REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 734 OF 2015

IN THE MATTER OF THE ESTATE OF ELIZABETH KAMENE NDING'A (DECEASED)

BENEDICT VALA NDING'A.....ADMINISTRATOR/RESPONDENT

VERSUS

PETER MUEMA NDING'A.....1ST OBJECTOR

STEPHEN MUASYA NDING'A.....2ND OBJECTOR

CHARLES MULATYA NDING'A.....3RD OBJECTOR

JOHN MUNYAKA NDING'A.....4TH OBJECTOR

AND

MARTINA WAVINYA WANYAMA.....APPLICANT

RULING

1. By Summons dated 3rd June, 2019 the applicant herein, **Martina Wavinya Wanyama**, seeks orders that the affidavits sworn on 9th July, 2018 and replying affidavit dated 13th July, 2018 be expunged from the record of this court; that the ruling made on the 6th February, 2019 be vacated, reviewed and or set aside; and that the grant on the 7th June, 2016 and confirmed on 1st September, 2016 be revoked.

2. In an earlier ruling in this matter, this court found with respect to the application which was similarly made by the applicant herein as hereunder:

> **11. In this case the Respondent has averred that the 1st applicant, Martina Wavinya Wanyama, has since intimated that she is nolonger interested in pursuing her application for revocation or nullification of grant. The Respondent has exhibited a letter purportedly written by the 1st Applicant to her advocates to that effect. He has also exhibited a copy of an affidavit sworn by the 1st applicant confirming the said position. These averments have however not been disputed by the 1st applicant. In Re The Estate of the Late Suleman Kusundwa [1965] EA 247, it was held that:**
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> **"The court is…not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded."**
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> **12. As the 1st Applicant has not refuted the allegations contained in a sworn affidavit that she is nolonger interested in pursuing her summons, the said summons is hereby deemed as abandoned.**

3. In this application the applicant, who is a daughter of the deceased herein and a brother to the petitioner herein, **Benedict Vala Ndinga**, avers that the petitioner petitioned for the grant herein without disclosing to the court the other family members. According to her the affidavit sworn on 9th July, 2018 in which it was averred that the applicant was in agreement with how the estate was to be distributed was fraudulently signed and she relied on the report of forensic document examiner to that effect.

4. It was further averred that one of the properties of the deceased, LR No. Machakos/Nguluni/2374 was excluded from the list of the

deceased's properties. It was disclosed that the purported agreements reached to settle the distribution of the deceased's estate were made in the absence of the daughters of the deceased. It was contended that one of the properties of the deceased, LR 12715/11 off Mombasa Road. Syokimau Area was sold by the Respondent at the sum of Kshs 75,000,000/= which was way blow its quoted valuation which placed its value at Kshs 120,000,000.00. To the applicant since the applicant consistently declined to furnish them with copies of the sale documents, the said purported sale was suspicious.

5. There was similarly an affidavit sworn by the 2nd objector herein, **Stephen Muasya Ndingá**, a younger brother of the applicant herein. According to him, he filed Summons for Revocation of Grant issued to the Administrator/Respondent in this matter dated 8th June, 2018 and after hearing the court delivered its ruling on 6th February, 2019, by which while declining to revoke the Certificate of Confirmation of Grant made on 1st September, 2016, directed the Administrator/Respondent to file a full inventory of the Estate of the deceased and a statement of accounts on how he had administered the Estate within 45 days of the date of the Ruling. However, the Administrator/Respondent has failed to render a full inventory of the Estate of the Deceased and a statement of account as required by law and the directive of the Ruling delivered on 6th February, 2019. This leaves this Honourable Court with no option but to revoke the Certificate of Confirmation of Grant made on 1st September, 2016 and the Grant of Letters of Administration issued on 7th June, 2016.

6. Based on legal advice, he deposed that this Court has inherent power by dint of Sections 76 and 83 (e) and (g) of the ***Law of Succession Act*** and Rule 44 of the ***Probate and Administration Rules***, 1980 made under the ***Law of Succession Act*** to revoke a Grant of Letters of Administration, whether confirmed or not, where it is proven that there was non-disclosure of material facts, where the Grant issued is defective and where the Administrator fails to perform his duties as per the Grant.

7. In this instant case, the Administrator/Respondent has failed to render an inventory and statement of account on how he has administered the Estate of the Deceased. He has further, using the confirmed Grant, sold off part of the Estate of the Deceased for his own benefit and has completely disinherited me and all the other surviving dependents of the Deceased.

8. According to the 2nd Objector, the Administrator/Respondent also left out two properties that were owned by the Deceased and were available for distribution amongst the surviving beneficiaries at the time of confirmation of grant. These properties are Matungulu/Nguluni/959 and Matungulu/Nguluni/2374 and therefore, the confirmed Grant does not depict all the properties of the Deceased. The 2nd Objector averred that he has been in custody of the titles for both Matungulu/Nguluni/959 and Matungulu/Nguluni/2374 and the Administrator/Respondent has resorted to using their Area Chief and policemen to force him to surrender the titles to him a matter which he reported to Tala Police Post on 4th July, 2019 and was booked as OB No. 21/4/7/2019. He was apprehensive that if he surrenders the title deeds for the said properties to the Administrator/Respondent, he will dispose of the properties or transfer them to his name and they will be completely disinherited.

9. It was his case that it is in the interest of justice that the Grant issued on 7th June, 2016 and the Certificate of Confirmed Grant made on 1st September, 2016 be revoked so that the Estate of the Deceased reverts to the Deceased for proper distribution amongst the surviving beneficiaries.

10. In response to the summons, the Respondent averred that since all the affidavits in question were in possession of the applicant and she did not respond to them this application does not meet the requirements of Order 45 of the ***Civil Procedure Rules***. It was further his averment that this court is functus officio and the only forum available for the applicant in the appellate court. It was his averment that the issues raised herein are similar to those determined in the earlier ruling hence the application is caught up by the doctrine of res judicata.

11. The Respondent deposed that the property has been sold and distributed and that the properties which were inadvertently omitted in the list were shard out equally and the court was told of the same as is reflected in the said ruling. It was contended that the consent to withdraw the earlier application was informed by the signing and filing of the consents by all the parties following a lengthy meeting and discussions by members of the family hence this application is an afterthought that ought not to be entertained by the court. It was contended by the Respondent that he never participated in the investigation conducted by the Directorate of Criminal Investigations hence he cannot verify the contents of its report. To the Respondent there should be an end to litigation.

Determination

12. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

13. **Musyoka, J. In re estate of Charles Kibe Karanja (Deceased) [2015] eKLR** expressed himself *inter alia* as follows:

> **"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 of 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."**

14. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1 of the ***Civil Procedure Rules***, certain requirements must be met. The said provision provides as follows:

> ***"(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.

(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."

15. The foregoing provisions are based on section 80 of the ***Civil Procedure Act*** Cap 21 Laws of Kenya which states as follows:

"Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

16. On the merits section 80 of the ***Civil Procedure Act***, unlike the provisions of Order 45 aforesaid, does not prescribe the conditions upon which an application for review may be granted. In the case of **Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998** the Court of Appeal held that section 80 of the ***Civil Procedure Act*** enables a court to make such orders on review application which it thinks just so that the words "or any sufficient reason" as used in Order 44 [now Order 45] rule 1 of the ***Civil Procedure Rules*** are not *ejusdem generis* with the words "discovery of new and important matter" etc. and "some mistake or error apparent on the face of the record" and that those words extend the scope of the review. Accordingly, the said court held that there is no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly section 80 of the ***Civil Procedure Act*** confers an unfettered right to apply for review and so the words "for any sufficient reason" need not be analogous with the other grounds specified in the Order.

17. In dealing with the delegated legislation made under the Act **Farrell, J** in **Sardar Mohamed vs. Charan Singh Nand Singh & Another HCCA No. 51 of 1959 [1959] EA 793** was of the following view, with which view, I respectfully associate myself:

"In terms section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on section 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of the other sections. Under section 81(1) of the Ordinance the Rules Committee has power to make rules "not inconsistent with the provisions of this Ordinance". If a rule is inconsistent it is to that extent *ultra vires;* and if the Ordinance confers unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires.* If, however, a rule is capable of two constructions, one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle *"út res magis valeat quam pereat".* If the words "or for any other sufficient reason" can be given a liberal construction, there is nothing in Order 44, rule 1(1) in any way inconsistent with section 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the two grounds specified are such as would entitle an aggrieved party to apply for review".

18. The ground upon which the application is based is that there is evidence from the Directorate of Criminal Investigations that the affidavit which the Respondent relied upon and which this Court based its earlier decision on, regarding the applicant's application, was not signed by the applicant. That ground would no doubt fall under the rubric of discovery of new material or evidence. However, it is not contended that this new material or evidence was not available to the Applicant at the time when the earlier application that led to the order sought to be reviewed was made. It has not been alleged that the alleged new matter could not have been discovered by the exercise of due diligence. Accordingly, I find that there is no ***"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".***

19. That however, is not the end of the matter. The Court is entitled to review its earlier decision if the applicant discloses the existence of "***any other sufficient reason."*** In this case, there is a report from the document examiner that states that the alleged signature appearing in the said affidavit does not belong to the applicant. In my view that is a weighty matter that cannot be ignored.

20. The Respondent however contends that this application is *res judicata* as the issues raised herein were determined in the said earlier ruling. However, it is clear that the applicant's earlier application was not determined on merits as it was simply deemed as having been abandoned. *In the case **MWK vs. AMW [2016] eKLR** in which the decision of the Court of Appeal in **Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97** was cited with approval, it was held that:*

"Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res Judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*. The last issue (dismissal for want of prosecution) was the issue

in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits."

21. The applicant's earlier application having not been determined on merits this application is not *res judicata*. In fact, the applicant need not have applied for review of the earlier order since her contentions have not and were not determined in the earlier ruling.

22. Section 76(a), (b) and (c) of the ***Law of Succession Act*** provides as hereunder:

> ***A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—***
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> > ***(a)that the proceedings to obtain the grant were defective in substance;***
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> > ***(b)that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***
> >
> > ***(c)that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

23. In this case the applicants' contention is that some of the names of the beneficiaries were not disclosed at the time of the petitioning for grant. Further not all the properties of the deceased were included in the list of properties placed before this court. The Respondent does not seem to deny these allegations. In fact, a look at the affidavit in support of the petition none of the daughters of the deceased are disclosed. the Respondent however states that the omitted properties were distributed. Section 51 of the ***Law of Succession Act*** provides as follows:

> ***(1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.***
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> ***(2) An application shall include information as to-***
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> > ***(a) the full names of the deceased;***
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> > ***(b) the date and place of his death;***
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> > ***(c) his last known place of residence;***
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> > ***(d) the relationship (if any) of the applicant to the deceased;***
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> > ***(e) whether or not the deceased left a valid will;***
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> > ***(f) the present addresses of any executors appointed by any such valid will;***
> >
> > ***(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;***
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> > ***(h) a full inventory of all the assets and liabilities of the deceased; and***
> >
> > ***(i) such other matters as may be prescribed.***

24. It is therefore clear that the omission to disclose the names of all the beneficiaries, assets and liabilities of a deceased person amounts to obtaining grant or confirming the same by the making of a false statement or by the concealment from the court of something material to the case or obtaining and confirming the same by means of an untrue allegation of a fact essential in point of law to justify the grant and it does not matter whether the allegation was made in ignorance or inadvertently.

25. Section 45(1) of the ***Law of Succession Act*** states that:

> ***(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.***
>
> ***(2) Any person who contravenes the provisions of this section shall—***
>
> > ***(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and***
> >
> > ***(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.***

26. I associate myself with the opinion of **Musyoka, J** in **Veronica Njoki Wakagoto (Deceased) [2013] eKLR** that:

> **"The effect of [section 45]…is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence."**

27. In my view to set out to distribute assets of a deceased's estate other than in the manner stated by the law amounts to intermeddling therewith. Intermeddling with a property of a deceased person being a criminal offence, the same cannot be justified unless it is shown those challenging the same are themselves guilty of inequitable conduct. No such allegation has been made against the applicant herein and in light of the findings by the document examiner that she did not sign the affidavit in question, a finding the Respondent has not seriously contested save for saying that he was not involved in the investigations, the allegations or depositions made therein cannot bind her.

28. In the premises, I am satisfied that the grant herein was obtained and confirmed by the making of a false statement or by the concealment from the court of something material to the case and that further the same was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

29. Accordingly, the summons dated 3rd June, 2019 succeeds and the grant issued on 7th June, 2016 and confirmed on 1st September, 2016 is hereby revoked. The Respondent is hereby directed to within 7 days of this ruling return the original grant as well as the certificate of confirmation for cancellation. In order not to create a vacuum in the administration of the estate of the deceased, fresh letters of administration will be issued jointly to the applicant herein, **Martina Wavinya Wanyama** and the Respondent, **Benedict Vala Ndinga**.

30. I further direct that this dispute be referred to mediation for the purposes of proper distribution of the estate of the deceased.

31. There will be no order as to costs.

32. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 10th day of December, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Kavita for Mr B M Musau for the Objector

Mr Ndolo for Mr. Ngaruiya for the Interested Party

Applicant present in person

CA Geoffrey