



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 87 OF 2017

(FORMERLY NAIROBI SUCCESSION CAUSE NO. 206 OF 1994)

IN THE MATTER OF THE ESTATE OF KIMACHIA GITUANJA (DECEASED)

RULING

1. Much of the pertinent history of this matter is adequately captured in the judgment delivered by **Musyoka J** on 12th May, 2017. The said judgment is the subject of the Summons filed on 29/5/17 by one of the Protectors before **Musyoka J**, one **Edward Ngugi Kabaa**.

2. Two issues had been identified for determination prior to the hearing before **Musyoka J** as captured at paragraph 4 of the said Judgment as follows:-

“ On 28th June, 2011, the issues for determination were framed and agreed upon:-

a) Whether some portions of properties comprise in the estate have been sold off; and

b) Whether upon distribution of the estate the share of Francis Kabaa should be transferred to his estate or to Edward Ngugi Kabaa.”

3. In the judgment the court returned a negative finding on the first issue. On the second issue the court found that the share due to **Francis Kabaa**, deceased father to the present applicant should go to the estate of **Francis Kabaa** to facilitate subsequent distribution of the estate to the beneficiaries of the estate of the said **Francis Kabaa**. In related succession proceedings, the present applicant had been appointed as an administrator of the estate of Francis Kabaa. **Musyoka J** proceeded to make orders in disposition of the matter, directing *inter alia*:-

a) “....

b) That the estate of the deceased shall be distributed in the manner set out in the title deeds on record in respect of Muguga/Kanyariri/69 and Kabete/Kibichiku/290 both issued on 15th July 1987.

c) That a certificate of confirmation of grant intestate shall issue accordingly.

d)

e)”

4. Although Prayer 2 of the instant Summons is generally expressed to be directed at the orders of **Musyoka J** above, it was clear from the grounds and arguments of the Protector at the hearing before me that the targeted order is (b) above.

5. I presume, notwithstanding the failure by the applicant to invoke any specific provisions of the law in the Summons, that the Summons is brought under Order 45 Rule 1 of the Civil Procedure Rules. Order 45 of the Civil Procedure Rules is applied to succession causes pursuant to Rule 63(1) of the Probate and Administration Rules. The Substantive prayers in the instant summons seeks that :-

“this Honourable court be pleased to review, vary and vacate the order made by the Hon. Justice Mr. W. Musyoka on 12.05.2017” (sic)

6. The grounds on the face of the application state *inter alia* that the orders of **Musyoka J** were made in “disregard” of previous orders in the cause, the administrators’ and protestors’ proposals on distribution, and were contrary to the law in so far as the said orders reinstated an “annulled distribution made on 1st December, 1981.”(sic). The alleged annulment relates to proceedings in **Miscellaneous Civil Case**

No. 620 of 1992 Francis Kabaa v Nancy Wambui & Another.

7. The Protessor/Applicant swore two affidavits in support of his application which, principally restate the history of the dispute, and canvass matters in support of the grounds on the face of the application. The applicant's submissions took cue from these filed materials. By their grounds and arguments the Respondents viewed the application as a disguised appeal, taking issue with delayed service of the Summons upon them. In their view, the application is misconceived and bad in law. The Respondents pointing out that issues relating to the **Miscellaneous Civil Case No. 620/92** were not canvassed before **Musyoka J**, and in any event, the orders therein were in regard to procedural and not substantive matters.

8. The Respondents asserted that the present Summons is intended to thwart the issuance of the confirmed grant. In a brief reply, the Applicant stated that the file relating to **Miscellaneous Civil Case 620/92** was missing during the hearing before **Musyoka J** but that he had canvassed "all issues", presumably related thereto.

9. The court has considered the material proffered in support of and in opposition to the Summons. That the applicant is aggrieved with the substantive portion of **Musyoka J**'s decision is not in dispute. Order 45 of the Civil Procedure Rules provides an avenue for an aggrieved litigant to seek review of the decree or order with which he is aggrieved.

10. Order 45 Rule 1 Civil Procedure Rules provides as follows:

"Application for review of decree or order. 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."

11. The above Rule envisages three situations in which such application for review may successfully be made:-

a) Upon the discovery of new and important matters or evidence which, after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time the decree was passed or order made.

b) On account of some mistake or error apparent on the face of the record.

c) For any other sufficient reason.

See also the decision of the Court of Appeal in **Muyodi v Industrial & Commercial Development Corporation and Another (2006) 1EA 243**.

12. This court has carefully read through the proceedings and judgment before **Musyoka J**, in light of the grounds raised in support of the present Summons. The tenor of the applicant's grounds, supporting affidavits and submissions is primarily that the honourable Judge erred in his decision. Allegedly because, he failed to consider certain pieces of evidence placed before him during the hearing. This is brought out clearly by the Applicant's depositions in the Further Affidavit. At paragraph 7, the Applicant deposes that the new and important matter or evidence necessitating the present application is the supposed failure by the court to issue witness summons to a certain witness, a **Mr. Kamau Waguchu** whose evidence would allegedly have led to a different determination of the matter by the court. This does not qualify as a new matter or new evidence under Order 45 Rule 1 in my opinion.

13. At paragraph 8 of the Further Affidavit the Applicant deposes further:-

"THAT the applicant also deny paragraph 4 of the respondents statement and wish to demonstrate that various mistake or errors the Judge recorded while delivering the judgment dated 12th May, 2017 as follow:"(sic)

14. The matters stated thereunder are clearly contested evidentiary matters which surfaced during the hearing and in the Judgment of **Musyoka J**. Indeed matters connected to item (a) of paragraph 8 of the Further Affidavit featured prominently during the cross-examination of the present Applicant by counsel for the administrators in the course of the hearing before **Musyoka J**. Then, the applicant was forced, under questioning to admit that no adverse orders were made by **Mbito J** (as then was) in **Miscellaneous Civil Case 620 of 1992**, in connection with the registration of beneficiary's titles done pursuant to previous succession proceedings. **Miscellaneous Civil Case no. 620 of 1992** is housed in the current file and was severally referred to during the hearing of the matter.

15. At paragraph 9 of the Further Affidavit, the Applicant claims that the Judgment of **Musyoka J** is replete with "illegalities and irregularities and therefore deserved to be reviewed and be quashed, vacated" allegedly for reinstating "nullified orders".

16. In the case of Antony **Gachara Ayub v Francis Mahinda Thinwa (2014) eKLR** the Court of Appeal cited the dictum in **Draft and Development Engineers Ltd v National Water Conservation and Pipeline Corporation Civil Case No. 11 of 2011** regarding the nature of an error apparent on the face of record, as follows:-

“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. Mere error or wrong view is certainly no ground for a review although it may be for an appeal”

17. It is evident that the Applicant’s material does not disclose such an error. Nor does it require a deeper analysis to conclude that the present application does not fall within the ambit of the provisions of Order 45 Rule 1 of the Civil Procedure Rules. The application represents a challenge to the merits of the decision of **Musyoka J**. As a court of equivalent jurisdiction, this court cannot purport to sit on an appeal in respect of the decision of **Musyoka J**. I say so because the Application before this court is on all accounts an appeal against the decision of **Musyoka J**, disguised as an application for review.

18. For all these reasons I find the application to be misconceived and bereft of legal basis and merit. The same is dismissed with costs. I direct that this court’s registry proceeds to comply with orders **(b)** and **(c)** as contained in the disposition portion of the judgment of **Musyoka J**, delivered on 12th May, 2017.

Delivered and signed at Kiambu this 13th day of July, 2018.

C. MEOLI

JUDGE

In the presence of:-

For the Applicant (Protestor) - In person

For the Respondents- Mr. Omulo

Court Assistant – Nancy Mburu