



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1103 OF 1997**

**IN THE MATTER OF THE ESTATE OF WILFRED OUMA RAO (DECEASED)**

**JUDY ONGONG' RAO.....APPLICANT**

**VERSUS**

**SILVESTER RAO AMBOYA.....RESPONDENT**

**RULING**

1. **Order 45 rule 1(1)** of the **Civil Procedure Rules** provides that an applicant who seeks the remedy of review 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 by him, at the time when the decree was passed or order made. The applicant may have to show that there was a mistake or error apparent on the face of the record, or that there is other sufficient reason why he is entitled to review. In such an application the court is being called upon to exercise its judicial discretion to grant or not to grant review, while remembering that litigation has to come to an end. In all the circumstances, the application should be brought without unreasonable delay before the court which passed the decree or made the order (**Tokesi Mombili and Others –v- Simon Litsangu, Civil Appeal No. 90 of 2001 at Kisumu**).

2. The facts of this cause are that the deceased Wilfred Ouma Rao died intestate on 15<sup>th</sup> February 1994. He was survived by his widow Judith Ongong' Rao (the applicant), a minor son Victor Wilfred, his father Silvester Rao Amboya (the respondent) and mother Agatha Apondi Rao. The applicant and the respondent petitioned this court for the grant of letters of administration intestate. The joint grant was issued to them on 22<sup>nd</sup> July 1997. The respondent filed an application dated 14<sup>th</sup> October 2002 seeking to have the grant confirmed. On 16<sup>th</sup> November 2004 the grant was confirmed in terms that the entire estate was to be held by the joint administrators in trust for the minor to whom it was to pass upon attaining the age of 18.

3. It does appear that prior to the filing of the petition, the respondent applicant had in 1996 applied for the grant of letters of administration *ad colligenda bona* and was allowed to gain access to the funds of the deceased. On 26<sup>th</sup> July 1996 the respondent applied to have the grant revoked on the basis that it had been obtained fraudulently and on the basis of false statement. On the same day the court ordered that the applicant be restrained from operating and making use of the monies in the fixed deposit account No. 10/7339966 at Barclays Bank, Queensway Branch, Nairobi and that the applicant be restrained from operating any other account in which the estate funds had been deposited.

4. In an application dated 4<sup>th</sup> August 2005 and filed on 8<sup>th</sup> August 2005 the applicant filed an application under **sections 47 and 76(b) and (c)** of the **Law of Succession Act (Cap 160)** and **rules 44, 63 and 73** of the **Probate and Administration Rules** seeking the review and setting aside of the order confirming the grant (dated 16<sup>th</sup> March 2004) and the order stopping her from accessing the account above or any other account into which the estate funds had been deposited. The other prayers were that the bank does allow her to access proceeds and monies held in deceased's accounts at the bank and that the bank does produce certified statements of account in respect of her accounts and those held by the deceased. The reasons for the application were that she was unaware that the grant had been confirmed; their advocate was Mr. Ojwang Agina who did not inform her that he was applying to confirm the grant; the application for confirmation was brought by the respondent without reference to her; the advocate informed the court at the time of the hearing of the application for confirmation that she was not interested in the estate which was not true; she had not instructed him that he was not interested in the estate; had she been involved in the application she would have insisted on a life interest in the estate; part of the monies that have now been kept for the minor belonged to her, and not the deceased; she had made her personal deposits into these accounts and also operated separate accounts, and now all had gone to the minor; and that, the order of 26<sup>th</sup> July 1996 had stopped her from accessing and using her own money held in the accounts.

5. In the replying affidavit, the respondent expressed surprise that it had taken the applicant one and a half years to seek the review of the orders of 16<sup>th</sup> March 2004, and more than 9 years to seek the review of the orders of 26<sup>th</sup> July 1996. In short, he stated that the applicant was

not working at the time she was married to the deceased and therefore had no separate money or accounts; she had secretly used the application and orders of 1996 to access and spirit away estate money from the deceased's accounts; and following the deceased's death she got re-married to one Lewis Odhiambo who subsequently died, and she inherited him. The respondent asked that the application be dismissed because it was brought late and was mischievous.

6. **Section 76** of the **Law of Succession Act** deals with revocation of grants, whether confirmed or not. This **section** was invoked but there was no request to revoke the grant or the confirmed grant. What was sought was the review of the orders. This is usually done under **Order 45 rule 1(1)** of the **Civil Procedure Rules**. Again, this **Order** was not invoked.

7. Both the applicant and the respondent were represented by Mr. Ojwang Ogina. The application to confirm the grant was supported by an affidavit that was sworn by the respondent. When the application came for hearing, the advocate holding brief of Mr. Ojwang Agina informed the court that the applicant had no interest in the estate, and that she had instructed that the net estate goes to the minor and that her and the respondent would hold it in trust until the minor was 18. She states that she gave no such instructions, and that it was when she instructed her new advocates (Amolo & Company Advocate) that she came to learn of the confirmation proceedings. One would have expected that immediately she learnt of the confirmation she should have moved to revoke it. She did not. Instead, on 7<sup>th</sup> April 2005, through the new advocate, she applied to be given Kshs.450,000/= from the estate to pay fees for the minor, etc, and Kshs.1,444,730/= to carry out renovations and repair on estate house on Nairobi (Block 72/862 Southlands, Nairobi). In the supporting affidavit she acknowledged that the grant issued to them had on 16<sup>th</sup> March 2004 been confirmed.

8. The consequence is that the applicant had no plausible explanation for the delay of about one and half years. If she tried to explain her delay in seeking to review the confirmation order, she made no explanation at all why it had taken her 9 years to seek to review the orders made on 26<sup>th</sup> July 1996. I find that in either case, the applicant was guilty of unreasonable delay.

9. Secondly, in regard to the application for confirmation, it is trite that an advocate has general authority to compromise on behalf of his client as long as he is acting *bonafide* and not contrary to express negative direction (**Kenya Commercial Bank Ltd –v- Specialised Engineering Company Ltd, HCCC No. 1728 of 1979 at Nairobi**). In the absence of proof of any express negative direction that was given to Mr Ojwang Agina by the applicant, the orders of 16<sup>th</sup> March 2004 shall stand.

10. In the final analysis, I dismiss the application with costs.

**DATED and SIGNED at NAIROBI this 3<sup>RD</sup> day of JUNE, 2019.**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 6<sup>TH</sup> day of JUNE, 2019.**

**A. ONGERI**

**JUDGE**