



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 1028 OF 2009

IN THE MATTER OF THE ESTATE OF PHILLIP MBUVI MUTUA (DECEASED)

PETER MUTHUSI MBUVI

FRANCIS KIMEU MBUVI.....PETITIONERS

VERSUS

PRISCILLA KAKII MBUVI.....RESPONDENT

RULING

The Application

The Petitioners filed an application by way of a Chamber Summons dated 22nd September 2015 seeking orders that this Court's orders dated 18th March 2015 be reviewed and set aside. The said orders were granted by Mutende J. pursuant to an application filed on 25th October 2013 by the Respondent, seeking revocation of a confirmed grant issued to the Petitioners. The learned Judge in a ruling dated 18th March 2015 revoked the grant issued herein, and granted the Respondent leave to file an affidavit of protest to the confirmation of the grant within 24 days, and for directions to thereafter be taken.

The grounds for the application by the Petitioner for review of the orders are stated in a supporting affidavit sworn on 22nd September 2015 by the 1st Petitioner. These are that the Respondent was aware of the confirmation proceedings in which full disclosure of the deceased's beneficiaries and assets was made, and deliberately concealed from the Court that the properties that were distributed to the Deceased's 1st and 2nd houses have long been registered in the respective names of both the 1st and 2nd Petitioners. Further, that the Respondent should disclose to the Court whether she has obtained title deeds on the properties given to the deceased's 3rd house. Therefore, that there is an error apparent on the face of the record.

The Petitioner's Advocates, Nzei and Company Advocates filed written submissions dated 5th April 2017 which in most part dwelt on the proceedings and arguments leading to the orders by Mutende J, and submitted that the orders given in the said ruling delivered on 18th March 2015 are not capable of taking effect as the administration process is already complete and properties of the estate transferred to beneficiaries.

The Response

The Respondent relied on a replying affidavit she swore on 20th January 2015 and submissions dated 17th May 2016 filed by her Advocates, P.M. Mutuku & Company Advocates. The Respondent denied

that there was a mistake of the ruling by Mutende J, as the ruling is well reasoned and grounded on the fact that Petitioners concealed that there was no consent as to the mode of distribution signed by all beneficiaries, and that the names of the beneficiaries were only stated in the Affidavit in support of Summons for Confirmation of Grant

Further, that the titles to parcels of land numbers KITETA/NGILUNI/508; KITETA/NGILUNI/517; KITETA/NGILUNI/499; KITETA/NGILUNI/2244; KITETA/NGILUNI/2242 and KITETA/KAKUSWI/371, all forming part of the deceased's estate but now in the names of the Petitioners , were obtained by the Petitioners 5 days before the ruling dated 18/03/2015 was delivered.

The Respondent averred that the grounds adduced by the Petitioners are not proper legal grounds for review but are grounds for appeal.

The Issues and Determination

The Court directed the Petitioners and Respondent to canvass the application by way of written submissions. The Petitioners Advocate, Nzei & Company Advocates filed submissions dated 5th April 2017, while the Respondents submissions dated 17th May 2016 were filed in Court on 18th May 2016 by her Advocates, M. Mutuku & Company Advocates. The said submissions have been summarized in the account of the parties respective cases hereinabove.

I have read and carefully considered the pleadings and submissions made by the Petitioners and Respondent. The issue to be decided is whether the ruling delivered by this Court (Mutende J.) on 18th March 2015 is amenable to review. The provisions of Order 45 of the Civil Procedure Rules avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. The said Order is one of the Orders of the Civil Procedure Rules that is listed in Rule 63 of the Probate and Administration Rules as applying to succession causes.

Order 45 rule 1 of the Civil Procedure Rules provides the circumstances under which an order can be reviewed. The said provisions state that:

“ any person considering himself aggrieved by:

a. a decree or order from which an appeal is allowed but from which no appeal has been preferred or

b. a decree or order from no appeal is hereby allowed

and 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.”

The conditions that must be met in an application for review of a decree or order are therefore as follows:

- i) There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
- ii) mistake or error apparent on the face of the record,
- iii) or for any other sufficient reason,
- v) the application must be made without unreasonable delay.

The main ground raised by the Petitioner is that there was an error on the face of the record in the ruling delivered by Mutende J. on 18th March 2015, The Petitioners did not however indicate which part of the ruling they considered erroneous and/or the reasons why. The reasoning by the learned judge in the said ruling as to no consent having been given by all the beneficiaries to the mode of distribution has also not been denied by the Petitioners.

The Court of Appeal in **National Bank of Kenya Ltd v Njau, (1995 – 1998) 2 EA 249** which was also followed in the case of **Nyamogo v Nyamogo Advocates v Kogo, (2000) 1 EA 173**, held that an error should be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points of which there may conceivably be two opinions. It is thus not open to the Petitioner to try and establish the error on record by relying on facts as to registration of the distributed property in the Petitioners' names, being facts that were argued and considered in the application on which a ruling was delivered by Mutende J. on 18th March 2015. The Petitioners can only raise these arguments on appeal.

The Petitioner's Chamber Summons dated 22nd September 2015 is therefore found not to have merit for the foregoing reasons, and is hereby dismissed.

There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 4th day of May 2017.

P. NYAMWEYA

JUDGE