REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

SUCCESSION CAUSE NO. 66B OF 2018

IN THE MATTER OF THE ESTATE OF SALEH AWKE (DECEASED)

KALTUM SALAH AWKE.....APPLICANT

-VERSUS-

KALTUM SALAH AWKE.....1ST RESPONDENT

MARIAM SALAH AWKE.....2ND RESPONDENT

AND

HASSAN SALAH.....INTERESTED PARTY

ZAINAB ABDI.....INTERESTED PARTY

RULING

1. By Summons dated 9th April, 2019, the Applicant sought an order to review the court's order made on 4th April 2019 revoking the Limited grant issued to Mariam Salah Awke on 4th October 2018.

2. The grounds upon which the summons are made are that counsel was not given sufficient time to respond to the summons for revocation of grant and that the court was misled that there was non-disclosure of material facts. It is contended that the Petitioner/ applicant had disclosed proceedings pending before the Kadhi's court hence the application for revocation should not have been granted.

3. The Respondent opposed the application through a Replying Affidavit sworn on 24th April 2019. The Respondent contended that there is no legal basis for setting aside the orders and that there exists a full grant which has not been revoked hence there was no basis for issuance of another grant for the same estate.

4. During the hearing of the application, Mr. Otieno submitted that the court was misled that the limited grant had been obtained through concealment of important materials and that the administrator had in any case been changed by consent of parties hence the limited grant was properly issued.

5. Mr. Marasi, on the other hand, maintained that the application was not meritorious hence it should be dismissed. He contended that there is a full grant issued by the High Court which had not been revoked hence there were no grounds for issuing another grant of letters of administration for the same estate.

6. I have considered the rival arguments for and against the application. What is before court is a summons for review, asking this court to review its order of 4th April 2019 revoking a limited grant issued to Mariam Salah Awke on 4th October, 2018. The limited grant was revoked after the application for revocation was heard inter-partes, with Ochuka holding brief for Mr. Otieno.

7. The matter first came up for hearing of the summons for revocation of the limited grant on 13th March 2019. Mr. Marasi for the applicant was present but there was no appearance for the petitioner. The court directed that the summons be served on the petitioner/ respondent and set the summons for directions on 1st April 2019. On 1st April 2019, Mr. Makumi held brief for Mr. Otieno and Mr. Marasi held brief for Mr. Ombasa. Mr. Makumi confirmed that the summons had been served on Mr. Otieno on 28th March 2019 and requested for time to file a response. Parties then agreed to have the summons heard on 4th April at Ngong.

8. On that day, Mr. Ochuka held brief for Mr. Otieno and applied for an adjournment on grounds that Mr. Otieno had not filed a response

and, secondly, that Mr. Otieno was held up at Thika Chief Magistrate's court. The application for adjournment was opposed by Mr. Marasi. The court declined to grant an adjournment and ordered that the summons be heard. The hearing proceeded interpartes. The court allowed the summons and revoked the limited Grant issued to Mariam Salah Awke on 4th October 2018, prompting the present application.

9. Section 80 of the Civil Procedure Act and Oder 45 rule (1) of the Civil Procedure Rules (2010)., lay down the basis upon which a court may review its judgment, decree and or order. Both the Section and the Order confer on the court wide discretion to review its judgments, decrees and orders. This should however only happen if there is a mistake or error apparent on the face of the record, discovery of important matter or because of any other sufficient reason.

10. The legal position espoused in section 80 as read with Order 45 rule (1) was appreciated by the Court of Appeal in the case of ***Benjoh Amalgamated Ltd and another v Kenya Commercial Bank Ltd*** (2014)eKLR when the Court stated;

> ***"In the High Court, both the Civil Procedure Act in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review." (Emphasis)***

11. The Court's power of review is essentially meant to ensure that the court serves justice to the parties before it but the power should not be used to cause injustice or hardship in situations that can be avoided or corrected. In that regard, ***Musinga JA*** observed in ***Equity Bank v West Link MBO limited*** [2013] eKLR, that Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met.

12. It emerges clearly, therefore, that for a party to succeed in an application for review, he/she must show that there is a mistake or error apparent on the face of the record, or that there is discovery of a new and important matter or evidence that has come to the knowledge of the applicant which he could not lay his hands on at the time the judgment, decree or order sought to be reviewed was made or that there are other sufficient reasons.

13. From the material before court, the only reason why the applicant seeks a review of the order made on 4th April 2019 is the fact that the proceedings before the Kadhi's court state that the administrator had been replaced by what he contends was consent of the parties. He also argues that there had been disclosure that there were proceedings before the Kadhi's court as opposed to the respondent's contention that the limited grant was obtained through concealment of material facts. I understand the applicant to say that the court was misled to revoke the limited grant yet it had been properly issued hence that is sufficient reason to review the order of 4th April 2019.

14. In the ruling of 4th April,2019 this court pointed out that there was already a grant of representation issued by the High Court sitting in Nairobi, on ***2nd October 1967*** to ***Saleh Awke*** in ***Cause No. 273 of 1967*** and, therefore, it was not possible to have two grants for the same estate held by two different administrators.

15. During the hearing of this application, Mr. Otieno conceded that the respondent's application for revocation of the limited grant issued herein, contained a copy of the grant issued in 1967, but that they themselves had not annexed it when they petitioned for the Limited Grant. Counsel further conceded that he had not perused the High Court file and was not aware whether or not that grant has been revoked.

16. I have perused the record of proceedings before the Kadhi's court attached to the Petitioner's application. At page 13 of those proceedings, the Kadhi's court remarked:

> *"That the court through appointment (sic) of the parties appoint Hassan Sale Awke and Maryan Saleh Awke as administrators to the estate in substitute (sic) the previous administrator Mr. Mohammed Sale Awke the procedure is complete."*

17. That is what counsel for the Petitioner/ applicant relies on to argue that there was no other administrator given that the previous administrator had been replaced by consent of the parties.

18. First, counsel for the Petitioner/ applicant has admitted that he has never perused the High Court file in Cause No. 237 of 1967 and that he is not sure whether the full grant issued on 2nd October 1967 was still in force. Without ascertaining whether or not that grant was in force, the Petitioner could not seek to have another grant for the same estate. And as this court stated on 4th April, 2019, there cannot be two administrators for the same estate appointed through different grants of administration whether full or limited. In other words, there cannot be two succession causes over the same estate.

19. Second, without ascertaining whether or not the grant issued by the High Court was still in force, the Kadhi's court could not purport to revoke that grant and appoint other administrators. Simply put, the Kadhi's Court cannot revoke a grant issued by this Court. It has no jurisdiction to do so and anything purported to have been done by the Kadhi's Court that would amount to revoking a grant issued by a Superior court would be a nullity because Kadhi's court has no such jurisdiction.

20. Even assuming that the Kadhi's court had jurisdiction to revoke the grant and appoint new administrators, there would still be a problem for the petitioner/applicant herein. The Kadhi's court having appointed other administrators, there would be no need to issue another grant given that there would already be other administrators. The entire scheme of the law of succession Act does not contemplate the situation perpetrated by the petitioner/applicant to the extent of there being two grants for the same estate.

21. I must state that I am not persuaded that the applicant has met the threshold for seeking review as required by law. First, I see no mistake or error apparent on the face of the record or discovery of new and important matter and the applicant has not been able to point out any. The

fact that the Kadhi's court may have appointed new administrators is not discovery of a new or important matter. It cannot also be said to be ***any other sufficient reason*** as contemplated both in section 80 and Order 45 rule (1).

22. This is because as the Court of Appeal stated in ***National Bank of Kenya Limited v Ndungu Njau*** (Civil Appeal No. 211 of 1996);

> ***"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."***

23. And in ***Pancras T Swai v Kenya Breweries Limited*** [2014] eKLR the Court of Appeal stated with regard to sufficient reason as a ground for review that the words, *"for any sufficient reason"* must be viewed in the context, firstly; of Section 80 of the Civil Procedure Act which confers an unfettered right to apply for review and, secondly; on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. The court emphasized that the discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason relates to issues of facts which may emerge from evidence.

24. Having given due consideration to this application, the response and the law, I am not satisfied on its merit. The applicant has not shown that there is an error or mistake apparent on the face of the record or that they have discovered a new and important matter to warrant the court's exercise of its jurisdiction to review its decision. The circumstances of this matter do not favour the applicant. Consequently, the application dated 9th April, 2019 is declined and dismissed. Each party will, however, bear their own costs.

Dated, Signed and Delivered at Kajiado this 6th day of May, 2019

E C MWITA

JUDGE