REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 55 OF 1984

IN THE MATTER OF THE ESTATE OF JOSEPH OKUNDA, DECEASED

RULING

1. The application for determination, is dated 16th December 2019, seeks review of the orders made in the ruling of this court, delivered 11th October 2012, on the ground that the respondent did not exhibit genuine letters of administration intestate before court.

2. The same is opposed by the respondent, on the basis that the applicant had filed an appeal, and that the appeal had been dismissed, and, therefore, the remedy of review is not available to the applicant. The respondent further contends that the fraud alleged was not proved, and that the matter has been overtaken by events.

3. Rule 63 of the Probate and Administration Rules provides as follows:

> *"63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules*
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> *(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.*
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> *(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules."*

4. In considering whether Order 45, of the Civil Procedure Rules, applies to succession matters, the court, in *John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another* [2016] eKLR, quoted Rule 63 of the Probate and Administration Rules, stated as follows:

> *"… the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules."*

5. Subsequently, the next question to consider is whether the applicant has met the substantive requirements of Order 45, which state as follows:

> *"1. (1) Any person considering himself aggrieved—*
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> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
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> *(b) by a decree or order from which no appeal is hereby allowed,*
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> *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.*
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> *(2) …"*

6. The Court of Appeal, in *Pancras T. Swai vs Kenya Breweries Limited* [2014] eKLR, took the view that for an applicant to succeed in an application for review, he must establish, to the satisfaction of the court, any one of the following three main grounds:

> *"i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or*
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> *ii. That there was a mistake or error apparent on the face of the record; or*
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> *iii. That sufficient reasons exist to warrant the review sought.*
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> *In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay."*

7. The applicant's case is that there is an error in the ruling, in the sense that the signature of the Judge, on the letters of administration intestate, issued on 11th May 1984, is a forgery.

8. With regard to error apparent on the record, the court, in *Republic vs. Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad* [2019] eKLR, observed:

> *"13. 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.*
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> *14. In Nyamogo & Nyamogo v Kobo [8] discussing what constitutes an error on the face of the record, the court rendered itself as follows: -*
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> *"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."*

9. The court went on to say:

> *"17. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out. [12]*
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> *18. 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. To put it 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.*
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> *19. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it."*

10. In *Paul Mwaniki vs. National Hospital Insurance Fund Board of Management* [2020] eKLR, on the matter of error on the face of the record, it was said:

> *"… 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."*

11. From the above, it is clear that the error, the subject of the instant application, ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long-drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

12. The applicant herein claims that the grant of letters of representation intestate used by the respondent was forged. I have noted from the court record that there is only only one copy of the grant of letters of administration intestate that was issued to the respondent, and the same bears the stamp of Gicheru J and the court seal.

13. The document that the applicant purports to be a forgery, does not form part of the court record, for its only existence is through its being exhibited in her application. She has not explained where she obtained the said document from, and why she is making reference to it, yet it does not form part of the court record, as a document issued by the court. Further, the allegation of fraud is a fundament issue that can only be determined by admission of evidence to prove the same, and, therefore, the same does not fall under the ambit of Order 45, as an error apparent on the face of the record. Needless to say, the issue of forgery, in my view, is a substantial issue, that can only be established by way of evidence, and, it cannot, therefore, be handled as an error apparent on the face of the record in the context of a review application.

14. It is my view, therefore, that in the application now before me, no error or mistake apparent on the face of the record has been pointed out by the applicant to warrant an order for review. In the order given by this court, on 11th October 2012, the court considered all the facts that had been placed before it by the parties, and reached a conclusion, and to be asked to change its mind on the issue would amount to inviting this court to sit on appeal on its own decision.

15. With regard to sufficient cause, the court, in *Republic vs. Cabinet Secretary for Interior and Co-Ordination of National Government Ex Parte Abulahi Said Sald* [2019] eKLR, the court observed that:

> "*A court can review a judgment for any other sufficient reason. In the case of Sadar Mohamed vs Charan Singh and Another [19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [20] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression ' any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement. [21]*
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> *31. I also find useful guidance in Tokesi Mambili and others vs Simion Litsanga [22] where they held as follows: -*
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> *i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. (Emphasis added)*
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> *ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion."*

16. The applicant herein, apart from the ground of error on the face of the record, has stated that she has been locked out of the succession, and that her late husband's estate will be taken from her. I have noted that the applicant herein had filed an application to have the grant revoked, which was heard and determined. The applicant also had a shot at appeal, by filing a notice of appeal, which she later abandoned, as showed in the court records.

17. Furthermore, it will be noted that the orders sought to be reviewed were made in 2012, approximately eight years ago. With regard to the period taken before review is sought, the court, in *Jaber Mohsen Ali & Another vs. Priscillah Boit & Another* [2014] eKLR, stated:

> '*The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.'*

18. On the same issue, the court, in *Stephen Gathua Kimani vs. Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR, the court stated:

> "*One thing is clear in this application. The delay of one year has not been explained. Perhaps, it's important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads '… may apply for review of judgement to the court which passed the decree or made the order without unreasonable*
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> *delay.' The logical question that follows is, was the present application made without unreasonable delay? Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay. Such a long delay must be sufficiently explained. In John Agina vs. Abdulswamad Sharif Alwi, [19] Cockar, Akiwumi and Tunoi had this to say: -*
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> "*An unexplained delay of two years in making an application for review under Order 44 Rule I (now Order 45 Rule 1) is not the type of 'sufficient reason' that will earn sympathy from any court.""*

19. The applicant, in her submissions, has not addressed the delay in filing the application for review. It is my opinion that the delay of eight

years was gross and unreasonable, and, therefore, the orders sought cannot be granted.

20. In an upshot, the applicant has utterly failed to adduce sufficient grounds to warrant grant of the review orders sought. Consequently, I do find that the application, dated 16th December 2019, is without merit, and I hereby dismiss the same. This being a family matter, each party shall bear their own costs. Any party aggrieved has leave of twenty-eight (28) days, to move the Court of Appeal appropriately. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF DECEMBER 2020

W MUSYOKA

JUDGE