



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT MERU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO 308 OF 2010

IN THE MATTER OF THE ESTATE OF M'IMIRONGO M'UTHAKA (DECEASED)

BETWEEN

ANDREW MURIUKI M'UTHAKA.....1ST PETITIONER

PATRICK KAMENGU.....2ND PETITIONER

JOHN MUTUMA ROBERT.....3RD PETITIONER

AND

SUSAN NKATHA.....1ST OBJECTOR

DAVID MUGAMBI.....2ND OBJECTOR

LUCY KAMAMI.....3RD OBJECTOR

FREDRICK KABERIA.....4TH OBJECTOR

AND

JACINTA KAREMA MUCHIRI.....PROPOSED 1ST INTERSTED PARTY

MONICA AGATA.....PROPOSED 2ND INTERSTED PARTY

ROSE KAMAMI MURURU.....PROPOSED 3RD INTERSTED PARTY

CHRISTINE WANJIRU MURURUPROPOSED 4TH INTERSTED PARTY

ISAIAH ITHALIE M'IMANYARA.....PROPOSED 5TH INTERSTED PARTY

FRANCIS MBAEPROPOSED 6TH INTERSTED PARTY

RULING

Introduction

1. Deceased's estate was distributed by a Certificate of Confirmation of Grant dated 14th February, 2020.
2. By notice of motion dated 15th September, 2020, 1st Petitioner prays for 18 orders which I have condensed into two prayers which are review and stay of the ruling dated 14th February, 2020. The application is based on the contention that deceased had made an oral will distributing his estate and had also sold part of his estate to the interested parties. The application is supported by four affidavits. The first is sworn by the 1st Petitioner's affidavit sworn on 15th September, 2020, the second by Silveria Kathoni Robert (deceased's daughter), the third by Lucy Kananu (3rd Petitioner) and Martha Wanja Gitonga (deceased's daughter in law) in which they aver that deceased made an oral will and distributed his estate and sold off some of his assets.
3. Susan Nkatha (1st Objector) by her replying affidavit sworn on 14th October, 2029 avers that the 1st Petitioner and others filed this cause and stated that the deceased died testate. She contends that this matter was heard and none of the parties tendered evidence that deceased had made a will. Finally, the 1st Objector avers that this application is res judicata for the reason that an application dated 02.12.2019 that raised similar issues was determined by a ruling dated 27th April, 2020.

Analysis and determination

4. I have considered the application in the light of the affidavits and submission on record and I have deduced the following issues for determination:

1. Whether the ruling dated 14th February, 2020 ought to be reviewed

2. Whether the ruling dated 14th February, 2020 ought to be stayed

5. Review of orders is governed by Section 80 of the Civil Procedure Act which provides *inter alia*: -

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.

6. The procedural provisions for review under Order 45 rule 1 of the Civil Procedure Rules provide 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.

7. The Court of Appeal in Anthony Gachara Ayub v Francis Mahinda Thinwa [2014] eKLR restated the main grounds for review which are discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.

8. The ruling from which the Applicant seeks to review was delivered on 14th February, 2020. The application for review was filed on 16th September, 2020 which is 7 months after the ruling sought to be reviewed was delivered. The 7 months' delay has not been explained to the satisfaction of the court or at all.

9. Section 80 of the Civil Procedure Act and order 45 rule 1 of the Civil Procedure rules gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, as it has been constantly stated, this discretion should be exercised judiciously and not capriciously.

10. In National Bank of Kenya Limited v Ndungu Njau (1997) eKLR the Court of Appeal held that:

“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 a sufficient ground for review that another Judge could have taken a different view of the matter”.

11. Before this court arrived at the decision to distribute the estate, the parties herein had an opportunity to tender oral evidence and the application by the Petitioner is more of an appeal against the determination of this court. By seeking an order of review, I understand the Applicant to ask this court to take a different view from the previous decision by this court concerning the distribution of deceased's estate.

12. This court cannot sit on appeal on its own judgement. The Applicant has a right to challenge the determination of this court in the proper forum, instead of improperly and impermissibly re-litigate on matters that have already been determined.

13. From the foregoing, I have no difficulty finding that this application is a mischievous attempt by the Applicant to get orders which the court has previously declined to grant.

14. Consequently, I have come to the conclusion that the Applicant has not demonstrated 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 impugned ruling was passed, or some self-evident error or omission on the face of the record, or any other sufficient reason that would entitle him to an order of review.

15. No material has been placed before the court to justify an order to stay this court's ruling and order dated 14th February, 2020. And since court does not, and ought not to be seen to make orders in vain, the court declines to stay its ruling dated 14th February, 2020.

16. In the end, the Notice of Motion dated 15th September, 2020 is found to have no merit and is dismissed with costs to the Respondents.

DATED AT MERU THIS 04TH DAY OF NOVEMBER ,2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

Applicant - Present

For Applicant - N/A for Kobia Michubu & Co. Advocates

For Objectors - N/A for B.G.Kariuki & Co. Advocates