REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 15 OF 2018

IN THE MATTER OF THE ESTATE OF GODANA SONGORO GUYO (DECEASED)

AHMED GODANA SONGORO...APPLICANT

AND

HELLEN SAFOO GODANA..RESPODENT

Coram: Hon. Justice R. Nyakundi

Chepkwony Advocate for the applicant

S. Ruwa Advocate for the respondent

RULING

On 18.9.2020 an application was made on behalf of the applicant for an order that the grant of confirmed letters of administration issued to **Hellen Safoo Godana** and **Ahmed Sangoro Godana** be rectified in the following respects in terms of Rule 43 (1) of the Probate and Administration Rules to incorporate:

> *(1) The correct spelt names of the beneficiaries to reflect as follows:*
>
> > *(a) Aroyi Godana, Ahmed Godana Songoro, Songoro Godana, Sampuli godana, Abbie Abalon Guyo, Hellen Safoo Godana, Janet Guyatho Godana, Annet Kashida Godana and Edna Haganda Godana.*
>
> *(2) That the Certificate of confirmation of grant be rectified to include the Barclays Bank Account numbers namely 2036999279 domiciled in Mombasa and Barclays Bank Account domiciled at Kilifi both in the names of the deceased.*
>
> *(3) That this Honourable Court be pleased to review the holding requiring that the money held in the Bank account be transferred directly to the beneficiaries and instead order that the amount be transferred through the advocates for onwards transfer to the respective beneficiaries in line with the Court directions.*

An affidavit in support sworn by counsel **Mr. Brian Otwoma** was filed on 18.9.2020 the verbatim statements contained in the affidavit deposes that both the trial Judgment and annexed confirmed certificate of grant contains errors and mistakes on the face of the record more specifically on the proper spelling of the names of the beneficiaries to the estate. Counsel then proceeded to recount that administrators had signed legal fees agreement for purposes of meeting the cost of litigation. That it transpired after the Judgment it has become impossible to trace the administrators for purposes of making good the offer of settling the agreement on fees. Counsel asked the Court to review the order in the Judgment declaring the cash at Bank to be channeled through their respective client accounts for purposes of garnishing their fees. Counsel said that it's the only process both of them can be assured of their legal fees in accordance to the professional fee agreement.

Determination

It is not surprising that such applications are common in our Courts of Law. It is clear from the applicant's application on the whole he is seeking rectification of the confirmed grant of letters of administration pursuant to Section 74 of the Law of Succession as read with Rule 43 (1) of the Probate and Administration Rules.

On the other hand, this is an application for review as stipulated under Section 80 of the Civil Procedure Act and Order 45 rule (1) of the Civil Procedure Rules. The starting point is for this Court to establish whether the applicant meets the criteria for rectification of grant. It is

clear from the provisions of Section 74 of the Primary Act on Succession that errors in names and descriptions or in setting out the time and place of the deceased's death or the purpose in a limited grant, mat be rectified by the Court and the grant of representation whether before or after confirmation may be altered and amended accordingly. As reflected in the expressed provisions of the Act ther are a number of situations in which the Court will permit rectification of a Judgment or Ruling. The most obvious are as captured in **Black's Law Dictionary 8th Edition pg 582 and Sakumar Ray**:

> ***"The code of Civil Procedure which defines the term "Clerical error" which the Learned author argues is limited to an error arising out of or occurring from accidental slip or omission due to careless mistake on the part of the Court."***

The rationale for this jurisdiction to be exercised by the trier of facts which led to the final order or Judgment.

The Court in Lakhamishi Brothers Ltd v R. Raju & Sons {1966} EA 313 said:

> ***"A Court will of course, only apply the slip rule where it is satisfied that it is giving effect to the intention of the Court at a time when Judgment was given or in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter brought to its attention."***

In the case of the matter of **the estate of Geofrey Kinuthia Nyawanga (deceased) {2013} eKLR** it was held as follows:

> ***"that the Law on rectification or alteration of grant is Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules what these provisions mean is that errors may be rectified by the Court where they relate to names or descriptions, or setting out of the time or place of the deceased death. The effect is that the power to order rectification is limited to those situations and therefore the power given to the Court by the provisions is not general."***

I also ascribe to the dictum in the comparative decision in **R v Cripps ex-parte Muldoon & others {1984} QB 686 Sir Donald Mr.** held:

> ***"Once the order has been perfected, the trial Judge is functus officio and in his capacity as the trial Judge, has no further power to reconsider or vary his decisions <u>under the authority of slip rule</u>***
>
> ***"It is suppressing wide in its scope. Its primary purpose is a kin to rectification, namely to allow the Court to amend a formal order which by accident or error does not reflect the actual decision of the Judge. Preston Banking Co. v William Alls Up & Sons {1895} 1 Ch 141, but it is also authorizes the Court to make an order which it failed to make as a result of the accidental omission of counsel to ask for it or the Court inadvertently failed to express the decision which it intended."***

In my view the Law is clear on account of topographical errors, accident skips or omissions the trial Court has the power to exercise jurisdiction to bring the Ruling/Judgment or order in conformity with the final pronouncement. The reasoning also fits in line with the principles in case of **Norman Hartly v Doreen Hankey {2010} JMCA:**

> ***"The rule does not provide an open door permitting a Court to reverse its decision merely because a party wishes the Court so to do. A court therefore, will only revisit an order previously made if an applicant seeking to revoke that order, shows some change of circumstances or demonstrates that a Judge who made the order was misled whether innocently or otherwise….."***

Similarly, with remedies under this statutory provisions, I hold that the remedy for rectification of letters of confirmed grant be permitted by this Court.

In the instant application, the paramount consideration is on the nature of the errors or omissions pointed out by the counsel for the applicant. As for his evidence I find existence of topographical errors, mistakes and omissions with regard to the Ruling and subsequent content of the confirmed grant of letters of administration issued to the administrators.

As stated by the applicant it relates to the names of the beneficiaries and particulars of the bank accounts which comprise part of the estate property for distribution. I must respectively agree with the contention by the applicant to move the Court for rectification of the Ruling and the confirmed grant of letters of administration to reflect the original intention of the Court. The strength of the review jurisdiction does posit the exercise of discretion by the Judge familiar with the proceedings and final order subject matter to be considered under Section 80 of the Act and Order 45 of the Civil Procedure Rules. It is the power of the Court to act insitu to effect a defect to expressly prohibit voidness and voidability form part of the Judgment.

The **Court of Australia in the case of Autodesk Inc v Dyason (No. 2 {1993} HCA 6 {1993} 176 CLR 300** held:

> ***"The public interest in the finality of litigation will not preclude the exceptional step of reviewing or reheating an issue when a Court has good reason to consider that in its earlier Judgment, it has proceeded on a misrepresentation as to the facts or the Law. It must emphasized however, that the jurisdiction is not exercised for the purpose of re-agitating arguments already considered by the Court, nor is it to be exercised simply because the party seeking a re-hearing has failed to present the argument in all its aspects or as well as it might have been put. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to re-argue their cases."***

Occasionally, the Court will allow to some degree review of its Ruling or Judgment as perfectly stated in the case of **Nyamogo (supra)** and in **Airban Tuleshwar Sharma v Ariban Pishad Sharma {1975} 45 CC 389 {1979} UJ 300 SC** in which the Court said:

"The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits that would be the province of the Court of Appeal. A power of review is not to be confused with appellate power which may enable an appellate Court to correct all manner of errors committed by the subordinate Court."

Lastly, the applicant referred me to the issue closer to the above application on rectification of grant on the writ of review. Likewise, the applicant averred that the administrators properly retained legal counsel to render professional legal services at a fee. Whilst it was expected of them to meet the cost of litigation, applicant deposes that recent conduct has shown otherwise necessitating a review of the Judgment.

According, to the applicant he contends that he is in possession of a legal fees agreement capable of being enforced against the administrators save for the order of the Court to release the funds to beneficiaries without the participation of their respective counsel. The applicant further states that on account of the turn of events by the administrators since the making of the declaration with respect to cash held in the two accounts, it has become necessary to apply for review of the Judgment.

The question now is whether the applicant has satisfied the criteria set out under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules on review of a Ruling or Judgment. This provisions stipulates:

"that any person aggrieved by a decreed or order from which an appeal is allowed, but from which no appeal has been preferred may seek review on grounds of discovery of new and important matter or evidence which after exercise of due diligence, was not within his knowledge or could not be 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."

The desire is to obtain a review of the decree may apply also for review of Judgment to the Court which passed the decree or made the order without unreasonable delay. The often cited case of **Nyamogo & Nyamogo v Kogo {2001} EA 170** laid down the canons of review jurisdiction, the implication of this and similar cases pauses an interesting scenario, one difference and another advantageous to the applicant. For remedy under Section 80 and Order 45 (1) of the Act and the Rules for the error to be sufficient as a ground it must appear upon the face of the record.

What is deductible from the above principles is that for an application for review to succeed it must satisfy the formal requirements under Section 80 of the Civil Procedure Act and Order 45 (1) of the Rules. In the present case a Judgment that determined the rights and liabilities of the parties was pronounced by this Court. The applicant in re-agitating his rights on payment of legal fees relies on the privity of fees agreement with his client. Under the structured test in Section 80 and Order 45 of the Act there are four questions which the applicant has failed to address sufficiently to entitle him of the remedy; as premised in the application.

That there is a mistake or error apparent on the face of the record as it relates the interpretation and admission of advocate-client legal fees agreement. That the aforesaid agreement being referred to falls under the category of discovery of new and important evidence which after exercise of due diligence was not within the applicant's knowledge or could not be produced during the trial or pendency of the claim before final Judgment.

That to impeach the decree the issue raised in the quest for review satisfies the criteria on sufficient reason as a ground for review that the Court failed to take account of material facts as stipulated in the legal fees agreement.

In assessing the adequacy of the fact finding exercise undertaken by this Court it's important to note that the issue being raised now under review jurisdiction was firmly dealt with and reasons given in the final order dated 29.7.2020. The fact that the clients have not made good the legal fees agreement is my opinion not itself to invoke the review jurisdiction of the Court.

I agree mistakes or errors do nevertheless occur from time to time in the course of writing the Ruling or Judgment. Correcting those errors or mistakes are different from asking the Court to change its mind on a pronounced Judgment made and delivered to the parties.

I have listened to the applicant on post-Judgment corrections, typographical errors or on facts in the determined issue leading to the confirmed grant of representation to the Estate of deceased on the issue of rectification of misspelled and or misdescription of the names of beneficiaries, asset portfolios and other clerical errors apparent on the face of the record. I humbly accede to the reliefs sought. This is an uncontroversial procedure in any event.

Whatever the merit of the application, there is no evidence of an error apparent on the face of the record to subject the Ruling for review as sought by the applicant. Here it was also argued that the determination of the matter did not take into account the advocate – client legal fees agreements to influence the outcome of the trial orders. The **Court in Northern India Carters Ltd v Governor of Delhi {1980}** observed interalia:

"Since review of the Judgment is neither an appeal nor a second inning to the party who has lost the case because of his negligence or indifference, the party seeking review on this ground must show that there was no remission on his part in adducing all possible evidence at the trial. In addition to this the evidence upon which the review is sought must be relevant and of such a character that if it would have been brought into the notice of the Court, he might…."

Applying the above principles in conclusion, the confirmed grant of letters of administration issued to the administrators by this Court on 29.7.2020 be duly rectified as identified in this Ruling to cover misdescription of the names of beneficiaries and particulars of the estate property.

However, on the issue the efficacy on the legal advocate-client fees agreement I decline to re-open the Judgment in exercise of the general exceptions provided for under Section 80 of the Act and Order 45 (1) of the Civil Procedure Rules.

I would therefore allow the application partially on rectification of confirmed grant of letters of administration but decline to set aside the Judgment on review in toto. Costs be borne by the applicant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE

<u>In the presence of:</u>

1. Mr. Otuoma advocate for applicant

2. Ms. Mettoh holding brief for Chepkwony advocate