



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

P&A APPEAL NO. 3 OF 2013

(IN THE MATTER OF THE ESTATE OF GATHUA NGURU MURIITHI (DECEASED))

JERIOTH WANGUI MAINA.....APPELLANT

VERSUS

ANNAH WAIRIMU WACHIRA.....RESPONDENT

(Being an appeal against the ruling and order in Karatina Resident Magistrates' Court Succession Cause No. 61 of 2001 (Hon D.M. Musyoka Ag PM) delivered on 11th day of June, 2013)

JUDGMENT

This appeal arises out of a ruling delivered in the magistrates' court on a successful application by the respondent that sought to review a judgment in respect of a dispute on distribution of property of the late Gathua Nguru Muriithi. In the judgment, the learned magistrate had held that one of the children of the deceased, the appellant herein, was entitled to inherit her father's parcel of land known as **parcel No. Iriaini/Chehe/1451** as the sole and absolute owner while the rest of the properties were to be shared equally amongst all of the deceased's children.

The principal prayers in the application for review were that;

"1. That the honourable court be pleased to review the judgment/order of the court confirming the grant on 08/02/2012.

2. That in place of the order confirming parcel no. Iriaini/Chehe/1451 absolutely to Jerioth Wangui Maina, the same be confirmed to her; Jerioth Wangui Maina and the applicant herein to hold in trust for themselves and Lucy Wangui Mwai, Margaret Wanjiru, Nyawira and Njoki Maina; all in equal shares."

The court (Hon D.N Musyoka) allowed the application for review and in his ruling delivered in court on 11th June, 2013 the learned magistrate noted that the appellant herself had in her evidence asked to be allocated the land in issue *"to hold it in trust for my sisters six of them in case they leave their husbands lands."*

The learned magistrate also noted that in her judgment, her senior colleague (Hon. Lucy Mbugua) had noted that the appellant's brothers had testified that the subject suit property was set aside for their sisters in the event their marriages failed.

The learned magistrate observed also that her senior colleague, Hon. Lucy Mbugua, had discounted this

evidence and held that in matters of inheritance, the law does not discriminate the beneficiaries either on grounds sex or marital status and in such circumstances if the rest of the deceased's daughters had laid a claim on his property, *"this court would have allowed them to inherit their father's property. But they have not."*

It is this last statement that Hon. D.N Musyoka took issue with and apparently faulted his learned senior colleague for. According to him married daughters need not have laid any claim on the property as long as they were listed as the deceased's survivors but rather it was incumbent upon the court to summons them and find out whether they were interested in the property.

The learned magistrate held that to the extent that his colleague's judgment held the contrary, there was a mistake or error apparent on the face of the record and he therefore proceeded to invoke **section 80 of the Civil Procedure Code** to review the judgment.

The appellant was aggrieved by this decision and so in the memorandum of appeal dated 26th June, 2013 and filed in this court on the following day, she faulted the learned magistrate's decision on the following grounds:-

“

1) . That the learned magistrate erred in law and fact in sitting on an appeal from the judgment of another magistrate.

2) That the learned magistrate erred in law and fact in interfering with the discretion of a fellow magistrate by reviewing the said judgment.

3) That the learned magistrate erred in law and in fact in finding that the sitting magistrate had erred in distribution thereby revoking the grant beyond his jurisdiction.

4) That the learned magistrate erred in law and fact in imputing a trust where the issue had not been addressed and which was beyond his jurisdiction.”

With these grounds the appellant asked this court to allow the appeal and set aside the ruling reviewing the judgment delivered in court on 8th February, 2012.

The parties resolved to have their appeal determined by way of written submissions and therefore directions were given to that effect; I have read and considered their respective written submissions.

The application for review and whose ruling is the subject of this appeal was made under **rule 63 and 73 of the Probate and Administration Rules and Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules.**

Rule 63 of the Probate and Administration Rules which the applicant invoked allows the application of **Order XLIV of the Civil Procedure Rules (now Order 45 of the Civil Procedure Rules 2010)** in proceedings initiated under the Probate and Administration Rules. This means that applications for review can be made in succession causes the same way they are made in civil proceedings initiated under the civil procedure rules. It follows that an application for review of an order or decree in a succession cause is subject to the same threshold to a similar application made in the context of the civil proceedings under the Civil Procedure Act and Rules. An applicant for review of an order made in succession proceedings must therefore satisfy the conditions for such review as prescribed by **Order 45 of the Civil Procedure Rules.** That order 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 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.

According to this rule the conditions or the grounds upon which an application for review may be made are:-

- a) a discovery of a new and important matter of evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the material time; or
- b) there is a mistake or error apparent on the face of the record; or
- c) for any other sufficient reason.

Any of the three grounds is sufficient for an application for review by an applicant who considers himself aggrieved by a decree or order.

The applicant did not cite any of the foregoing grounds as the basis for their application for review and in fact there were no grounds on the face of the application in its support although it was stated to be supported by the respondent's affidavit and on "*further grounds to be adduced at the hearing hereof.*"

A closer look at the affidavit in support of the application does not reveal any of the prescribed grounds either. In its pertinent part, this is what the affidavit contained:-

- 1) ...
- 2) THAT I and my sisters had initially instructed our brother Francis Wachira Gathua to appear on our behalf in the Citations herein.
- 3) THAT I was not made aware of the confirmation proceedings herein as I was never notified.
- 4) THAT I have since instructed my current advocate on record to act for me in the matter.
- 5) THAT as rightly observed by court and the respondents in this application, the land herein had been clearly designated for us sisters of the deceased.
- 6) THAT our sister Jerioth Wangui Maina is not trustworthy to hold the land herein without a note that the same is held in trust as she will definitely act to defeat our transmission interest by either selling or charging the land and to prevent us from working the land where need be.
- 7) THAT I pray that the court in recognition of the rights o(sic) the land do review its final orders herein by having my name inserted as an owner together with the first respondent to hold the land for ourselves and in trust for all our other sisters noted in the register.
- 8) THAT it is mete in order to avoid future litigation as our sister is bound to bar us from the land upon her getting the title.
- 9) ..."

Looking at these depositions there is none that suggests that after the delivery of the judgment the applicant had discovered a new and important matter of evidence which, even after the exercise of due diligence, was neither within the applicant's knowledge nor could be produced by him at the material

time.

The depositions do not also appear to me to have brought out any mistake or error apparent in the judgment or, as it were, on the face of the record. Neither am I satisfied that whatever reasons have been given fit what would properly be described as “*any other sufficient reason*” for review.

It is not clear how the learned magistrate court came to the notion that the application was made on the basis that there was an error apparent on the face of record and proceeded to review the judgment on that ground because that ground was neither manifest on the face of the application itself nor in the affidavit in support of the application.

It follows that from the very outset, and weighed against the conditions prescribed for an application for review under **Order 45 Rule (1) (1)** of the **Civil Procedure Rules**, the respondent’s application had no basis in law and in my humble view, it ought not to have been entertained.

The next issue which the court ought to have considered is more or less a procedural requirement yet a mandatory one in an application based on **Order 45 Rule 1** of the **Civil Procedure Rules**. Having invoked this particular rule it was incumbent upon the applicant to exhibit to her summons the decree sought to be reviewed. Neither the decree nor the judgment from which it should have been extracted was part of the application; such an omission is fatal to an application for review under **Order 45 Rule 1** of the **Civil Procedure Rules**.

In **Gulamhussein Mulla Jivanji & Another versus Ebrahim Mulla Jivanji & Another 1929-1930 KLR (Vol XII) 41** at pages 44-45 the Court of Appeal for Eastern Africa addressed this issue and said (per Pickering C.J):-

Apart from any consideration whether the course adopted by the learned Judge in relation to the ex parte order of the 8th July, 1930, was or was not well founded, the question emerges as to the precise character of the grievance which must be experienced by a person applying for a review of judgment under Order XLII. A person applying for a review under that Order must be “aggrieved by a decree or order.” The words “decree” and “order” are here used in the sense set out in the definitions in section 2 of the Civil Procedure Ordinance. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should be for review of the judgment upon which it is based. But, in my opinion, however aggrieved a person may be at the various expressions contained in a judgment or even at the various rulings embodied therein, unless that person is aggrieved at the formal decree or the formal order based upon judgment as a whole, that person cannot under Order XLII appear before the Judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The ratio decidendi expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to the suit. In these proceedings no resultant decree on the 29th August, 1930, had yet come into existence. Indeed no attempt to draw up any has yet been made. It is the duty of a party who wishes to appeal against, or apply for review of a decree or order to move the Court to draw up and issue the formal decree or order. (Underlying mine)

In the absence of the decree, the application for review was incompetent and fatally so.

The final and a more substantive issue that emerges in this appeal is whether an application for review is merited merely because one holds a contrary view from that of the decision maker or the latter’s decision sought to be reviewed is not sound in law. The sentiments expressed by Hon. D.N. Musyoka suggest that his ‘review’ of his senior colleague’s decision was simply informed by a difference in opinion on a point of law or, to put it in another way, the learned magistrate thought that his learned colleague was mistaken in law. This is what he said of his colleague’s judgment:-

“With due respect to the learned magistrate, the married daughters need not come and claim the property so long as they are listed as survivors of the deceased, it is for the court to summon

them and hear their views whether or not they are interested in the property.

The 1st respondent having had expressed her desire to have parcel No. 1451 registered in her name to hold it in trust for the other six sisters, the learned trial magistrate should not have proceeded to grant to the 1st respondent the property absolutely.”

The learned magistrate continued to say;

“The land in being disputed upon parcel No. 1451 is a family land to which each child is entitled to a beneficial or legal share, not under Kikuyu customary law, but under the constitution of Kenya 2010. There can therefore, be no question of the respondent giving a share of the land to the applicant and her sisters purely on the basis of her generosity or good heart.”

These remarks suggest to me that although the learned magistrate described his colleague’s judgment or parts thereof as a mistake or an error apparent on the face of record, he simply held a contrary view to that of his colleague on the interpretation of the law on inheritance; his sentiments, in my view, demonstrate a clear case of a difference of opinion on a point of law. An objective observer would conclude, and quite legitimately so, that he thought his colleague was mistaken on the proper procedure in confirmation proceedings and subsequently, the application of the proper law in distribution of a deceased’s estate.

Regardless of whether the learned magistrate, the author of the impugned judgment, was correct in interpretation and application of the law, both procedural and substantive, in matters inheritance, it was not within the constituency of Hon. D.N. Musyoka who, at most, held a coordinate jurisdiction to that of his colleague, to effectively overturn the latter’s judgment under the pretext of reviewing it. It matters not that he may have held what he thought was the correct position on the applicable law.

Looking at the learned magistrate’s judgment, it is quite apparent that she appreciated the evidence before her and was clear in her mind in the decision she ultimately came to. She was well aware that in law the appellant’s sisters were entitled to a share of their father’s estate irrespective of their marital status but that since they did not step forward to lay a claim on their share the learned magistrate was not giving them anything. I understand this to be what she meant when she said:-

The view of this court is that under Succession Act, a daughter cannot be discriminated when it comes to inheritance because of the marital status. As such, it even matters not that Jerioth had been married. If other daughters of the deceased had come to claim the property and they are married, this court would have allowed them to inherit their father’s property. But they have not. So the issue of Jerioth’s marital status is actually a non-issue. In the light of the foregoing, I find that Jerioth Maina the petitioner is the open (sic) who should inherit her father’s parcel of land No. Iriaini/Chehe/1451. I grant this property to the said Jerioth Wangui.

The learned magistrate may or may have not misapprehend the law yet even if she was so mistaken such a mistake or misapprehension of the law could not have been a cause for an application for review of her judgment under **Order 45** of the Civil procedure Rules.

A mistake or an error apparent on the face of record in the context of **Order 45** of the **Civil Procedure Rules** will neither invite an argument nor call for a decision on whether a magistrate or a judge correctly interpreted or applied the law; a proper forum for such an argument would be an appellate court.

The Court of Appeal deliberated on this point in **National Bank of Kenya Ltd versus Njau (1995-1998) 2EA 249 (CAK)**; at page 253 of the judgment, the Court said:-

A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for 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 the law cannot be a ground for review. (Underlining mine)

It is clear thus far that the decision by the learned magistrate purporting to review his colleague's decision cannot be allowed to stand; it is contrary to the law for review as we know it; in particular apart from the absence of anything to demonstrate that fresh evidence had been discovered or that there was an error on that face of the record, there was also nothing in the application to suggest that there existed any other sufficient reason that would ordinarily warrant a review of the judgment delivered by Hon. Lucy Mbugua on 8th February, 2012. I would, for reasons given, allow the appeal with no orders as to costs considering that the disputants are family members.

Dated, signed and delivered in open court this 2nd day of October, 2015

Ngaah Jairus

JUDGE