REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 41 OF 1999

IN THE MATTER OF THE ESTATE OF JOHN MWAKA KOKA – (DECEASED)

BETWEEN

PILISILAH KAMENE MWAKA..PETITIONER

VERSUS

MONICAH MWAKA KOKA..............OBJECTOR/CO-ADMINISTRATOR

RULING

1. By summons for rectification of grant dated 14th June, 2018, **Monicah Mwaka Koka**, the 2nd Administrator of the Estate of **John Mwaka Koka**, seeks an order that the 1st administrator, **Pilisilah Kamene Mwaka**, who is deceased be substituted with **Cosmas Munyao Mwaka** and that the grant issues herein be rectified accordingly. It is further sought that this court should partly review its said judgement so that Land parcel nos. Mitaboni/Mutituni/2147 (0.14 ha) and Mumbuni/Kasinga/1208 (0.13ha) be given to the deceased's 1st house (the 1st administrator) while plot no. 1766 and share No. 24 – Katelembo Athiani Muputi Farmiong & Ranching Co-operative Society Ltd and Land Parcel No. Mitaboni/Mutituni/1865 (0.13ha) be given to the deceased's 2nd house (the applicant).

2. According to the Applicant, the 1st administrator was her co-wife and was the deceased's first wife while the applicant was the deceased's 2nd wife. And they were jointly granted letters of administration in respect of the estate of the deceased.

3. On 27th May, 2015 this court delivered a judgement in which it distributed the estate of the deceased. However, the subsequent death of the 1st administrator now necessitates that she be substituted with her son, **Cosmas Munyao Koka**.

4. Apart from that, it was deposed that in the interest of fairness and in order to avoid unnecessary hardship and expenses, this court should partly review its said judgement so that Land parcel nos. Mitaboni/Mutituni/2147 (0.14 ha) and Mumbuni/Kasinga/1208 (0.13ha) be given to the deceased's 1st house (the 1st administrator) while plot no. 1766 and share No. 24 – Katelembo Athiani Muputi Farming & Ranching Co-operative Society Ltd and Land Parcel No. Mitaboni/Mutituni/1865 (0.13ha) be given to the deceased's 2nd house (the applicant).

5. According to the applicant, the need to review the judgement in the manner proposed arises from the deceased's two families' long-time use and development of the deceased's various properties, an issue that has been conclusively discussed by the two families.

6. In his reply to the application, **Cosmas Munyao Mwaka** deposed that the 1st prayer in the said application was spent. He however opposed the other prayers on the ground that there has been an inordinate delay in bringing the application considering that the judgment sought to be reviewed was delivered on 27th May, 2015, 3years before. Further, despite the fact that the applicant was given 45 days from 24th January, 2017 to file this application, it was not filed until a year and half later without any explanation being given for the delay nor time being extended hence the application is not properly before the court

7. According to the deponent, land parcel no. 1766 Katelembo together with the share certificate no. 24 for Katelembo Athiani Farmers' Co-operative was confirmed to be jointly owned between the deceased 1st administrator and the applicant by consent of the parties which consent can only be set aside under unique circumstances which have not been demonstrated.

8. It was therefore contended that there being no basis for the grant of prayer 2(a) both prayers in prayer 2 cannot be granted as the threshold for review has not been met.

9. According to the deponent there have been no discussions as alluded to by the applicant and that the applicant is approaching the court based on falsehoods and that this application is only meant to delay the distribution of the estate.

10. It was claimed that the applicant has taken charge and sold some of the properties which were granted to the 1st house or to both house by the said judgement.

11. He therefore prayed that this application be dismissed.

12. There was a further affidavit sworn by the applicant herein in which she accused the Respondent, **Cosmas Munyao Mwaka's** brother of having leased a parcel of land while the deceased 1st administrator sold one property given to both houses hence the necessity for the present application.

Determination

13. I have considered the issues raised in the subject application, the affidavits in support of and in opposition thereto, the submissions filed and authorities relied upon and this is the view I form of this matter.

14. The matter before me is a Summons for Rectification of Grant expressed to be brought under section 47 of the ***Law of Succession Act*** and Rules 63 and 73 of the ***Probate and Administration Rules***.

15. However as pointed out by **Musyoka, J** and rightly so in my view in **In re estate of Charles Kibe Karanja (Deceased) [2015] eKLR.**

> **"…the provisions in Section 74 are on alteration of grants of representation, not certificates of confirmation of grant. A certificate of confirmation of grant is not a grant of representation. In probate practice, the term "confirmed grant" has gained currency and it is understood by some to mean the certificate of confirmation of grant. It is a misconception. The certificate issued upon a grant being confirmed does alter the grant of representation made in the matter. It does not replace the grant of representation, and it is not the confirmed grant. It is an instrument to certify that the grant made in the matter has been confirmed. In short it is the evidence of the confirmation of the grant. From the wording of Section 74, it is plain that the same was not tailored to for amendment of such documents as certificates of confirmation of grant, but rather of grants of representation themselves, be they full or limited, confirmed or not."**

16. The learned judge proceeded to hold that:

> **"A party wishing to have rectified or altered or amended a certificates of confirmation of grant, need not approach the court through Section 74 of the Law of Succession Act, for the reasons that I have given above; rather they ought to apply for review of the orders made upon the application for confirmation of grant, where the alterations sought are fundamental; or for amendment of the certificate under Rule 73 of the Probate and Administration Rules to address minor errors or mistakes in the body of the certificate. A certificate of confirmation of grant is by its nature a formal order extracted from the orders made by the court on the application for confirmation of grant. If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be effected without touching the orders made by the court at the distribution of the estate. Consequently, such changes cannot and should be effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of court orders is not directly provided for in the Law of Succession Act and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure rules. Among the imported procedures is the device of review under the Civil Procedure Rules. In the relevant rules on review under the Civil Procedure Rules, an order of the court can be revised on the grounds of an error on the face or the record or discovery of new and important evidence that was not available at the time of the making of the order sought to be reviewed or for any other sufficient reason."**

17. According to the learned judge:

> **"Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the court has confirmed the grant or a heir or survivor of the deceased who had previously been previously unheard of materializes after distribution, the court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed. The matters referred to above may require that the court interferes with its earlier orders on distribution of the assets. They may require a disturbance of the earlier orders. The court would be invited to revise its earlier orders so as to deal with the new situation occasioned by omission of assets or heirs, or by discovery of new assets or heirs. The accommodation of such assets or heirs cannot be effected by merely altering the certificate of confirmation of grant, for the certificate of confirmation of grant has no life of itself without the orders of the court confirming the grant. The alteration of the certificate of confirmation of grant has to find genesis in the review of the orders of the court upon which the certificate is grounded. The only time when a certificate of confirmation of grant may be altered without affecting the orders upon which the certificate is derived from is where there are superficial errors, such as misspelling of names or misdescription of property or persons, or mistakes arising from the transcription or extraction of the certificate from original order of the court. This does not call for review of the original order of the court, but rather for correction of the superficial**

errors and mistakes. For such the court can be moved under Rule 73 of the Probate and Administration Rules, which saves the inherent powers of the court.”

18. In the learned judge’s view, the application before him was not a proper application for rectification because in his view:

> **“The application dated 2nd August 2012 sought rectification of the certificate of confirmation of grant by adding to the schedule assets that had been left out because they were unknown at the time of confirmation of grant. In the same application the applicant proposed how the said assets were to be distributed. For all purposes, the application dated 2nd August 2012 invited the court to distribute the newly discovered assets. In view of what I have stated in the proceeding paragraphs, the said application was misconceived. The changes sought to be effected on the certificate of confirmation of grant cannot be made without reviewing the orders made on 7th November 2006 confirming the grant and distributing the estate as per the terms of the will of the deceased. New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November 2006 so as to include the discovered assets and to distribute them. It is only after the review or revision of the said orders that an altered certificate of confirmation of grant can issue.’’**

19. Borrowing a leaf from the learned Judge’s opinion, it is clear from the orders sought in this application that what is sought by the applicant herein is strictly speaking not an order for rectification but one for review. Section 74 of the ***Law of Succession Act*** which deals with rectification states as follows:-

> ***“Errors in names and descriptions, or in setting out the time and place of the deceased’s death, or the purpose of in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered or amended accordingly.”***

20. The reliefs sought are not restricted to rectification of errors in names and descriptions, or in setting out the time and place of the deceased’s death, or the purpose of, in a limited grant. They are in fact prayers which substantially seek to alter the judgement delivered by this court on distribution of the estate. They therefore ought to be treated for what they seek, review of the judgement. Accordingly, the principles that guide the review of judgement under Order 45 of the ***Civil Procedure Rules*** must apply to the present application. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the ***Civil Procedure Rules***, certain requirements must be met. The said provision states as follows:

> ***“(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.***
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> ***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”***

21. **The *Code of Civil Procedure*,** Volume III Pages 3652-3653 by **Sir Dinshaw Fardunji Mulla** states:

> ***“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure…The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper.”***

22. The Court of Appeal in **Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418** expressed itself as follows:

> **“The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made.”**

23. The decision whether or not to review a court’s decision was well captured by the Court of Appeal in **Mumby’s Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002,** where it was held that 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 however 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 a ground for review that the Court proceeded on an incorrect

exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

24. That was the Court of Appeal's decision in **Anthony Gachara Ayub vs. Francis Mahinda Thinwa [2014] eKLR** which quoted with approval the judgment of the High Court in **Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation**, by stating:

> **"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 a 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 a 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 apparent on the face of the record even though another view was also possible."**

25. I agree with **Warsame, J** (as he then was) in **Sara Lee Household & Body Care (K) Ltd vs. Damji Pramji Mandavia Kisumu HCCC No. 114 of 2004** that the essence of a review must ordinarily be to deal with straight forward issues which would not fundamentally and radically change the judgement intended to be reviewed, otherwise parties would lose direction as to the finality of a decision made by a particular court as on occasions a review may necessarily entail arriving at a decision different from the one originally arrived at. This was the position in **Atilio vs. Mbowe (1969) THCD** where it was held that an application for review should not be granted if it will result into the orders, which were not contemplated.

26. In this case, the issues being raised by the applicant now must have been within the knowledge of the applicant at the time the earlier application was being argued. They ought to have been raised at that point. In **Ndungu Njau vs. National Bank of Kenya Limited Civil Appeal No. 257 of 2002,** the Court of Appeal expressed itself as follows:

> **"Neither in the application, its grounds or supporting affidavit nor in the instant appeal was or has been raised any important matter or evidence which was not within the knowledge of the appellant at the time the decree was passed in spite of exercise of due diligence which requires strict proof...Nor was there any submission before the Court about any mistake or error apparent on the face of the record to warrant an order of review which was sought. The error or omission on record must be self evident on the part of the court and should not require elaborate argument in order to be established... There was no reference to such mistake or error before the trial Court and the grounds of appeal in the instant appeal do not point to any such omission or error."**

27. In this case, it is clear that one of the orders sought to be reviewed was an order made by consent of the parties. In such circumstances the general rule was laid down by the Court of Appeal **Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another Civil Appeal No. 276 of 1997** in where it was held that:

> **"A solicitor has a general authority to compromise on behalf of a client, if *bona fide* and not contrary to express negative direction; and it would seem that a solicitor acting as an agent for the principal solicitor has the same power. No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice…A consent order can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be settled which are not carried out."**

28. The locus classicus in applications for setting aside consent orders or judgements is the Court of Appeal decision in **Flora N. Wasike vs. Destimo Wamboko [1988] KLR 429; [1982-88] 1 KAR 625.** In that case the Court expressed itself as hereunder:

> **"It is well-settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only really be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons…Prima facie a consent order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement...A court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties…In the instant case, while the Judge did not in terms record the parties' 'or their advocates' consent to the consent judgement he entered, nevertheless the original record shows that both parties were represented by advocates and that the consent judgement was recorded in their presence. The universal practice is to record that a judgement or order is by consent, if that be the case, and it is difficult to believe unless demonstrably shown otherwise that the court would so head the judgement if it were not the case, at least so far as the Judge was aware. Furthermore, a solicitor or counsel would ordinarily have ostensible authority to compromise suit so far as the opponent is concerned…But it would be no mean task for a party to a decree by consent to prove that the decree is invalid on the grounds referred. It is abundantly clear that the appellant was a ready and willing party to the material judgement by consent and that the terms and consequences of the judgement were explained to her."**

29. The East African Court of Appeal on its part in **Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] EA 266** noted that:

> **"In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of**

all the material facts and there could have been no mistake or misunderstanding. None of the factors which give rise to the setting aside of a consent agreement existed.”

30. In this case the decision sought to be reviewed was made on 27th May, 2015. This application was mot made till 14th June, 2018, some 3 years after the judgement. On 19th June, 2017, this court gave the applicant until 19th September, 2017 to make the application for review. Clearly that order was neither complied with nor was the time given for doing so extended. It is clear that not only was the application brought after inordinate delay but was also filed in contravention of an express order of this court.

31. Having considered the application, it is my view that both on merits and on technicalities prayer 1 of the application being spent the other prayers of this application cannot be granted. In the premises prayer 2 in the summons for rectification of grant dated 14th June, 2018 fails and is hereby dismissed. As none of the parties complied with this court’s directions regarding the furnishing of soft copies of their pleadings and submissions, there will be no order as to the costs.

32. It is so ordered.

Read, signed and delivered in open Court at Machakos this 6th day of November, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muema for Mrs Nzei for the applicant

Miss Kaloki for Mr Mulei for the Respondent

CA Geoffrey