



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 346 OF 1986

IN THE MATTER OF THE ESTATE OF DANIEL WAINAINA

GACHOKA alias DANIEL MARIBA GACHOKA (DECEASED)

JOHN MBIRI GACHOKA

LUCAS KAIRU WAIRIMU (as the administrators of the Estate of

MARGRET MAGIRI (deceased)APPLICANTS

VERSUS

STEPHEHN KAGUKU MARIBA.....RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion application dated **10th May 2021** by which the Applicants **JOHN MBIRI GACHOKA** and **LUCAS KAIRU WAIRIMU** (as Administrators of the Estate of **MARGARET MAGIRI** (deceased) seek the following orders:-

1. “SPENT

2. That this Honourable court be pleased to review its ruling delivered on **7th May 2021** by Lady Justice Maureen Odera.

3. SPENT

4. Cost of the Application be awarded to the Applicants.”

2. The application was premised upon **Section 1A, 1B (a), 3A and 80** of the **Civil Procedure Act, Order 45** of the **Civil Procedure Rules 2010** and all other enabling provision of the Law, and was supported by the Affidavit of even date sworn by **Lucas Kairu Wairimu** and the supplementary affidavit dated **10th June 2021** the 2nd Applicant. The Respondent/Administrator **STEPHEN KAGUKU MARIBA** filed a replying affidavit dated **6th November 2020** opposing the application for review.

3. The Application was canvassed by way of written submissions. The Applicants filed their written submissions dated **27th July 2021** whilst the Respondent relied upon his written submission dated **10th August 2021**.

Analysis and Determination

4. This application arises from a Ruling delivered by this court on **7th May 2021** in which Ruling the court declined to grant the prayer for revocation of Grant issued to the Administrator/Respondent in respect of the Estate of **KIBE MARIBA**. In striking out the application, the court held as follows: -

“The Applicants have not demonstrated that they are the legal representatives of the Estate of the late Margaret Magiri. As such, the Applicants have failed to comply with the directives given by Justice Ali-Aroni in her Ruling of **26th February 2020**. All they have done is to file the same application once again. The order sought in this application cannot be granted to the Applicants until the orders of Justice Ali-Aroni have been complied with. Only then will the Applicants have the requisite *locus standi* to pursue this matter. In the circumstances I do hereby strike out the Notice of Motion dated **16th July**

2020 and make no orders on costs”.

5. The Applicants submit that the finding by the court that they lacked *locus standi* in relation to the estate of the late **Margaret Magiri** was erroneous. That their Advocate inadvertently omitted to annex a copy of the certificate of confirmed grant issued to the Applicants on **7th July 2020**. The Applicants contend that they do in fact have *locus standi* in this matter.

6. In opposing the application the Respondent/Administrator vide his Replying Affidavit raises arguments touching on the main application for revocation of the Grant issued to himself. The Respondent did not substantially address the question of review. However, the Respondent in his written submissions suggested that **section 80** of the **Civil Procedure Rules** dealing with Review is not applicable to succession causes which are governed by the **Law of Succession Act**, not the **Civil Procedure Rules**.

7. **Rule 63** of the **Probate and Administration Rules** provides for the instances in which the **Civil Procedure Act** and Rules will apply in succession causes. **Rule 63** provides –

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules.

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 Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21. Sub. Leg.). Together with High Court (Practice and Procedure) Rules (Cap. 8, 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 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 persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

8. From the above it is manifest that in a succession matter where a party is seeking a review the matter will be governed by **Order 45** of the **Civil Procedure Rules** which provides as follows –

“1. (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.

9. The principles governing the exercise of the courts discretion to review a Ruling were re-stated in the case of **NATIONAL BANK LTD – VS – NDUNGU NJAU [1997] eKLR** as follows: -

“A review may be granted wherever 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 a ground for review”. (own emphasis)

10. In this case, the Applicants rely on their plea that the court erroneously came to the decision that they have no *locus standi vis a vis* the estate of **Margaret Magiri** which was not actually the case. They argue that their Advocate inadvertently failed to annex a copy of the certificate of confirmed grant issued to them on **7th July 2020**. A copy of said confirmed Grant is annexed to the supporting affidavit dated **10th May 2021** (annexture JL-‘1’).

11. In the case of **Edney Adaka Ismail v. Equity Bank Limited [2014] eKLR** the court held: -

“The question then that arises is whether the Plaintiff has offered sufficient reason to persuade this court to exercise its discretion in his favour and reinstate the application. It is true that where the justice of the case mandates, mistakes of Advocates even if they are blunders, should not be visited on the clients when the situation can be remedied by costs. In the case of *Lucy Bosire – vs – Kehancha Div. Dispute Tribunal & 2 others (supra) Odunga J held as follows: -*

“It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.....” (own emphasis)

12. To err it is said is human. The inadvertent omission by Counsel to annex the copy of certificate of confirmed grant is an excusable error. [In the case of **PHILIP KIPTOO CHEMWOK & ANOTHER – vs AUGSUTINE KUBENDE [1986] eKLR, Hon Justice Apondi** (as he then was) states as follows:-

“I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits”.

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.” (own emphasis).

13. All in all it is evident that had the confirmed grant been annexed then the court would not have reached the decision that it did. I find this resulted from genuine mistake, as there is no proof of fraud and/or malice. In the circumstances, I am satisfied that sufficient ground has been laid for review of my Ruling of 7th May 2021. I hereby review the said Ruling and find that on the basis of the annexed copy of certificate of confirmed Grant the Applicants being the named Administrators and legal representatives of the estate of **Margaret Magiri wife of Mbiri Gachoka** have sufficient *locus standi* in this matter. Accordingly, I make orders **THAT-**

i) The Notice of Motion dated 16th July 2020 is hereby reinstated for hearing.

ii) The stay orders issued by this court on 23rd December 2020 are hereby extended pending determination of the notice of motion dated 16th July 2020.

iii) Each party to meet its own costs.

DATED IN NAIROBI THIS 1ST DAY OF OCTOBER 2021.

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MAUREEN A. ODERO

JUDGE