



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE NO. 612 OF 2009

IN THE MATTER OF THE ESTATE OF GODFREY NYAGA KAMUNYORI alias NYAGA KAMUNYORI (DECEASED)

ALBERT IRERI MBARIRE.....1ST ADMINSTRATOR/APPLICANT

PHILIP NJAGE G. NYAGA.....2ND ADMINSTRATOR/APPLICANT

PATRICIA RWAMBA NYAGA.....3RD ADMINSTRATOR/APPLICANT

VERSUS

MERCY GACERI MURIITHI.....RESPONDENT

RULING

A. Introduction

1. This ruling pertains to the summons dated 13th August 2019 in which the applicants seek review of orders made on 18th July 2018 so as to ensure execution that the certificate of confirmed grant issued on the 29th July 2013 is fully executed. The applicants also seek orders to have the respondent hastened to file an ELC case to determine her allegation of purchase of land.
2. The respondent opposes the application on the grounds that her deceased husband is entitled to land parcel number Kagaari/Kigaa/5971 which forms part of the deceased estate for he validly purchased the same. Further the respondent states that despite struggling to get funds, she is willing to pursue her claim as directed by court in the orders made on 18th July 2018.
3. The parties agreed to have the matter determined from their affidavits.

B. Analysis & Determination

4. From the pleadings and submissions of the parties the issue for determination is whether the applicants have made out a case for review of the decision of the court made on 18th July 2018.
5. Rule 63 of the Probate and Administration Rules provides as follows: -

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

(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.

(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.”

6. In considering whether Order 45 applies to succession matters, the court in **John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another [2016] eKLR** quoted rule 63 of the Probate and Administration Rules then stated as follows: -

“As stated above, 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.”

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

“1. (1) Any person considering himself aggrieved—

(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.

(2)...”

8. Order 45 thus provides three circumstances under which an order for review can be made. To be successful, the applicant must demonstrate to the court that there has been 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. A party may successfully apply for review, secondly, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.

9. On the 18th July 2018, the respondent was heard by court on an application for rectification of the name of his deceased husband whom she alleges was a valid purchaser for value of part of the deceased’s estate specifically Kagaari/Kigaa/5971 as provided in the certificate of confirmed grant issued on the 29th July 2013. The court proceeded to stay the grant pending the filing and determination of the respondent’s case for ownership over Kagaari/Kigaa/5971.

10. For this court to exercise its jurisdiction on an application for review, there must be discovery of new and important matter or evidence which was not within the knowledge or could not be produced at the time by an applicant; or on account of a mistake or error apparent on the record or any sufficient reason. In addition, the application must be made timeously.

11. It is the applicant’s case that they are seeking review of this court’s orders of 18th July 2018 so as to ensure that the certificate of confirmed grant issued on the 29th July 2013 is implemented. The applicants also seek orders to hasten the respondent filing an ELC case to determine her allegation of purchase of land.

12. The question is whether the averments in the supporting affidavit are ‘*new and important matters or evidence*’ that were not within the knowledge of the applicants, and which could not be discovered at the time of the hearing through the exercise of due diligence.

13. In **Dubai Bank Kenya Limited v Kwanza Estates Limited [2015] eKLR**, the court stated that the only way to discover whether a party had exercised all diligence is to consider the conduct of the party.

“The only way to tell if a party has exercised due diligence from one who is merely out to re-litigate the matter is by their conduct. In this case, the appellant’s conduct and pursuit of the purported new evidence does not appear to have been zealous; bearing in mind when it learnt of the forged documents. If anything, the purported new material appears to have been a calculated move to keep the respondent from enjoying the fruits of its success in litigation. The burden of proof lay with the appellant to show that it had moved with due diligence and expediency in having the alleged fraud and/or forgery investigated. The appellant made a complaint to the police in regard to the alleged fraud/forgery of the signature on the Memorandum through a letter dated 1st October 2013. However, at the time of filing its Replying Affidavit on 4th June 2013, the appellant had knowledge of the purported forgery. No explanation was ever given as to why there was a delay of over three months before investigations could be pursued.”

14. The Court of Appeal in **Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & Another [2018] eKLR** stated categorically that where an applicant in an application for review sought to rely on the ground that there was discovery of new and important evidence, they had to strictly prove the same. The court stated as follows: -

“We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”

15. It is my considered view that the applicants have not demonstrated any “new and important evidence” to warrant review.

16. The other ground for review under Order 45 is error apparent on the face of the record. In **Muyodi v Industrial and Commercial Development Corporation & Another (2006) 1 EA 243** the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record and stated as follows:

“In Nyamogo & Nyamogo vs Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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 long drawn process of reasoning or 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 or wrong view is certainly no ground for a review although it may be for an appeal.”

The Court accorded no particular definition for an error apparent on the face of the record, stating that it would vary with each particular case. But in an earlier Tanzanian decision in the case of Chandrakant Joshibhai Patel v R (2004) TLR, 218, it was held that an error stated to be apparent on the face of the record:

‘...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions’.

17. In the application now before me, no error or mistake apparent on the face of the record has been pointed out by the applicants to warrant an order for review. In the order given by this court on the 18th July 2018, this court considered all the facts that had been placed before it by the parties, and reached a conclusion that the order for stay of the succession proceedings was necessary so that the respondent may be accorded a chance to be heard on the land dispute.

18. The last thing is whether there is any other sufficient cause that would allow the court to exercise powers of review under Order 45. The only reason for the advancement of this application is that they are seeking implementation of the certificate of confirmed grant issued on the 29th July 2013 which was stayed pending the determination of ownership of land parcel No. Kagaari/Kigaa/ 5971. It is not in dispute that the respondent has not taken any steps to advance her claim over land parcel No. Kagaari/Kigaa/ 5971 and as such continues to deprive the deceased’s beneficiaries of the deceased from benefiting from his estate. This in my considered view is a sufficient cause that warrants the exercise of powers of review under Order 45.

19. In the premises, and without labouring the matter any further, I find that the summons dated 13th August 2019 is merited.

20. Consequently, the order of 18th July 2018 is reviewed as follows;

a) The respondent is directed to file her claim of ownership of LR. No. Kagaari/Kigaa/5971 in the Environment and Land Court (ELC) in the next thirty (30) days failure to which the stay of the implementation of the grant issued on the 29th July 2013 shall be automatically lifted.

b) Each party to bear its own costs.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Respondent in person