



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 249 OF 1999

IN THE MATTER OF THE ESTATE OF NJOROGE MUGANE – DECEASED

RULING

1. The application dated 19th June 2014 invites me to review the orders I made on 13th June 2014 on the application for revocation of grant by Alexander Murage Njoroje dated 8th May 2012.
2. The review application is at the instance of Patrick Mwaniki Njoroje, one of the former administrators named in the grant revoked on 13th June 2014. In his affidavit of 19th June 2004 he states that he and his former co-administrator were represented previously by the firm of Messrs. Kinyori N. M. & Co. Advocates. He accuses the said lawyers of failing to attend court on 20th January 2014 when the matter came up for hearing of the application dated 8th May 2012 or failing to notify them of the hearing date of 20th January 2014. He avers that the former administrator have since changed advocates and pleads that they ought not be punished for the conduct of their former lawyers.
3. The other grounds advanced in support of the application are that the respondent lied to the court when he alleged to be a son of the deceased and when he alleged that assets were devolved upon non-family members, such a Felister Thenda, yet the said Felister was his wife and he indeed resided in property that was given to the wife. It is also alleged that the court did not consider the affidavits that the administrators had sworn in opposition to the application.
4. The respondent replied to the application through his affidavit of 7th June 2014. He avers that the applicant had been properly served with court papers but he chose to stay away. He states that the application does not satisfy the conditions for review of an order of the court.
5. The application dated 19th June 2014 was argued orally before me on 27th October 2014. The applicant was represented by Mr. Karigi, while the respondent was in person.
6. Mr. Karigi submitted that the date for hearing, that is 20th January 2014, had been obtained *ex parte* by the respondent, the applicants were not informed of it by their advocate or the respondent. He stated that the respondent did not call witnesses although it had been directed by the court that the application be disposed of by way of oral evidence. He argued that the respondent had told the court that one of the former administrators was dead, yet the said former administrator was still alive. He stated that it had not been demonstrated that there had been proper service of the hearing notice for 20th January 2014 on either the advocates on record or on the applicants. He submitted that the orders on record ought to be set aside so that the applicant can get a chance to cross examine the respondent.

7. In his reply, the respondent stated that the applicants case was founded on pure lies.
8. The review motion is premised on section 47 of the Law of Succession Act, rule 63 of the Probate and Administration Rules and order 10 rule 10 of the Civil Procedure Rules. Section 47 states the general jurisdiction of the High Court over probate matters, while rule 63 imports a number of provisions from the Civil Procedure Rules for application in probate cases. The provisions in the Civil Procedure Rules governing review of orders and decrees is one of them, but order 10 rule 10 is not among them. Order 10 rule 10 of the Civil Procedure Rules does not therefore apply to probate proceedings.
9. A court order is reviewable on the three grounds set out in the provisions of Civil Procedure Rules governing review. The relevant provision is order 45 rule 1(1) of the Civil Procedure Rules, and it states-

“1(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 other sufficient reason, desires to obtain review of the decree or order, may apply for a review of the judgment of the court which passed the decree or made the order without unreasonable delay.”**

10. The above provision identifies three (3) general grounds for review – error on the face of the record, discovery of new matter or evidence of importance which could not be produced at the time of the hearing or any other sufficient reason. An applicant seeking review must endeavor to bring their application within these three grounds.

11. The applicant’s case as set out in the affidavit in support of the application is that his advocate did not inform him of the hearing scheduled for 20th July 2014, neither did he attend court on that day. He prays that they should not be penalized for the sins of their advocate. He also alleges fraud and concealment in the manner the orders of 13th June 2014 were obtained. He also alleges that the court did not consider the averments made in their replying affidavit.

12. The matters set out in the affidavit in support of the application do not demonstrate any error on the face of the record or discovery of any new matter or evidence that the applicant was not able to place before the court at the hearing. The matters raised perhaps fall under the third limb of review, that is any other sufficient cause.

13. Three matters are raised – fraud, lack of service and lack of consideration of the averments in the affidavit in opposition to the application dated 14th January 2013.

14. The applicant does not dispute that their advocates were served with the hearing notice, they blame them instead for failing to notify them of the hearing date. Indeed, there is an affidavit of service sworn on 13th July 2014 returning service of the hearing notice for 20th January 2014. The advocates for the applicants acknowledged receipt of the notice by embossing their official stamp on it and signed against the stamp. The advocates on record were the applicant’s agents; the applicant cannot therefore plead non-service when his advocates had been properly served.

15. The affidavit of service of 13th January 2004 also states that the applicant and the deponent of the affidavit sworn on 19th June 2014 in support of the application herein, Patrick Mwaniki Njoroge, was also served with the notice of the hearing scheduled for 20th January 2014. According to the

affidavit of service the notice was served personally on him on 2nd January 2014 at 10.00 am at Kiandathi village, Embu, but he declined to sign copy of the notice as acknowledgement of service.

16. I have scrupulously scrutinized the affidavit of Patrick Mwaniki Njoroge sworn on 19th June 2014 in support of the instant application, and noted that he has not contested the averments in the affidavit of service of 13th January 2014 to the effect that he had been properly served with the notice of the hearing of 20th January 2014. He merely avers that the respondent did not notify him of the hearing, but does not breathe a word on the damning allegations made against him in the affidavit of service.
17. I have noted too that whereas the usual way of challenging allegations that one was served with court process is to call the process server who swears and files an affidavit of service to attest to that service. The applicant had the opportunity to have the process server who swore the affidavit of 13th July 2014 called so as to be cross-examined on his alleged service of the hearing notice on the applicant on 2nd January 2014; but he chose not avail himself of that opportunity.
18. From what is before me I can deduce that the applicant and his advocates were notified of the hearing on 20th January 2014. No plausible explanation has been given for their failure to attend court on the appointed day, and I therefore do not find any sufficient grounds based on those facts for reviewing the orders that I made on 13th June 2014.
19. On whether there was fraud and misrepresentation employed by the respondent to obtain the orders of 13th June 2014, the holding that the respondent was a child of the deceased was founded on the material that was before me on the time, as set out on paragraph 10 of the said ruling, and the applicant herein has not placed anything before me in the affidavit of 19th June 2014 which contradicts that position or convinces me otherwise.
20. The third allegation is that the court while ruling on the application dated 8th May 2012 did not consider the affidavit of the applicant sworn on 14th January 2014. Paragraph 5 of the ruling dated 13th June 2014 is a summary of the contents of affidavit of Patrick Mwaniki Njoroge sworn on 14th January 2014. The contents of the said affidavit are also adverted to at paragraphs 9 and 10 of the said ruling. It cannot be true therefore for the applicant to allege that his affidavit of 14th January 2014 was not taken into account.
21. In the end, it is my conclusion that the applicant herein has not made out a case for the review of the orders made on 13th June 2014. In the result, the application dated 19th June 2014 is for dismissal. It is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 3rd day of July, 2015.

W. MUSYOKA

JUDGE

In the presence of Mr. Kaigi advocate for the Applicant

Respondent is present in person.