REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1088 OF 2005

IN THE MATTER OF THE ESTATE OF JOSEPH GICHANA KIMANI (DECEASED)

RISPER WAMAITHA GICHANGA…..……..PETITIONER/APPLICANT

VERSUS

ALEXANDER KIMANI GICHANGA……..……1ST RESPONDENT

YVONNE ASABE MBURU(*Substitute of Daniel Mburu*

Gachanga, deceased)……..…….……2ND RESPONDENT

RULING

By an application dated 10th July 2017 parties sought to have **Public Trustee** appointed to administer the estate of the deceased. The application sought for orders:

> **a) That the court be pleased to stay implementation of the orders of the Honourable court made on 9th June 2017 pending the hearing and determination of this application;**
>
> **b) That the order No. 1 made by the Honourable court on 9th June 2017 under disposition be reviewed.**

The order to be reviewed was that;

> **1) The objection of 1st July 2005 and 15th July 2005 by the 1st former wife of the deceased now deceased and taken over by her 2 sons PW1 and PW4 vide application of 3rd August 2006 to making of grant is upheld and the petition for grant of probate shall be amended to include the following;**
>
> **a) Grant of letters of administration intestate issued in the names of the petitioner Rispa Wamaitha Gichanga representing the 1st house.**

Forensic report dated 24th November 2014 indicated that the alleged signature of the deceased appearing on the **Land Control Board** and the alleged **Will** were not made by the same person.

This Court heard various witnesses on whether the deceased's estate was testate or intestate estate. In the Judgment dated 9th June 2017, this Court found the **1st Will** by the deceased was valid, as parties did not sign. For the **2nd Will** and later Agreement were invalid as signature of the deceased was not confirmed and the whole estate was bequeathed to the **2nd family** of the deceased leaving out the **1st family.** The Court granted the orders sought in application dated 3rd August 2006 and ordered the administrators to be issued grant of letters of administration intestate in the names of Risper Wamaitha Gichana representing the 2nd house and Alexander Kimani Gichana representing the 1st house.

APPLICATION FOR STAY OF EXECUTION & REVIEW

The application for consideration is the **Notice of Motion** dated 10th July 2017. The Applicant sought review of the orders of this Court on 9th June 2017. The same is premised on grounds that the said order of 9th June 2017 is erroneous after the Court having found that the **Will** dated 26th April 1995 is valid inform was invalid. Further that the order seeking to amend the Petition for grant of probate to Grant of letters of administration intestate to be issued to the Applicant and the 1st Respondent is erroneous as there exists a valid will. That the said order is not based on the evidence presented in Court. To the effect that the 1st Respondent had been bequeathed **Ngong/Ngong/9759** and **9760** while

the respondent was bequeathed **Ngong/Ngong/9762**. Further, that despite this Court making a finding that the will of the deceased was valid proceeded to hold that the estate of the deceased be distributed in accordance with to **section 35, 37, 40 and 42 of the law of succession** which deal with intestacy**.** Further that the order is erroneous as it seeks to invalidate the will dated 26th April 1995 which was valid in form but failed to make provisions to the Respondents to have directed to file an application under **section 26** of the law of **Succession Act**.

The Respondent opposed the said application and filed his grounds of opposition dated 14th September 2017 stating that what the Applicant was seeking was an Appeal over its own judgment. Further, that the evidence in support of the Notice of Motion is an expression of dissatisfaction of the said judgment which can only support an appeal. He added that should the application be allowed, it would amount to the Court overturning its own decision. Further that the said application was an abuse of the Court process and intended to delay the final determination of this matter. He urged the Court to dismiss the application with costs.

The 2nd Respondent in his replying affidavit in opposition to the review, gave a background of the matter culminating to the current application. He opposed the orders sought for stay and review. That **Section 7 of the Act** had the effect on invalidating the will on grounds of coercion which led the deceased to draw a **Will** in which he deprived his 1st family any share of his estate. Though the **Will** was valid in form the same was void in law. He averred that the Applicant had failed to demonstrate;

i. The discovery of new and important matter or evidence after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced at the time when orders by the honorable court were issued or;

ii. The existent of mistake or error apparent on the face of the record or other analogous reason to warrant a review of the orders issued on 9th June 2017;

iii. Sufficient reason; and

iv. The application for review was filed within reasonable time without undue delay.

That it is in the interest of justice the court to uphold the judgment and redistribute the estate accordingly as there were no valid grounds for review.

Parties filed written submissions. The Petitioner in her submissions raised 3 issues for determination namely;

i. Whether the deceased left a valid will;

ii. Whether the order for review is warranted; and

iii. whether the deceased estate should be administered and distributed according to the will

On whether the deceased left a valid will? It was submitted that the will had satisfied the elements provided under **Section 5(1) & 11 of Law of Succession Act** and in regard to testamentary freedom, execution and witnessing. It was submitted that the Court ruled that deceased wrote and signed the Will dated 26th April 1995 in compliance with **Section 11** of the Act.

On whether the order for review is warranted it was submitted that there three reasons that would warrant a review of orders namely;

i. Discovery of new facts;

ii. Discovery of a mistake on the face of the record;

iii. Any other sufficient reasons.

It was submitted that mistake was discovered on the face of the judgment by holding that the will was valid in form but not substance and on which basis the Court rendered the will invalid. It was argued that this fact was contradictory in that a will that is valid in form is sufficient considering the main elements of a Will were satisfied.

On whether the deceased's estate should be administered and distributed according to the will, it was submitted that **Section 5 of the Law of Succession Act** provides that every adult Kenyan had unfettered testamentary freedom to dispose of their property by Will hence the deceased's estate ought to be distributed as he willed. Further, that **Section 26 of the Law of Succession**; dependants not adequately provided for by will or intestacy are catered for by reasonable provision.

Section 26 reads;

"where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate."

The Petitioner relied on the case of ***Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR,***

> ***"This court must however recognize and accept the position that under the provisions of section 5 of the Act every Kenyan adult has unfettered testamentary freedom to dispose off his or her property by will in any manner he or she sees fit."***

> ***"we must however , take into account that the undoubted fact that the appellant herein was the deceased's preferred wife and we can only do so by allocating to her house a larger share of the deceased's net estate.***

That **Section 11 of the Act** magnifies matter of validity of a will and a will valid in form is indeed valid.

In the case of ***James Maina Anyanga v Lorna Yimbiha Ottaro & 4 Others eKLR*****, It was held that,**

> ***"failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under section 26 of the law of succession to make reasonable provisions for the dependant."***

The 1st Respondent submits that there is no contradiction between the judgment delivered on 9th June 2017, the validity of the will and the finding of the court that the objectors are entitled to a share of the deceased's estate as the will failed to make reasonable provision for the 1st Respondent and his siblings. He urged the court to disallow the application.

The 2nd Respondent submitted that **Order 45 Rule 1 of the Civil Procedure Rules 2010** sets out the instances when a Court can entertain an application for review. It was submitted that the application seeks to fault the merit of the judgment as such the same should be dismissed.

He relied on the case of ***Stephen Gathua Kimani Wanjira t/a Provident Auctioneers eKLR*** cited with approval the decision in ***Abasi Belinda vs Fredrick Kangwamu and another [1963]*** when the court held,

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

He relied on the case of ***Wingrove vs Wingrove (1885) 11 P & D 81, Sir James Hanne*** stated as follows;

> ***"To make a good will, a man must be a free agent. But not all influences are unlawful. Persuasion appeals to the affections of ties of kindred, to a sentiment of gratitude for past services or pity for future destitution or he like, these are all legitimate and may fairly be pressed on a testator … in a will, the testator may be led but not driven and his will must be the offspring of his own volition and not the record of some else"***

Section 7 of the Law of Succession provides that a will whose making is influenced by coercion is void.

DETERMINATION

I have read and considered the parties pleadings, affidavits, testimony and submissions and have identified these are the Issues for determination;

> **i. Whether the applicant had met the requirements for this court to grant the orders sought.**

It is trite law that for one to obtain orders for review one must satisfy the following ingredients; discovery of new facts, mistakes or sufficient reasons The arguments raised by the Applicant, her main grievance is more on the substance of the judgment. There issues would have been better challenged through an appeal and not a review. The Applicant seeks to review the orders given by this court on 9th June 2017.

In ***National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996)*** it was held,

> ***"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 ground for review."***

> ***".... He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it."***

The applicant in essence is challenging the finding of the court. There is no error on the face of the record has been pointed out. In my view what the applicant seeks to challenge is not an error apparent on the face of the said judgment but the substance of the said judgment.

This Court's finding as elucidated in the judgment of 9th June 2017 is that the deceased wrote 3 documents in relation to his estate;

a) Will of 25th September 1987 which this court valid in form and substance. The deceased provided for 5 sons of 1st wife 2 acres each on **L.R. Ngong/Ngong 5425 &** ¾ interest in Diani **Plot 214** and other properties were bequeathed to the Petitioner & 4 children;

b) Thereafter, an Agreement dated 16th August 1991 was alleged to have been agreed upon before the District Commissioner Kiambu by the deceased 1st wife Leah Njoki Kimani, Leonard Gichuru Kimani, Andrew Gitau Kimani and Edwin Kiarie Kimani that Caution on suit properties **Dagoretti/ Kinoo 1025, 1027, 1029 & 1030** would be removed in return the 1st 3 properties would be bequeathed to the 3 sons of the deceased and **1030** would be left as part of his estate. They did not sign the Agreement;

c) Will of 26th April 1995 was the deceased's last Will and testament and he allocated all properties constituting his estate to the Petitioner and her 4 children only;

d) This Court considered testimony of witnesses in Court and affidavits they deponed , After the 1st wife left the matrimonial home, the deceased was left with 5 sons to singlehandedly bring up. When the Petitioner came to the home, she mistreated the 1 st wife's children and they left home. She was cruel to the last born of the 1st wife who was left behind Eventually, the deceased abandoned his 5 sons of the 1st wife and they were cared for by their late mother;

e) The Petitioner did not attend Court on any occasion or testify or depone affidavits to controvert these facts;

f) From the above conduct by the deceased who was with the Petitioner to ostracize his 1 st family, this Court found that from the successive efforts in form of Wills and/or Agreements as outlined above, the Petitioner was behind the exclusion of any benefit of the 1st family to the deceased's estate, contrary to the distribution in the 1st Will of 25th September 1987. The Will though valid in form by virtue of **Section 7** of Law of Succession Act, it was void for coercion of the deceased by the Petitioner;

g) Secondly, aspersions were cast on the authenticity of the deceased's signature as alluded to by the **Document Examiner** and no other evidence was adduced to controvert his finding, that the signature on the Will and on document previously signed that was not the deceased's Will;

h) If the Will was valid in form and substance by virtue of **Sections 5(1) & (3) 7 & 11** of Law of **Succession Act** but the 1st family was left out and were not allocated any property, yet it is not denied that they were children of the deceased, then Section 26 of Law of Succession would aptly apply. There would be a valid Will but reasonable provision for the 1 st family would be made by the Court. In the instant case, this Court holds that the deceased did not write and/or the 2nd Will and Final Testament and if he did it was not with his own free will considering the antecedents as alluded to by **PW 1 & PW4** respectively;

i) Infact at Pg 17 of the judgment, I observed;

> ***"From the above observations and analysis the Will of 25th April 1995 cannot be said to be an expression of the deceased's intention as envisaged by Section 7 of the Act, compared to the Will of 1987 where the deceased bequeathed the sons of the 1st wife some property"***

j) There is no contradiction or error on the face of the record, I have outlined reasons for invalidating the **Wills** and the estate of the deceased ought to be administered as an intestate estate, I appointed Co administrators under **Section 66** of Law of **Succession Act Cap 160** and maintained status quo pending administrators either jointly or separately filing summons for confirmation and any/each party aggrieved to file protest(s) and the matter be heard and determined before any Court in Family Division.

The parties are also at liberty to exercise right of appeal.

DISPOSITION

The Applicant's application is challenging the substance of this court's judgment of 9th June 2017. As such I find that these are matters that lie in the purview of the Court of Appeal and not this Court. Calling upon this Court to interfere with the said judgment will be tantamount to sitting on appeal of its own judgment. For these reasons, the Applicant's application is not granted but dismissed. It is not for review but appeal. Cost in the cause. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT ON 13TH MARCH 2019

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. MBINDYO FOR THE PETITIONER

MR. KAMAU FOR THE 1ST RESPONDENTS

MS MAIHAKI FOR THE 2ND RESPONDENT

MS JASMINE - COURT CLERK