REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 183 OF 2004

In the matter of the Estate of GATUMU KAMANJA Alias JAMLECK IRERI (Deceased)

ELIAS NJOGU NGUU.....APPLICANT/PROTESTER

VERSUS

GICHOBI MBORA.....PETITIONER/RESPONDENT

R U L I N G

By a notice of motion dated 14th May 2013 brought under Order 45 Rule 7 of the Civil Procedure Rules, Rules 47, 63 and 73 of the Probate and Administration Rules Cap 160 Laws of Kenya the applicant/protester Elias Njogu Nguu prays for the following orders:-

(a) *That this honourable court be pleased to review its ruling of 18th April 2013 dismissing the protest and thereafter order that the protest be heard afresh.*

(b) That the cost of this application be provided for.

The ground relied on on the face of the application and on the supporting affidavit was that the applicant was sick on the date of hearing, he suffers from memory loss and hypertension which matters were not brought to the attention of the court. Due to the sickness, the protester gave confused testimony which disadvantaged his case. He depones that he is the rightful heir of the deceased's estate being his biological son. He states that earlier, the Land Disputes Tribunal had ordered that he be given an equal share with the other sons of the deceased. The applicant depones that although he was raised by the brother of the deceased, he cannot inherit from the said brother who was just an uncle to him.

In his replying affidavit the respondent/petitioner opposes the application on grounds that it is the applicant's advocate who took the hearing date for 7/3/2013 and that during the hearing date, the applicant did not inform his advocates of his state of health. The applicant did not give any reason why his advocate or himself failed to inform the court of his poor state of health when he was testifying. The respondent depones that the applicant is only bringing this application because the case did not favour him.

Further that the medical report relied on was prepared about two months after the hearing and one month after the ruling was delivered. It is further argued that the Tribunal award which ordered that the applicant be given an equal share with the other sons of the deceased was declared a nullity on the 27/10/1995 in Embu PMCC No. 63 of 1994. It is the respondent's argument that the application is an abuse of the court and should be dismissed.

By consent of the parties, this application was herd by way of written submissions. The petitioner's

submissions filed by his counsel Fatuma Wanjiku & Co. were based the premise that the application does not meet the threshold of Order 45 in that there was no discovery of any new matter or new evidence and that there was no error or mistake apparent on the face of the record. It is further contended that the application was an afterthought after the applicant lost the case and that the medical report annexed to the application was not genuine.

The respondent contends that the health condition of the applicant is not a sufficient reason to allow review under Order 45 since it is only supported by documents and by the judges Ongudi, J's ruling in which the judge found that the applicants case was inconsistent. The application is not based on discovery of new evidence but on the reason that there is overwhelming evidence which the applicant was not able to produce during the hearing of his case due to his poor health condition.

The relevant law under which this application is brought requires to be interrogated in view of the grounds relied on by the applicant for this court to satisfy itself that the threshold has been met. The protest in this case was heard and determined by Ongudi, J. in her ruling delivered on 18th April 2013, in which she dismissed it for lack of merit.

The Judge was later transferred to another station before hearing this review application. This is a case with a long history where the applicant was the original petitioner in this case. The grant was revoked on the grounds that it was obtained with concealment of facts material and further that the applicant herein was a stranger to the deceased's estate. The respondent Gichobi Mbora was appointed administrator of the estate.

The applicant was to return to this cause as a protester. This is the protest which was dismissed by the Judge and which gave rise to this application.

The main reason why the protest was dismissed was because the applicant was not able to prove that he was a son of the deceased. In this application he has not annexed any new evidence to show that he is the son of the deceased. The learned Judge in her ruling identified that as the only issue in the protest.

The medical report purporting to show that the applicant is of poor physical and mental health was prepared two months after the applicant was heard by the court and one month after the court's ruling dismissing the protest was delivered. This is a clear indication that the idea of filing this application came up only after the applicant lost the case. The delay of 2 months since he was heard demonstrates that the application is an afterthought.

The applicant brings into focus the issue of an award by Land Dispute Tribunal which had directed the deceased in his lifetime to give the applicant a share of his land. This award was nullified by the court in 1996 a fact within the knowledge of the applicant. When he purports to rely on a non-existent award, the applicant can only be said to be a vexatious litigant as well as a dishonest person. He has been in court since 1995 claiming land from the deceased and later from the deceased's estate to date. It does not bother him that he has lost all the court battles which should send a signal that his claim has flopped and is indeed a gone matter. The judge commented in her ruling that the applicant knew all along that he was not an heir to the deceased's estate but he nevertheless delayed the distribution of the estate for too long.

Back to the law, I cite the provision of Order 45 which provides:-

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.

(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.

This application brings in no discovery of any new evidence or matter as required by the foregoing foregoing provision. The applicant has not shown that there is any error or mistake apparent in the ruling of the judge. In his submissions, he argues that his application is not about any new matter or new evidence but that is intended to show that had it not been due to mental confusion or forgetfulness which failed him he had overwhelming evidence in his protest.

This raises the issue as to why the applicant opted to bring the application under Order 45. The provision is all about new evidence or a new matter which could not have been produced by him, after exercise of due diligence, at the time the case was heard or at the time the order dismissing the protest was made.

The emphasis here is "exercise of due diligence" and not mental confusion or forgetfulness. It is my considered opinion that the applicant had failed to satisfy this threshold of Order 45.

The second option provided by the provision is that the applicant ought to satisfy the court that there was an error or mistake apparent on the face of the record. No attempt has been made to demonstrate existence of any mistake or any error.

In my view, the applicant is trying to obtain orders of appeal of the decision of a judge of the same court through the back door. He ought to have lodged an appeal against the judge's ruling. Even opening the protest afresh to hear evidence of the applicant or his representative which is essentially the same as that presented before Judge Ong'udi and which formed the basis of her ruling, would be an exercise in futility.

I find no merit in this application and I hereby dismiss it with costs to the respondent.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF MAY, 2015.

F. MUCHEMI

J U D G E

In the presence of:-

Both parties.