



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC APPLICATION NO. 34 OF 2008

IBRAHIM MURIITHI KARIUKI.....APPLICANT

VERSUS

JAMES NJIRU.....RESPONDENT

RULING

1. Before me is an application dated 19.11.2020 wherein the applicant seeks the following orders;-

1) That this Honourable court be pleased to set aside and /or review the orders issued on 05.03.2019 dismissing the applicant's application dated 16.10.2017 and reinstate the same for hearing and the applicant be given leave to amend the said application and include land parcel No. Gaturi/Nembure/6153.

2) That land parcel No. Gaturi/Nembure/6153 be registered in the names of the other beneficiaries of the other house.

3) That the costs of this application be on the cause.

2. The application is premised on the grounds on its face and further supported by the affidavit sworn by applicant. The applicant's case is that the court dismissed the application dated 16.10.2017 where *inter alia* he had sought that the land parcel No. Gaturi/Nembure/6152 be registered in his name and that the respondent misrepresented facts before the court that he was a son to the deceased yet he is a grandchild. He therefore sought orders as prayed in the application herein.

3. The record indicates that the application dated 16.10.2017 came up for hearing on the 5.03.2019 and upon hearing the same, the court dismissed it and the Hon. Judge noted that the application was not made in good faith and that it was apparent it was intended to disinherit the other beneficiaries.

4. The applicant herein has sought to review the orders that were made on 15.03.2017. Orders made by a probate court can be reviewed as Order 45 is among the orders in the Civil Procedure Rules that apply to succession matters. (see Rule 63)

5. Under **Order 45 of the Civil Procedure Rules**, review can only be allowed if the applicant satisfies the court of the following;

1) Discovery of new and important matter of evidence which, after 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.

2) Mistake or error apparent on the face of the record.

3) Any other sufficient reason which may make the court to review its order.

6. As indicated above, review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed.

7. The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.

8. Where an applicant in an application for review seeks to rely on the ground that there is discovery of new and important evidence, one has to strictly prove the same. In the case of **Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) –v- Kariuki Marega & Another (2018) eKLR** the Court of Appeal stated as follows:

“We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”

9. In the same breadth, the Court of Appeal in the case of **Rose Kaiza –v- Angelo MPanju Kaiza (2009) eKLR** held that not every new fact will qualify for interference of the judgment. In this case, the applicant states that it has come to his knowledge that land parcel Gatari/Nembure/6153 belongs to the deceased herein and the same has not been included in the list of properties belonging to the estate of the deceased. In my view, this cannot be described as a discovery of new evidence which was not within his knowledge since the alleged land was listed in the replying affidavit of the applicant dated 29.11.2012, where upon he deponed that the same parcel formed the estate of the deceased herein and that the same was being occupied by a beneficiary of the estate. The allegation clearly has no basis and has not met the requirements of Order 45.

10. On whether there was an error apparent on the face of record, in **Muyodi Vs Industrial and Commercial Development Corporation & Another EA LR [2006] 1 EA 213** and cited in **Muhamed Mungai Vs. Ford Kenya Election, and Nominations. Board and Another, Nairobi High. Court Judicial Review Misc. Application No. 53 of 2013,** the court *inter alia* went on to state;

“For one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinions ought to be the subject of an appeal. The applicant before us has not established that there is an error or mistake in decision he has asked us to review. He has not even pointed out what in his opinion is the error or mistake in that decision. He has just told us to review the court's decision. That is not good enough, his dissatisfaction with the decision aforesaid notwithstanding. We therefore find no reason for reviewing the decision on the said ground.”

11. Further, in **Attorney General & Another v Boniface Byanyima, HCMA No.1789 of 2000** the court citing **Levi Outa v Uganda Transport Company [1995] HCB 340,** held that the expression “mistake or error apparent on the face of record” refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.

12. The term "mistake or error apparent" by its very connotation signifies an error which is evident *per se* from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and **Section 80** of the Act. Put differently, an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision. In this case, nothing has been pleaded by the applicant herein to denote an apparent error on the face of the ruling he endeavours to review.

13. The other ground for review is, if there is a sufficient cause. The orders dated 05.03.2019 were as a result of the application dated 16.10.2017 wherein the applicant moved the court seeking for orders *inter alia* that the land parcel Gatari /Nembure/6152 be registered in his name. This court notes that the orders being sought by the applicant are similar in nature to those that had already been dealt with by the court. The court heard all the parties concerned and then made a determination on the application.

14. In the ruling dated 05.03.2019 the court considered all the facts that were placed before it by the parties, dismissed the application but advised the parties to apply for the revocation of the grant in Runyenjes Succession Cause so that the succession of the deceased can begin afresh with all the beneficiaries being involved.

15. In view of the foregoing, I find that;

i. The application before the court is bereft of any merit and it is hereby dismissed.

ii. Costs to the respondent.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF NOVEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Respondents

.....for the Interested Party/Applicant