



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**SUCCESSION CAUSE NO. 612 OF 2008**

**IN THE MATTER OF THE ESTATE OF THE LATE MUSA MOLENJE DALIDI (DECEASED)**

**JIMMY MUSOTSI MOLENJE.....PETITIONER**

**VERSUS**

**SAMUEL MOLENJE DALIDI**

**LOIS MWAITSI CHEMA.....OBJECTOR**

**RULING**

**BACKGROUND.**

1. Grant of letters of administration for the deceased herein MUSA MOLENJE DALIDI alias MOLENJE TALITI were first issued to JIMMY MUSOTSI MOLENJE on the 27<sup>th</sup> February, 2009 and confirmed on the 26<sup>th</sup> of October, 2009.
2. On the 25<sup>th</sup> February, 2010 Samuel Molenje Daldi sought for the revocation of the said grant vide the Summons for revocation of grant of the same date. The court on the 29<sup>th</sup> April, 2010 revoked the grant above mentioned on grounds that there was no application for confirmation of the same. Title No. Kakamega/Bushu/909 reverted to the deceased's name.
3. On the 7<sup>th</sup> July, 2010 parties agreed that a fresh grant be issued jointly in the names of JIMMY MUSOTSI DALIDI and SAMUEL MOLENJE DALIDI and JIMMY DALIDI was to file an application to confirm the same. On the 15<sup>th</sup> day of December, 2011, the court ruled on the distribution of the deceased's property where SAMWEL DALIDI MOLENJE got 8.5 acres and JIMMY MUSOTSI MOLENJE got 17.0 acres. A "fresh certificate of confirmed grant" was then issued on the above terms.
4. LOIS MWAITSI CHIEMA, a daughter of the deceased herein then filed summons on the 10<sup>th</sup> of January, 2012 for orders that she be apportioned seven (7) acres out of the deceased's estate. By the ruling dated 20<sup>th</sup> day of September, 2012 the court revoked the grant issued on 15<sup>th</sup> December, 2011 and the estate of the deceased was again re-distributed as follows:-

LOIS MWAITSI CHIEMA - 7 ACRES.

SAMUEL DALIDI MOLENJE - 5 ACRES.

JIMMY MUSOTSI MOLENJE - 13 ½ ACRES.

5. A new “Amended Certificate of confirmation of grant” was then issued on those terms and in the name of LOISE MWAITSI CHIEMA on the 20<sup>th</sup> September, 2012.

### **The application.**

6. It is the above orders dated 20<sup>th</sup> day of September, 2012 that the applicant SAMWEL DALIDI MOLENJE wants set aside. He has filed the application dated 3<sup>rd</sup> November, 2015 brought pursuant to order 45 rules 1 & 2 of C.P.R. and Section 80 of the C.P.A. The application is premised on the grounds that there is an error of law apparent on the face of the record. That at the time the application dated 10<sup>th</sup> January, 2012 was made the estate herein had been distributed and there was no application for revocation of the same. He adds that the court granted orders not prayed for. The application is supported by the applicant’s own affidavit where he puts more emphasis on the grounds herein above stated.

### **The response.**

7. JIMMY MUSOTSI MOLENJE filed a response on the 11<sup>th</sup> of March, 2016. He deponed therein that the application is an abuse of the process of the court and is an afterthought having been brought three and a half years 3 ½ years after the delivery of the ruling.

8. He adds that the applicant has brought a replica of the application seeking leave to appeal that was dismissed. He explains that the court by revoking the grant acted within its powers under section 73 of Probate and Administration Rules. He further explains section 76 of the Law of Succession act which empowers the court to revoke a grant on its own motion. He opines that the application herein is brought under the provision of Civil Procedure Rules while the Law of Succession Act and Probate Rules does not in any way import the provisions of the Civil Procedure Act.

9. He wants the application herein dismissed because it lacks merit. He has relied on the authority Nairobi H.C. Succ. Cause No. 2274 of 2012 in respect of the Estate of PatrobaNduriMbai (Deceased).

### **Submissions.**

10. In his submissions SAMWEL DALIDI MOLENJE states that the grant was confirmed upon LOIS MWAITSI CHIEMA stating that she was not interested in the estate of the deceased herein. He adds that the applicant Lois did not file an application for the revocation of grant under Section 76 of the Law of Succession and therefore there was no basis for the court to consider the application dated 10<sup>th</sup> January, 2012. He urges that since there was no application for revocation of the grant there was no estate for redistribution as the grant had already been confirmed. He maintains that the consideration of the application dated 10<sup>th</sup> January, 2012 constituted an error of law on the face of the records.

11. In their submissions the petitioner maintains that there was an inordinate delay in filing the application for review and the reason for the delay have not been given. He further submits on the application seeking leave to file appeal out of time dated 14<sup>th</sup> November, 2014 which was dismissed. He adds that section 76 of the Law of Succession Act gives the court powers to revoke a grant of representation either on an application or by the court on its own motion. He submits also on rules of procedure and opines that the applicant Samuel was wrong to apply provisions of the Civil Procedure Act and Rules in a Succession matter.

### **Determination.**

12. The issue for determination in this matter is whether to set aside and/or review this courts orders issued on the 20<sup>th</sup> September, 2012. Secondly whether the applicant’s application dated 3<sup>rd</sup> November, 2015 is properly before this court.

13. In answer to the second issue this court finds that the application which is to be determined is properly before this court. The application is provided for under Order 45 of the Civil Procedure Rules

one of the provisions imported into succession practice through rule 63 of the Probate and Administration Rules.

14. On the issue of review of probate orders and decrees, it is trite law that where the orders or decree issued by the court in succession causes have errors on the face of the record or a new and important piece of evidence has been discovered subsequent to the making of the order or decree, the court may on the application of a party review the order or decree on these ground or for any other sufficient reason.

15. A look at order 45 of the Civil Procedure Rules, rule (1) provides:-

***“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 of 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 orders 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 .....*”**

16. A party who wants a review of a court’s order must therefore demonstrate that he or she has discovered new evidence which was not within his knowledge at the time the order was made and that the order so made was made on account of an error or mistake apparent on the face of the record or any other sufficient reason. It has been held that orders cannot be reviewed to change the character of the order or disentitle a party to their right of inheritance.

17. In this case the applicant claims that there was an error and/or mistake apparent on the record. The application that led the court to revoke the grant was brought by the sister to the applicant herein. It was just a summons wherein she sought to be issued with seven (7) acres of the deceased’s estate. The court apart from issuing the seven (7) acres to her went ahead and revoked the grant earlier issued to her two brothers dated 15<sup>th</sup> December, 2011. This was done on 20<sup>th</sup> September, 2012 and a new grant in the names of Lois was issued and the deceased estate re-distributed.

18. The court exercised its jurisdiction conferred under section 76 of the Law of Succession Act Cap 160 which states:-

***“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 -.....”***

19. The court acted on its own motion, there was no application for revocation by anyone. The court must have seen the plight of Lois as deponed to in her affidavit. It is true that Lois had indicated a lack of interest in the deceased estate but her circumstances changed like the prodigal son and she opted to go back to his father the deceased herein to seek refuge. I therefore find that the fact that the court acted on its own motion is not an error or mistake apparent on the face of the record but it’s discretionary on the part of the court which court has to exercise judiciously. I find therefore that the applicant assumption that there was an error or mistake apparent on the record cannot stand for the above reasons.

20. I also find that there was an inordinate delay by the applicant to file for review even after being aware of the ruling of the 20<sup>th</sup> September, 2012. They have not endeavoured to explain why they delayed or what caused the delay.

21. I therefore find no merit in the applicant’s application dated 3<sup>rd</sup> November, 2015 and the same is

dismissed with no orders as to costs.

**SIGNED, DATED** at **KAKAMEGA** this **10<sup>TH</sup>** day of **NOVEMBER**, 2016.

**C. KARIUKI**

**JUDGE**

**In the presence of:-**

.....**Present** .....**for the Petitioner.**

.....**Present** .....**for the Objector.**

.....**Present** ..... **Court Assistant**