REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 50 OF 1999

In the Matter of the Estate of Jeniffer Kiacia Anampiu (Deceased)

ELIAS GITARI MARETE……..…….PETITIONER/APPLICANT

-VS-

JOYCE KATHAMBI MUTHONI……RESPONDENT

RULING

Two applications for review

[1] Before me are two applications for Review. Both applications were brought by the Petitioner/Applicant. Going by their respective dates, I will refer to the Application **dated 10th October 2014 and the one** dated 24th May 2016 as 1st and 2nd Application, respectively.

The 1st Application

[2] The 1stApplication is dated 10th October 2014 and is expressed to be brought pursuant to Rule 45 and 73 of the Probate and Administration Rules and Section 47 of the Law of Succession Act CAP 160 and all other enabling provisions of the law. The Application seeks the following orders:

> ***1. .....spent***
>
> ***2. The honourable court [to] be pleased to review its orders for confirmation of grant upon the Objector/Respondent herein dated 25th February 2014 and rectify the grant by adjusting the shares to the dependants and be set aside.***
>
> ***3. That conservatory orders in the form of inhibition be issued against Land Parcel No. Ngusishi Settlement Scheme No. 192 restraining the objector, his agents, representatives or any other person claiming through him from transferring/registering/transmitting or in any other way dealing in the suit land.***
>
> ***4. That costs be provided for.***

[3] The Applicant's gravamen is that he filed this application for rectification of grant because he ought to have been informed of the hearing of the application for confirmation grant and that it was un-procedural and unfair for his Co- Petitioner to have filed for confirmation without his consent. He further contended that he had previously engaged the firm of B.G. Kariuki and Company Advocates who seems not to have been served with the application for confirmation of grant as they did not advise him to file any protest or

a separate schedule of distribution. He further contended that upon enquiring from his then advocate on record, the advocate informed him that he was not aware of any application**.**

[4] The application was opposed through the Replying Affidavit sworn by the Respondent on 18th December 2014. In the affidavit, it was deposed that the Applicant through his advocates was fully aware of the existence and the hearing of the application for confirmation of grant; indeed a hearing notice was served and received by his advocate. Accordingly, they termed the allegations of non-service of the application and the hearing notice to be unfounded. She further contended that all the children of the deceased contributed towards discharging the suit land from the settlement fund trustees. Consequently she urged the court to reject the request for review of its orders for there is no ground or justification shown.

DETERMINATION OF 1ST APPLICATION

[5] First things first. When this matter came up for hearing on 31st May 2016, the court directed the parties to file submissions in respect of these applications. Partiesdid not file submissions on this particular application. Nonetheless, I will consider and determinethe merits of this application and the affidavits filed on it.

[6] I have carefully considered this application and the affidavits filed. The application before court is seeks for a number of reliefs, namely review of the order of confirmation of grant, rectification of the confirmed grant and orders of inhibition on the suit property. The basis for applying is that neither the Applicant nor his advocate was informed of the hearing of the summons of confirmation of grant.The Respondent on the other hand claims that both the Applicant and his advocate were fully aware of the hearing date. She also stated that all the beneficiaries were entitled to an equal share of the estate as ordered by court. I have examined the record and I see that the Respondent has annexed a hearing notice dated 14th January 2014 which was duly served upon and received by Advocates for the Applicant on 15th January 2014, at 9:40 AM. The Applicantcannot therefore be heard to say that neither he nor his Advocates were aware of the hearing of summons for confirmation of grant. The court record is also unfailing testimony; on 25th February 2014 when the case came up for the hearing of summons for confirmation of grant, Makau J recorded as follows:

> *"25.02.14*
>
> *Before HON J.A. MAKAU J*
>
> *C/C Penina*
>
> *Mr. T. David for objector*
>
> *Petitioner in person present*
>
> *Mr. T. David*
>
> *All parties present. No objection to grant being confirmed.*
>
> *COURT*
>
> *Grant confirmed as prayed."*

[7] From the above recordings of the court, the contention by the Applicant that he was neither aware of nor present during the hearing of summons for confirmation of grant are therefore false. The grant was confirmed in his presence and he did not raise any issue. There is absolutely no reason for reviewing or setting aside the confirmation of grant. The least I can say is that this application is most unfortunate and an afterthought. Even if I should weigh the application to the legal yardstick, rectification of the grant by

adjusting the shares of the dependants is not merited as no basis has been laid for it. In any case, Section 74 of the Law of Succession Act CAP 160 of the Laws of Kenya sets out the type of errors and grounds for which a grant may be rectified as follows:

> ***74 Errors may be rectified by court***
>
> ***Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.***
>
> Obviously, the grounds for which rectification has been sough here are not those envisaged by section 74 of the Act (ibid). In any event the suit property was divided equally among all the beneficiaries, and the Applicant has not laid the basis upon which this court should interfere with that decision.Accordingly, there is no ground to inhibit the suit land. In the end result I find the 1st application to be without merit and I according dismiss it with costs to the Respondent.

2ND APPLICATION

[8] This application is brought pursuant to Rule 73 of the Probate and Administration Rules whereinthe Applicant seeks the following orders:

> ***1. The honourable court [to] be pleased to set aside, vary and/or review the judgment dated 20th January 2009.***
>
> ***2. The honourable court [to] be pleased to make any other orders as may meet the ends of justice.***
>
> ***3. Costs [to] be provided for.***

[9] The said application is premised on the following grounds:

> 1. The deceased is not the registered owner of L.R NO. Ngushishi Settlement Scheme/192.
>
> 2. The registered owner of Ngushishi Settlement Scheme/192 is the Applicant.
>
> 3. The judgment of the court was premised on the mistaken believe that L.R NO. Ngushishi Settlement Scheme/192 was deceased property.
>
> 4. The land registrar cannot effect the grant herein as the same is erroneous as the deceased is not the registered owner of the said land.

[10] In a nutshell, the Applicant's case was that; he was the registered proprietor of L.R NO. Ngushishi Settlement Scheme/192; therefore, the land does not form part of the estate of the deceased. He stated that had this fact been disclosed to the court, it would have reached a different verdict. Consequently he prayed that the judgment herein to be reviewed and be set aside.

[11] The Application was opposed via a Replying Affidavit sworn by the Respondent/Objector on 6th June 2016, who deposed inter alia that the application herein is attended to by inordinate delay having been brought seven years after the judgment the subject of the application was delivered. And that the said delay had not been explained. The Respondent further averred that the ground upon which the Applicant is seeking for review or setting aside of the judgment herein is fallacious in that the suit property was the property of the deceased herein; indeed the Applicant filed this cause acknowledging that the suit land was the property of the deceased. In any event, the Respondent argued that during the hearing of the objection proceedings evidence was led to prove that the deceased owned the land and the court made finding of fact and law that the title the Petitioner was holding in his name was worthless in

light of the outcome of the objection proceedings and the subsequent distribution of the deceased estate as per the confirmed grant on 25th February 2014. Consequently she urged the court to dismiss the application dated 24th May 2016 with costs.

DETERMINATION OF 2ND APPLICATION

[12] Following the directions of the court given on 31st May 2016, the two applications for review dated 24th May 2014 and 10thOctober 2014 were to be heard first and were to be canvassed of by way of written submissions.I will consider the submissions herein. First, I wish to fathom the purport of the following arguments by the Applicant. The Applicant contended that he was the registered owner of the suit property having obtained it directly from the settlement fund trustee andnot by way of succession as alleged by the Respondent. Therefore, he argued that this land belonged to a living person, thus, is neither part of the deceased's estate property nor be subject of succession for sharing out to the Applicant. He found support in the fact that the Land Registrar could not register a grant on a living person's land i.e. the Applicant.I also wish to consider the arguments by the Respondent that the basis for filing the instant application was fallacious as the suit was solely the property of the deceased and the Petitioner acknowledged this fact at the time of filing this cause. More was submitted for the Respondent; that the issue of ownership of the suit land was extensively canvassed during the hearing of and was determined by the court in the objection proceedings to belong to the deceased. It was further submitted for the Respondent that it was after the Petitioner obtained the grant dated 7th March 2000 (which has since been revoked and the grant dated 25/2/2014 issued) that he got himself registered as the owner of the suit land from the settlement fund trustees and that the revocation of the grant dated 7th March 2000 effectively revoked the registration of the Petitioner as the owner of the suit land and that the court had subsequently issued a grant dated 25th February 2014 which distributes the suit land equally to the Petitioner and his three siblings. Consequently, it was contended that the argument by the Petitioner that he was the owner of the suit land was untrue.

[13] After careful consideration of this application and the rival submissions by the parties I am of the following orientation. The arguments above are quite substantial grounds for appeal and not review or setting aside or variation of the judgment in question. I will, however, weigh it on the scales of law to find out whether;

> ***(a) The application has been brought without unreasonable delay;***
>
> ***(b) There has been a 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***
>
> ***(d) There is some mistake or error apparent on the face of the record, or***
>
> ***(e) There is any other sufficient reason for which the court may grant a review of thedecree or order***

[14] Applying this test to this application, the specific reason for seeking review of the judgment of this court is that the deceased was not the owner of the suit property and that the judgment was premised on the mistaken believe that the suit property was the deceased's property. I note that the Applicant made two inextricable allegations; One, that he was the registered owner of the suit land but this fact was not brought to the attention of the court; and two, had it been so brought to the attention of the court, it could have reached a different verdict. These submissions made me embark on a meticulous perusal of the record of the court; the record reveals that the issues that the Applicant is now raising were fully canvassed before the judge and a determination thereof was pronounced. Therefore, this application is a stealthrepackage of issues which have been determined under tags such as review, setting aside or variation of judgment herein which equally calculated complexion of moot issues for purposes of obtaining another round of litigation. The only lawful forum for these issues would be an appeal. I am reinforced on these pronouncements by what the Learned Judge specifically stated at page 6 of the

judgment thus:

> ***"I am persuaded from their testimony that the suit land was allocated to the deceased as a poor landless lady with children and no husband."***

Again at page 10 of the judgment herein, the learned judge stated that:

> ***''From the foregoing, I come to the conclusion that the suit land was allocated to the deceased… The land was allocated to her while she was not in any form of association with any man. It is therefore not true that the land was allocated to her while married to Kanampiu…'***

The above recapitulation of the facts of this matter brings me to the point where I should ask whether such matters could be even ''new and discovered'' matters in the sense of the law? What constitutes discovery of new and important matter or evidence is so well known and clear in law that it does not call for any exposition given the legion of judicial decision on the phraseology. But, more help comes from the decision of the Court of Appeal in **MUYODI V INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION & ANOR. (2006) 1 EA 243**)when it held that:

> ***"For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay".***

Accordingly, the matters that the Applicant is now raising cannot be said to be new and important matters of evidence which were not in his possession and which with exercise of due diligence could not have been produced by him at the time of the judgment. I do not even think they constitute an error apparent on the face of the record as such error for which review is grantable must be patently in plain eye-sight of the court. See the case of **MWIHOKO HOUSING COMPANY LIMITED v EQUITY BUILDING SOCIETY [2007] 2KLR**when it held that:

> ***"The error or omission must be self-evident and should not require an elaborate argument to be established.***
>
> *More fundamentally, and I stated this earlier, the grounds being relied upon are substantial grounds for appeal. The application is in fact asking this court to sit as an appellate court upon the judgment of another judge of concurrent jurisdiction and substitute the earlier judgment of the court. No court of law would descend upon such invitation. I will not, therefore, discus their merits or demerits. It suffices to state that, in the above case (ibid) when arguments similar to the ones I am facing were made, the answer of the court wasclear that:*
>
> > ***It will not be a sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. See <u>Nairobi City Council v Thabiti Enterprises Ltd [1995 – 98] 2 EA 251 (CAK).</u>***
> >
> > ***In the instant case it is plain that the matters in dispute had been fully canvassed before the learned Judge. It is plain from his ruling that he made a conscious decision on the matters in controversy and correctly exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review."***

I am content to adopt the above holding in this case *mutatis mutandis*. I so hold.

The upshot

[15] One other thing. The application herein was attended to by inordinate delay.Although there is no precise measure of inordinate delay, but an application for review coming seven years after the judgment was delivered-i.e. on 20th January 2009- is way beyond any acceptable limits and I find no difficulty in finding that the delay is inordinate; and since it was not explained, it is, therefore inexcusable. The Applicant is guilty of lashes and he seems to be bent at delaying the administration of this estate for as long as he wants. Again the Applicant has not shown that he has discovered new and important evidence or matter which, despite exercise of due diligence, could not have been within his knowledge or produced at the time of the judgment. Similarly, there was no error on the face of the record. Ultimately, I do not see any other or sufficient reason for which I can order a review or variation or setting aside of the judgment herein. The upshot of my above analysis of all the circumstances of this case is this. For the above reasons and having found that the Applicant has not satisfied the requirements of orders of review, variation or setting aside of court orders or judgment, I find the 2nd application to be without merit and I accordingly dismiss it with costs to the Respondent. I must also state that once orders are made by the court all relevant implementing bodies or parties must give effect to the orders and should not be the stumbling block by self-proclaiming to be the ultimate interpreter of the decision of this court.The land registrar herein should give effect to the confirmed grant herein and accordingly align the record on this land to the decision of the court. But to avoid such dilemmas parties are advised to always request for specific declarations of ownership and rectification of the register of land in line with the orders they have sought. It is so ordered.

Dated, signed and delivered in open court at Meru this 12thday of September 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Kariuki advocate for Objector/Respondent

Mr. Kimathi Kiara advocate for Petitioner/applicant –absent

Petitioner – present

F. GIKONYO

JUDGE