



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

SUCCESSION CAUSE NO. 624A OF 2010

IN THE MATTER OF ESTATE OF THE LATE NZOVE WAMBUA (DECEASED)

DANIEL MULI JUSTUS..... 1ST APPLICANT

AND

AGNES MBULWA JUSTUS..... 2ND APPLICANT

VERSUS

RICHARD MUTUA NZOVE

ANTHONY WAMBUA NZOVE.....ADMINISTRATORS RESPONDENTS

RULING

1. The deceased herein **NZOVE WAMBUA** died on 9th February, 2006. Before his death the deceased was presumably the registered owner of land Title No. Mavoko Town Block 3/2997 that is currently registered in the names of Richard Mutua Nzove and Antony Wambua Nzove as from 18.6.2014.

2. The genesis of this matter as presented by the two applicants is that one Rose Mwikali Justus who was their mother had been a wife to the deceased having been married to the him via customary law and resided with him on the suit property and on her death, the applicants were denied a right to bury her remains on the suit land. This prompted the filing of the application dated 15.2.2016 on 23.1.2016 seeking revocation of the grant that was issued on 11.4.2011 on the grounds of concealment of material information and misrepresentation of facts.

3. The said application was dismissed and found to lack merit and this prompted the instant application that was brought under **Sections 47 and 76(b) and (c) of the Law of Succession Act** and **Rules 68 and 73 of the Probate and Administration Rules** seeking orders that:

a. *Spent.*

b. *Spent*

c. *This Honourable Court's orders/ruling dated 22.5.2018 dismissing the 1st applicant's application dated 18.2.2016 be reviewed and set aside.*

d. *The confirmed grant issued to Richard Mutua Nzove and Anthony Wambua Nzove be revoked.*

e. *That the 1st and 2nd Applicants, whom the deceased had taken and recognized as his children and dependants during his lifetime be included in the list of beneficiaries of the deceased's estate and be given their shares thereof.*

f. *The costs of the application be provided for.*

4. The application is premised on the grounds enumerated in it and buttressed by the affidavit of Agnes Mbulwa Justus dated 30th January

2019.

5. The affidavit sets out three main grounds upon which the orders are sought, being that the applicants' mother was married to the deceased and yet they have been elbowed out from benefitting from the estate of the deceased.

6. The Respondent, via undated replying affidavit opposed the application. It was his contention that the application does not meet the threshold for grant of review orders and that the matters raised in paragraph 4, 5 and 6 of the affidavit were handled by the court and hence they are res judicata.

7. The respondent further deponed that the application elicits nothing new and the same is an attempt to fill in the gaps that the 1st applicant failed to fill in his application dated 15.2.2016 that was heard and determined by the court.

8. According to the Applicants, the court ought to include them as beneficiaries to the estate of the deceased and ought to review the dismissal of the orders issued in respect of application dated 15.2.2016 and at the same time revoke the grant that was issued in this matter.

9. The parties agreed to canvas the application vide written submissions. In support of the application, counsel for the applicant vide submissions filed on 22.1.2020 submitted that the court in the delivery of its ruling on 22.5.2018 did not consider the provisions of the Kamba law on divorce; the ingredients of a marriage under Kamba Customary Law; all parties subscribe to Kamba Customary Law and Practices; did not interrogate the procedure and ingredients of Kamba customary law and practices in regard to who is considered a wife and did not hear the evidence of one Justus Nzioka Muli. It was submitted that the deceased's 1st wife had only one child, a daughter whose name was not included in the chief's letter and the said 1st wife had married one Agnes Mutio under an "iweto" arrangement and had 4 children including the 2nd respondent. Counsel argued that the children arising from the iweto could not be referred to as children of the deceased save as under Kamba Customary Law. Learned counsel pointed out to court that the deceased performed the mandatory Kamba customary marriage on 6.9.2005 and took Rosina Mukali alias Mbesu and settled with her on his land at Lukenya. Counsel pointed out to court that the deceased recognized the applicant and her brother as his children who lived on the deceased's home when the respondents demanded that they leave. It was counsel's strong argument that there was new evidence that warranted review from Justus Nzioka Muli, from expert witnesses on Kamba customary law and from the respondents who received dowry when Agnes Mbulwa was getting married.

10. Learned counsel for the respondent in submissions filed on 7.2.2020 submitted that the applicant had not met the requirements for granting of an order for review. Learned counsel cited the provisions of Order 45 of the Civil Procedure Rules and the case of **In re Estate of Lesinko Sokorte Kirayio (Deceased) (2017) eKLR** and submitted that the new evidence was that which would speak to the fact that the applicant was married to the deceased. It was counsel's argument that there was no explanation why this evidence was not called during trial and thus submitted that there is no new evidence that could not have been made available during trial. It was counsel's further argument that the information was available and within the knowledge of the applicant and that they just failed or neglected to use it during trial. Learned counsel pointed out to court that the application was brought 8 months after this court delivered its judgement and this delay is unexplained. The court was urged to dismiss the application with costs.

11. Having carefully considered the pleadings of both the Applicants and the Respondent, as well as their respective submissions, it is my view that the following three substantive issues are up for determination:

- a. **Whether the application meets the threshold for granting Review orders.**
- b. **If the application meets the threshold, what orders should the court issue?**
- c. **Whether the court can revoke the grant that was issued in this matter.**

12. The remedy of review is set out under Order 45 of the Civil Procedure Rules 2010. This is provided for under rule 63 of the Probate and Administration Rules. Order 45 states that:

1. (1) *Any person considering himself aggrieved—*

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.

13. This order derives from section 80 of the Civil Procedure Act which gives the court power to review its own orders or decrees it had previously passed.

14. In order for an application for Review to succeed, the Applicant must convince the court of the existence 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. The applicant is obliged to clearly and specifically state the new evidence or matter and strictly prove the same. In the case of **James M. Kingaru & 17 others v J. M. Kangari & Muhu Holdings Ltd & 2 Others (2005) eKLR Visram** (as he then was) held as follows: -

“Applications on this ground (review) must be treated with caution. The applicant must show that he could not have produced the

evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial.

15. Review cannot be an avenue to supplement or introduce introducing new evidence. Having looked at the Applicants pleadings I find that they failed to demonstrate any new matter or evidence that could not have been made available at the time of conducting proceedings for the application to revoke the grant. It appears that they seek to introduce new evidence and bring other witnesses other than those that were pointed out to court when directions were being taken with regard to the hearing in this matter. The witnesses identified by the parties then testified and were all cross-examined at length after which the respective parties closed their cases.

16. The second limb of Order 45 Rule 1 refers to an error apparent on the face of the record. In making an examination as to whether there is an error apparent on the face of the record, the court must be quick to draw a parallel between a decision that is merely erroneous in nature and an error that is self-evident on the face of it. A review application must confine itself to the scope and ambit of Order 45 rule 1 lest it mutates into an appeal. Under the guise of review, parties cannot purport to re hear the same issues that had already been sufficiently dealt with.

17. The case of **Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173** defined an error apparent on the face record, thus:

“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 a real distinction between a mere erroneous decision and an error apparent on the face of the 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 a 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

18. In its original decision, the court heard that Rosina Mwikali Justus was a third wife to the deceased and the 1st applicant told the court that he was left out of the succession cause as this information was concealed from the court. The court was told that the 1st applicant was allocated the suit property by the deceased and as it is Rosina Mwikali’s remains are yet to be buried. In response, the court was told that the applicant is a stranger to the estate and therefore his claim to the estate ought to be rejected. In my view having this court sit and hear again what was presented to it on additional evidence that was clearly available to the applicant would be tantamount to sitting on appeal on its own decision and this is not permissible in law.

19. Be that as it may, Order 45 Rule 1 has the third limb for granting an application for review as ‘*for any sufficient reason*’. It is the finding of this court that a wholesome assessment of the matter has revealed that what the instant application intends to deal with was handled substantively vide the ruling that was delivered on 22nd May, 2018 after considering the evidence that was available before it as at the time of hearing. At the time it was the 1st applicant who prosecuted the case as an objector and at that time the 2nd applicant was not there. It is believed that the 1st applicant knew about the existence of the 2nd applicant who is his sister but he opted not to call her as a witness. The only conclusion one makes is that he took it upon himself that he had all the information and what it takes concerning the matter needed by the court to make a determination. This court duly made a determination on the matter. I am not satisfied that there is new evidence that was not within the knowledge of the applicants as all the issues in controversy were presented to court.

20. In light of the foregoing, I find that the Applicant has not met the threshold envisioned in **Rule 63 of the Probate and Administration Rules** for the granting of review orders. Accordingly, I find the application for review lacks merit.

21. With the preceding in mind, this court will now embark upon addressing the second issue of what orders the court ought to grant in the circumstances. To this end, the court directs itself to the prayer for revocation of the Grant made by the Applicant that are included in the instant application.

22. **Section 76(1) of the Law of Succession Act** confirms that a grant can be revoked in the circumstances contemplated by the Applicant:

“76 (1) A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) That the proceedings to obtain the grant were defective in substance;

(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) To proceed diligently with the administration of the estate; or

(iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or Continuing trust arising.

(e) That the grant has become useless and inoperative through subsequent circumstances.”

23. To begin with, the orders sought echo those that were sought and rejected in the application that was dismissed. The respondent has averred that this is *res judicata*. Section 7 of the Civil Procedure Act and the case of **the Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR** elucidates the prerequisites to be met for a matter to be deemed as *res judicata*, to wit;

- a. The suit or issue was directly and substantially in issue in the former suit;
- b. The former suit was between the same parties or parties under whom they or any claim;
- c. Those parties were litigating under the same title;
- d. The issue was heard and determined in the former suit;
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.

24. Applying the test of law, it is clear that prayer 4 cannot be granted by the court as the same is barred by the doctrine of *res judicata*. The record bears witness that on 22.5.2018 the court declined to issue the same order now being sought and because the order has not been set aside, the dismissal remains valid and proper. I therefore deem it unnecessary to delve into the issue of revocation of grant in this regard.

25. In the upshot it is my finding that the applicants' application dated 30th January 2019 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at **Machakos** this **20th** day of **May 2020**.

D. K. Kemei

Judge