REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 762 OF 2008

IN THE MATTER OF THE ESTATE OF JANE NJERI KARIUKI (DECEASED)

SALAVINA WANGECHI MWANGI.....APPLICANT

-VERSUS-

LORNA NYOKABI MBATIA.....1ST RESPONDENT

TERESIA NJUGUNI MUNENE.....2ND RESPONDENT

SAMSON RODGERS KABUGI.....3RD RESPONDENT

STEPHEN MURIRO KARIUKI.....4TH RESPONDENT

RULING

The grant of letters of administration to the estate of the late Jane Njeri Kariuki was made in the joint names of the 1st. 3rd and 4th respondents who are respectively the daughter-in-law and sons of the deceased; it was subsequently confirmed on 22 April 2009.

According to the schedule to the certificate of confirmation of grant the deceased's estate comprising Title No. Loc.10/Gatheru/370 and shares in Wangu Investment Company Ltd was shared out equally amongst the applicant and the respondents.

The applicant, the 2nd and the 3rd respondents, were named as the deceased's daughters-in-law while the 3rd and 4th respondents are her sons. The daughters-in-law were substituted at various times in place of their respective husbands who predeceased them.

By a summons general dated 4 May 2011, the applicant sought for an order that in sharing out Title No. Loc.10/Gatheru/370, the land be divided in such a way that the respective shares would run horizontally from the road down to the river. It would appear from the affidavit in support of the summons that the applicant had been allocated the lower side of the land bordering the river and, in her view, that portion of the land was not suitable for development because its poor terrain. According to her, it was only fair that everybody should get a share of the upper and the lower parts of the land. That application was opposed by the rest of the beneficiaries.

In the face of these disagreements, the court directed the Murang'a district land surveyor to survey the land and file his report in court. The surveyor complied and filed his report on 25th of August 2011. He proposed that the deceased's homestead and the area where she had been buried be jointly owned but the remainder of the land be apportioned in equal shares; his proposal was represented in the sketch map which was also filed in court. It was his view that this proposal met the surveying standards and was consistent with the formula agreed upon by all the beneficiaries before the land registrar on 21 February 2011. The surveyor noted that it was not possible to distribute the land as proposed by the applicant because its upper part had been developed by three permanent structures while the lower part gradually narrows as one approaches the river to the extent that it is impracticable for that part of the land to be divided into five separate parts.

The applicant was not satisfied with the report and she informed the court as much complaining in particular that the surveyor's report was not consistent with the confirmed the grant.

In its ruling delivered on 2 August 2012 this court endorsed the surveyor's report and directed that the land be distributed in accordance with his proposal. The applicant's application was effectively dismissed.

Undeterred, on 7 March 2013, the applicant filed a summons in general form seeking for a review or setting aside of the order of 2 August 2012. It is this application that is now the subject of this ruling.

In the affidavit in support of the summons, the applicant deposed that the there is an error apparent on the face of the record in the sense that the ruling is inconsistent with the distribution of the estate as provided for in the certificate of confirmation of grant. Secondly, while the ruling provides for joint ownership of part of the estate, the confirmed grant provided for individual shares for each of the beneficiaries. The applicant's argument is simply that the order of 2 August 2012, altered the scheme of distribution of the deceased estate as represented in the confirmed grant.

The respondents opposed the application and deposed that it was the wish of the deceased that the family sets aside a common area accessible to all of them for the development of their residential houses and also a graveyard. As a matter of fact, the 1st, the 3rd and 4th respondents have developed their houses on this common area and that it is only the applicant and the 1st respondent who have not put up any development of their own.

Although the applicant has not stated so in application, it is apparent that it is based on order 45 of the Civil Procedure Rules which applies in succession proceedings by virtue of rule 63 of the Probate and Administration Rules. That rule reads 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***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, 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.***

According to this rule the conditions or the grounds upon which an application for review may be made are: -

> a) A discovery of a new and important matter of evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the material time; or
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> b) there is a mistake or error apparent on the face of the record; or
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> c) for any other sufficient reason.

Any of the three grounds is sufficient for an application for review by an applicant who considers himself aggrieved by a decree or order; however, the application must be made without undue delay regardless of which of the three grounds it is based upon.

Although the applicant has claimed that there is an error apparent on the face of record, I am unable to see such an error. Instead, all I can see is the same argument which the applicant raised in her application in pursuit of her proposal to divide the land horizontally rather than vertically. This argument was duly captured by my brother, Sergon, J. in his ruling of 2nd August 2012 when he stated thus:

> ***The beneficiaries were unable to agree on how the land should be subdivided. The statement prompted this court to issue an order directing the Muranga District Land Surveyor to visit the land and carry out the survey and filed a report in this court. The District Land Surveyor complied with this court's directive and filed his report in court on 25th of August 2011. Mr Kingori, learned counsel for Sarapinah Wangechi Mwangi, one of the beneficiaries, informed this court that the surveyor's report did not conform with the confirmed grant. This court then retired to peruse the surveyor's report to confirm whether the same conforms with the grant.***

The learned judge then concluded

> ***I am satisfied that the most appropriate and reasonable manner of subdividing and distributing Loc. 10/GATHERU/370 is to adopt and approve the surveyor's proposal No. 8 which I hereby do. The suggestion strictly complies with the terms of the confirmed grant.***

It is therefore apparent that what the applicant considers as an error apparent on the face of the record is an issue that was not only argued but it was also determined conclusively by this court. The effect of the ruling of 2 August 2012 was to disregard the proposal by the applicant on how the land should be distributed.

If, for whatever reason the applicant was not satisfied with this decision, she should have appealed against it. In my humble view, the present application is seeking nothing more than what her initial application could not achieve. In truth, the applicant is saying that her application ought to have been allowed; in other words, she thinks she was entitled to the order she sought and the learned judge was wrong in dismissing the application for that particular order. Looked at from this perspective, the application is an abuse of the due process of the court.

One other thing I have noticed in the applicant's application is that though the ruling was delivered on 4 August 2012, it was not until 7 March, 2013, seven months later, that she filed the application for review.

As noted regardless of the ground upon which an applicant seeks an order for review under Order 45 of the Civil Procedure Rules, the application must be made without undue delay. A delay of seven months is, in my view, undue. I note also that the applicant did not offer

any sort of explanation why it took her such a long time to file the application.

All that this boils down to is that, from whichever angle the applicant's application is considered, it is bound to fail; at the very least it is misconceived and an abuse of the due process of the court. It is hereby dismissed with costs.

Dated, signed and delivered in open court this 19th day of July, 2019

Ngaah Jairus

JUDGE