whereas the Application for review was made on 21st October, 2020.

On their second issue they reiterated the submissions filed in support of the Summons and restated that the variation of the Will was necessitated by Esther Nguhi Ndung'u's renunciation as beneficiary in the first instance of the whole estate and of the life interest accruing by operation of the law to her as spouse. That the estate is made up largely of immovable properties and has accruing and continuing expenses including existing company loan, taxes, salaries, land rates and rent, projected costs of dissolution of the company and incidental costs thereto. That though the Will provided for settlement of these expenses from the estate, the Testator didn't specify the source of funds and thus necessitated the need to sell off certain properties. That the Will was not self-executing in that while the testator bequeathed several properties to the four children jointly and in equal shares- such joint ownership was not clearly clarified and would be problematic in terms of registration, use and ownership and ineffective in terms of costs and maintenance. Therefore, the beneficiaries apportioned the properties amongst themselves while maintaining the equal shares principle and sold off certain properties to cover expenses and balance shared equally. The sale properties were to be registered in the name of the spouse in trust for the four children pending sale.

She submitted that certain properties came to be known as having not been bequeathed in the Will. This included certain gifts *intervivos* granted to certain beneficiaries but registration of the same at the Lands Registry had not been finalized at the Testator's death.

She submitted that the court has power to allow for clarification of the bequests made in the Will. That the Deed was not a variation of beneficial interest under the Will but rather a re-organization to ensure that the Will be legally enforceable. That confirming the grant in accordance with the Will, it will render such certificate of confirmation vague, inoperative and probably unenforceable particularly noting the registration processes at the Ministry of Lands and the Companies Registry, which the court has judicial notice of. That the court should invoke its inherent power to allow for the distribution of the Estate as per the Summons for Confirmation which is based on mutual consent of all beneficiaries. She also submitted that the court is empowered under sections 56 and 62 of the Trustees Act, Cap 167 with power to vary administration or management of trusts without interfering with beneficial interest. They submit that the Testator did not die partially intestate as all assets not catered to directly in the Will were catered for under clause 9 of the Will under Residuary Estate. That the summons as filed before the court are in the correct form.

Analysis and Determination

This Application is unopposed. The legal provisions for Review is Section 80 of the Civil procedure Act and Order 45 Rule 1 of the Civil Procedure Rules as pointed out by the Applicants. Section 80 of the Civil Procedure Act states that;

Any person who considers himself aggrieved

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(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.

Order 45 Rule 1 (1) of the Civil Procedure Rules provides that:

“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 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 the judgment to the court which passed the decree or made the order without unreasonable delay.” (emphasis added)

In the case of **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243** the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record and stated 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 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.”*

The court in the case of **Chandrakant Joshibhai Patel -v- R [2004] TLR, 218** held that an error stated to be apparent on the face of the record: *“...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reading on points on which may be conceivably be two opinions.”*

In this instant case I have considered the Applicants’ arguments and perused the impugned Ruling of this Honourable court delivered on 21st September 2020. It is apparent to me that this court (Onyiego, J) did not have the opportunity to consider the submissions of the parties before making his determination. Had the honourable judge seen and considered the submissions dated 21st July, 2020, I am certain that his determination of this matter would have taken a different direction. I have gone through both the submissions dated 21st July, 2020 and the Ruling dated 21st September, 2020. I have also noted that all the beneficiaries have consented to the turn of events in respect of this matter and entered into a Deed of Family Arrangement. There is therefore no objection to the mode of distribution of the estate to the beneficiaries.

It is true that the learned judge did not consider the submissions, hence the Ruling and orders he made. I am not sure whether in failing to consider submissions that were already filed and therefore determining the matter in the manner the learned Judge did amounts to an error apparent on the face of the record. But I am persuaded that there being no objection and the beneficiaries having reached a mutual agreement which in a way does not alter the equal distribution as provided in the Will is in my considered view, “any other sufficient reasons” under Order 45 Rule 1 (1) (b). By consenting to this Deed of Family Arrangement, Esther Nguhi Ndung’u has renounced her legacy in the Estate of the deceased and offered it for absolute distribution to her children and it is in order to allow the parties to proceed with the distribution of the Estate as they deem fit. I do not think they mean any disrespect of the deceased who is the testator or his wishes in respect to the estate and how the same should be distributed. Consequently, I hereby allow the Notice of Motion dated 21st October 2020 and grant the following specific orders:

1. That the orders emanating from the Ruling delivered on 21st September 2020 and confirming the Grant of Probate with written Will issued on 13th July 2018 in accordance with the Will of the deceased dated 1st August 2017 are hereby varied and set aside.
2. That the Summons for confirmation of the Grant dated 4th June 2020 is hereby allowed as prayed.
3. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED THIS 22ND SEPTEMBER 2021.

S. N. MUTUKU

JUDGE