REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 314 OF 2014

IN THE MATTEROF THE ESTATE OF ZEPHANIA KARETI M'ITHIRA (DECEASED)

ELIZABETH KARUMA KARITI.....APPLICANT/ADMINISTRATOR

JUSTIN NJERU ZEPHANIA.....RESPONDENT/ADMINISTRATOR

RULING

1. Before me is an application dated 30.04.2021 filed by the applicant herein and wherein she seeks the following orders;-

i. ……Spent…..

ii. …..Spent……

iii. That the Honourable court be pleased to review and or set aside the orders issued on 24.02.2021 and specifically the distribution by the court of land parcel No. KYENI/KIGUMO/1776.

iv. The Honourable court do redistribute land parcel no. No. KYENI/KIGUMO/1776 as per the applicant's proposed mode of distribution as per paragraph 5 of the affidavit in support of the summons for confirmation of grant dated 07.02.2019.

v. That cost of this application be borne by the respondent.

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 a grant of letters of administration intestate in the instant cause was made to the respondent who is the applicant's step son and the same was confirmed on 11.02.1998. That the applicant filed for revocation of the said grant and vide a ruling delivered on 07.06.2016 by Bwononga J, the court allowed the application and did set aside the confirmed grant issued on 11.02.1998.

3. Via summons for confirmation of grant dated 07.02.2019 and affidavit in support, the applicant moved the court once more for orders that this court adopts her proposed mode of distribution for Land Parcel No. KYENI/KIGUMO/1776 which was opposed by the respondent, a matter which this court determined via a ruling delivered on 24.02.2021 which is now the subject of this court's determination as whether the said ruling could be reviewed as prayed by the applicant.

4. The applicant did pray in her submissions that the orders issued on 24.02.2021 distributing the estate of the deceased herein be set aside and specifically the distribution of Land Parcel No. KYENI/KIGUMO/1776 (herein the suit land). That the Honourable court redistribute the suit land as per the proposed mode of distribution made by the applicant in the summons for confirmation of grant dated 07.02.2019. It was the applicant's case that there was no consent between the applicant and the respondent on the mode of distribution made on 11.02.1998 and further that, there was no consent by beneficiaries when the said grant was confirmed. She went on to submit that this court by adopting orders issued on 11.02.1998 and specifically for distribution of the suit land amounted to setting aside the orders issued by Bwononga, J. on 17.06.2016 who set aside the said confirmed grant on the basis that the applicant was never consulted.

5. The respondent herein did not file submissions but instead relied entirely on his replying affidavit dated 18.06.2021. This court has a duty to examine and determine the merits of the application.

6. The applicant has sought to review and/or set aside the orders made by this court on 24.02.2021. 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).

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

i. 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.

ii. Mistake or error apparent on the face of the record.

iii. Any other sufficient reason which may make the court review its order.

8. As indicated above, a 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 one's knowledge or could not be produced by her at the time when the decree or order was passed; 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 her part in adducing all possible evidence at the trial.

9. 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) Vs 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."

10. In the same breadth, the Court of Appeal in the case of **Rose Kaiza Vs Angelo MPanju Kaiza (2009) eKLR** held that not every new fact will qualify for interference of the judgment.

11. 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 v Ford Kenya Election, and Nominations Board and Another, Nairobi High Court Judicial Review Misc. Application No. 53 of 2013**, the court interalia 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."

12. In this case, the applicant states that there was an error on the face of record in that the applicant did not consent to the mode of distribution on the suit land during the confirmation that was done on 11.02.1998 and further that, there was no consent by other beneficiaries on the proposed mode of distribution as the court had held in the ruling. That, the applicant had moved the court to revoke the grant issued to the respondent in the said distribution as there was concealment of material facts and that the applicant was never consulted on the said distribution by the respondent.

13. The applicant avers that by the Honourable court adopting the distribution of the suit land in the manner made on 24.12.2021 is tantamount to setting aside the orders issued by Bwononga J on 07.06.2016. I do note from the court record that letters of administration was made to the respondent herein and the same was confirmed on 11.02.1998 and thereafter distribution of the estate was done. Immediately, an application seeking for review of the same grant for reason that the administrator had only distributed 9 acres instead of 10 acres was made by the respondent herein after having made the discovery; the court therefore allowed the review in the presence of the beneficiaries who were present in court including the applicant herein; and whereupon the applicant being asked, she replied that she had no objection on her part. The court thus proceeded to allow the review application as was sought; it is in this regard that I hold an opinion that the applicant should be estopped from denying her actions which she had previously freely consented to.

14. As per the provisions of the law, the orders sought by the applicant herein ought to have been served upon all the beneficiaries of the suit land so that the court does not end up making orders that affect non participants. The same has not been exhibited in this case. In my considered view, the averment made by the applicant herein clearly has no basis and has not met the requirements of Order 45.

15. Further, in **Attorney General & Others 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.

16. 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.

17. 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 she endeavours to review.

18. The other ground for review is, if there is a sufficient cause. The orders dated 24.02.2021 were as a result of the summons for confirmation of grant filed on 07.02.2019 wherein the applicant moved the court seeking for confirmation of grant and adoption of her proposed mode of distribution in relation to the suit land. 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.

19. The court notes that this matter has been in court for such a long time; this court appreciates the applicant's right to be heard but in the same breadth, all parties deserve a right to administrative action that is expeditious, efficient and procedurally fair having in mind the precious judicial time available.

20. In the ruling dated 24.02.2021 the court considered all the facts that were placed before it by the parties and the court pronounced itself.

21. Therefore, it is my considered view that :

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

ii. Costs to the respondent.

22. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF DECEMBER, 2021

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent