



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO. 237 OF 2010

IN THE MATTER OF THE ESTATE OF JOHN WANDERA MAGONDA----- DECEASED

AND

CECILIA MUDONDO WANDERA----- APPLICANT

VERSUS

MATILDA WANDERA-----RESPONDENT

RULING

1. By virtue of Rule 63(1) of the Probate and Administration Rules, the Civil Procedure Rules in respect to Review (Order 45) apply to Probate and Administration Proceedings. In a Summons for Review dated 24th February 2015, the Applicant herein is seeking that the Court be pleased to Review, set aside or vary its Ruling and Orders of 12th June 2014.
2. That Application is supported on the Grounds on its face and the Supporting Affidavit of Cecilia Mudondo Wandera sworn on 24th February 2015. From the face of the Application, the Affidavit in support and Arguments made by Counsel at the hearing of Application, this Court is asked to review its Ruling and order of 12th June 2014 on grounds which can be clustered into three (3).
3. First, that some of the Properties of The Deceased Estate, and in particular Namboboto plot No. 13 and Changamwe House 82, were not included for Distribution. In respect to the latter property it was also argued that no evidence was adduced by the Applicant on how the Deceased acquired it. And further that the Deceased having given each of the widows exclusive management and use of the Changamwe House and Kisumu Block 10/10, the Court ought not to interfere with the status quo and the peaceful co-existence of the widows. Supplementing this, Mr. Kasamani argued that at the time the Ruling sought to be reviewed was delivered The Matrimonial Property Act No 49 of 2013 was in operation. I was asked to find that Sections 8(a) and 15 of that Act would have influenced the Court's outcome on Distribution.
4. It was further asserted by the Applicant that the Court made a skewed order on distribution that disadvantaged her. That the Court reached this skewed distribution because it did not consider that;
 - a. Each widow ought to be granted single and exclusive possession of the Agriculture lands,
 - b. That a property, Kiosk No. 54, was fraudulently transferred from the Deceased's Estate to the Respondent after his death. Kiosk Nos. 41 and 49 were transferred to third parties. While kiosk No. 57 which remains in the name of the Deceased was excluded from the inventory of his Estate.

5. This court was also asked to be sympathetic to the position of the Applicant as her then Advocate did not file submissions on her preferred mode of Distribution. That if he had done so then the Court would have reached a different result.
6. The Respondent reads bad faith in the Application and sees it as an attempt to delay the finalization of these five (5) years old proceedings. It was charged by the Respondent that the Applicant has a habit of changing her mind and shifting goal posts.
7. The Court was reminded that the Ruling on Distribution was on specific properties after the parties had reached a agreement on some of the properties. One of the properties that was not in contention was the Changamwe property and it was agreed that it be transferred to the Respondent.
8. Now, the purview of Review under Order 45 of the Civil Procedure Rules has been set out on numerous occasions by the Court of Appeal. Not too long ago on 28th February 2014, the Court of Appeal rendered itself as follows in **Pancras T. Swai vs Kenya Breweries Limited (2014) eKLR.**

“As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In Sarder Mohamed v Charan Singh Nand Sing and Another (1959) EA 793, the High Court correctly held that Section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the section was deliberate. In Shanzu Investments Limited v Commissioner for Lands (Civil Appeal No. 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in Wangechi Kimata & Another v Charan Singh (C.A. No. 80 of 1985) (unreported) wherein this Court held that;

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to”. (My emphasis)

This passage guides me in dealing with this Application.

9. The submission by the Applicant that the Court should have applied the provisions of the Matrimonial Property Act (No. 49 of 2013) in distributing the Changamwe House and Kisumu block 10/10 was a submission that this Court misapprehended the law and or failed to take the provisions of this Statute into account. That is not a matter to be taken up on Review. It is a matter for an Appeal. This Court will not be drawn into defending its decision and will leave the correctness or otherwise of its decision to the Judgment of the Court of Appeal in the event that this matter reaches there.
10. That said, it would be to exercise undue restraint on my part if I did not point out that one aspect of the criticism leveled against my decision of 12th June 2014 is out rightly unjustified. The Applicant stated, and correctly so, that the Court’s order on Distribution did not include the Changamwe House No. 82. What the Applicant failed to point out was that the property was excluded for consideration on Distribution because in the consent of 8th May 2013 Counsel for The Parties agreed that the Respondent is entitled to this property.

11. The Court's intervention on Distribution was bespoken by that consent of 8th May 2013 which needs to be set out in full:-

a) The following three properties shall be divided equally between the hoses of Cecilia Wandera and Matilda Wandera

- i. **Samia/Luanda-Mudoma/383**
- ii. **Kisumu/Nyalenda "A"/1053**
- iii. **Kisumu/Korando/4163**

b. **The following properties already with Matilda shall remain with her:-**

1. **Posho mill (2) welding machine (3) motor vehicle 944 (4) motor cycle.**

c. **Matilda Wandera shall be entitled to Mombasa Municipality/Changamwe/tenant purchase House No. 82.**

d. **The Court shall make a decision on distribution of the following:**

1. **Samia/Luanda Mudoma/461,1420,1482,1436**
2. **Funyula Town Council Plot No. 58**
3. **Kisumu Municipality Block 10/10**

e. **The Parties to discuss and agree on the division of Samia/Luanda Mudoma/656 and plot at Namboboto Trading centre.**

Oral Evidence to be led in respect to the contested issues.

Although there was an attempt by the Applicant to discredit the consent on the ground that it was not personally signed by the parties, she has not moved the Court to set it aside. Looking at Clause (e) of that consent the accusation by the Applicant that the Court failed to make an order in respect to Distribution of Namboboto Plot No. 1B may also not be well founded.

12. In respect to the Applicant's ownership of the USAID house (Plot No. 392), it was submitted that no evidence was adduced to prove that the ownership was facilitated by the Deceased. But my decision speaks to this. After analyzing some evidence in respect of this property in paragraphs 6 and 7 of my decision of 12th June 2014, the Court concluded as follows in paragraph 8 thereof,

"This Court believes that the development of Plot 392 was funded, at least partly, from the proceeds of sale of the Migosi property. To that extent that property was funded, in part, by the Deceased."

If this Court misapprehended the evidence, then it is for a Court of Appeal in an Appeal, and not this Court, to set it aside.

13. The inventory of the Assets of the Deceased Estate was captured in the consent of 8th May 2013. The terms of that Consent are captured in full in paragraph 11 of this Decision. There is now an allegation that some kiosks namely Funyula Township kiosk Nos 41, 58, 17 and 59 were left out from that inventory. If that were so, there is still opportunity for the Distribution of those kiosks to be canvassed as the parties and yet to finally settle the Division of the undistributed portion of the Estate (see Paragraph (e) of the consent 8th May 2013). The Applicant has not demonstrated that the nature or value of those kiosks are such that they should undo the order of Distribution already made by this court in respect of the other properties.

14. Should this Court Review its Ruling simply because the Applicant's Counsel never made any submissions on the mode of Distribution? In this regard the Applicant avers as follows in paragraph 16 of her affidavit.

“That it has come to my attention that my (sic) the Advocate on record did not file submission at the end of the trial despite my having instructed him to do so and gave my proposal on the distribution which if the court had, it would have come to a different result.”

15. That Advocate is Mr. Okutta who was then appearing for the Applicant. After the close of hearing, Counsel for the parties were invited to file written submissions and the matter was fixed for mention on 29th January 2014 to check on compliance. On that day Mr. Okutta stated,

“I have no submissions to make”

Surely, if the Applicant is of the view that she was prejudiced by the failure of her Advocate to make submissions, then she will have to seek Counsel on where and against whom to seek redress. It cannot be by forcing a re-opening of this matter.

16. The upshot of my observation is that the Application for Review is without merit and is for Dismissal. But as I close, this Court notes that the Respondent is agreeable to revisiting the Order made in respect to the agriculture land as suggested by the Applicant. Of course, the parties are free to file a consent on how they agree! Otherwise, the Application dated 24th February 2015 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF JULY 2015

F TUIYOTT

JUDGE

IN THE PRESENCE OF:-

OILE.....COURT CLERK

ONSONGO H/B FOR KASAMANI.....APPLICANT

JUMA.....RESPONDENT