REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

AD COLLIGENDA CAUSE NO. 64 OF 2020

IN THE MATTER OF THE ESTATE OF GILLIAN ANYANGO RICHARD(DECEASED)

MARY OLLYV ADHIAMBO RICHARD & 2 OTHERS.....APPLICANTS

VERSUS

JONATHAN OGUTU OMONDI & ANOTHER.....RESPONDENT

RULING

1. The applicant filed this application under a notice of motion dated 9th September, 2020 seeking for orders that: -

    a. This honourable court be pleased to review the orders of 8th September, 2020.

    b. Upon review of the orders of 8th September, 2020 this honourable court be pleased to stay the grant of letters of administration ad colligenda bona issued on 2nd September,2020 pending the hearing and determination of this application interparties.

2. The application is based on the grounds that the honourable court on 8/9/2020 dismissed the applicant's application dated 5/9/2020 on account of an error on the face of the court record.

3. The said application was seeking to revoke grant of letters of administration ad colligenda bona issued to the 1st and 2nd respondents as they were obtained fraudulently by concealment of material facts and untrue allegations.

4. The court failed to consider that the grant of letters of administration ad colligenda was for the alleged payment of the deceased's hospital bill which had already been settled.

5. By granting the said orders, due process was not followed and thus the applicants are apprehensive that the respondents will withdraw money from the deceased's account.

6. The application is opposed through a replying affidavit sworn by Jonathan Ogutu and Andrew Ochieng on the grounds that they are the children and dependants of the deceased and the only rightful beneficiaries of the estate.

7. The deceased had freely offered permanent parental responsibilities despite her not being their biological mother and therefore they acquired the status of the sons to the deceased.

8. The applicants have not pointed out the purported error apparent on the face of the record.

9. The issues raised in the present application are the same ones raised in the summons dated 5th September, 2020 which was found by this court to be of no useful purpose.

10. The application was canvassed by written submissions. The applicant submitted that the honourable court erred in failing to consider that the grant of letters of administration ad colligenda issued to the 1st and 2nd respondents was obtained fraudulently by concealment of material facts and untrue allegations.

11. The respondents in their petition sought for a limited grant to enable them access the deceased account at Eco Bank for purposes of settling the bill at Eldoret Hospital. They never sought for preservation of the deceased's estate.

12. The applicant's application dated 5/9/2020 was summarily dismissed without hearing the merits of the said application. The applicant relied on the case of ***Nzioka versus Kitusa(1982)eKLR*** where it was held that "**the application for review has never been heard, and it could not therefore lawfully have been dismissed. We set aside the order of Muli, j dismissing that application. We order that the application for review be remitted to the High Court for hearing according to the law."**

13. Lastly, that it was wrong and erroneous for the court to dismiss the applicant's application dated 5/9/2020 without hearing any argument on the merits of the application.

14. The respondent submitted that the applicants have not annexed a copy of the order they are seeking the review of. The directions sought to be reviewed against are not an order or decree within the meaning of *Order 45* of the *Civil Procedure Rules*.

14. The respondent relied on the case of **Fidelity Commercial Bank vs Michael Ruraya Mwangi** the court noted that "**A plain reading of this rule shows that an extracted order is a prerequisite of an Application for review because, as the rule reads it is a review of a decree or order passed or made''**.

16. The applicants have not satisfied the threshold for granting an order of review in law. There is nothing in the current application to show that there is discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicants at the time the orders were made.

17. Further, that there is nothing to show that there is an error on the face of the record of the court which warrants to be corrected by the court.

18. The applicant has failed to prove that there was an error apparent on the face of record or that there is a discovery of new evidence which was earlier not within their knowledge.

Issues for determination

19. The main issue for determination is whether the applicant has established grounds for review.

20. **Order 45, rule 1 provides 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.**
>
> **(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"**

21. Therefore, Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist: -

> **(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or**
>
> **(b) There was a mistake or error apparent on the face of the record; or**
>
> **(c) There are other sufficient reasons; and**
>
> **(d) The application is made without undue delay**.

22. The pertinent issue for determination herein, therefore, is whether the Applicant has established any of the above grounds to warrant an order of review.

In **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,** the Court of Appeal described an error apparent on the face of the record as follows:

> **"…In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that 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 judiciously on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of 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 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 or wrong view is certainly no ground for a review although it may be for an appeal."

23. On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in ***Pancras T. Swai v Kenya Breweries Limited [2014] eKLR*** held that:

"In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-

"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."

We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J. We think Bennett J was correct in **Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557** when he held that:

"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal"

24. The applicant's contends that their application was summarily dismissed without being heard on the grounds that it was of no useful purpose.

25. In ***National Bank of Kenya Limited v Ndungu Njau [1997] eKLR*** the court delved deeply into the jurisdiction to review and said in very firm exposition as follows: -

"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. 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".

26. In the present case, the applicant has established that no amount has been withdrawn from the deceased account held at Eco Bank, Eldoret branch in the name of the deceased. The intended purpose of the grant of letters was to pay the hospital bill which had already been cleared thus the orders need be stayed.

27. The grant of letters of administration ad colligenda bona was limited only to the said issue which means the administrators were not entitled to conduct any other transaction concerning the deceased's estate.

28. The prayer for review has merit as the applicant has met the threshold of granting the same. The application is allowed.

29. The Grant of Letters of Administration ad Colligenda bona issued to the 1st and 2nd Respondents on the 2nd day of September, 2020 for purposes of collecting and/or withdrawing money from the deceased's account held at Eco Bank, Eldoret Branch Account No. **********, Kshs. 265,109/- to settle an alleged Hospital bill at Eldoret Hospital, is therefore hereby revoked.

S.M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **9th** day of **December,** 2020.

In the presence of:-

Mr. Mbaji for the applicant

Mr. Kipkurui for the respondent

Ms Gladys - Court Assistant