



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.854 OF 1993

IN THE MATTER OF THE ESTATE OF GEORGE KYUNA GATURUHO (DECEASED)

TERESIA WANGUI KARIUKI.....APPLICANT

VERSUS

LUCY NJERI KIUNA.....1ST RESPONDENT

MARGARET MUMBI KIUNA.....2ND RESPONDENT

RULING

Before me is a notice of motion filed by Teresia Wangui Kariuki (the Applicant) pursuant to the provisions of **Rule 63** of the **Probate and Administration Rules** and **Order 45 Rule 1&2** of the **Civil Procedure Rules** seeking orders from this court of review and the setting aside of the ruling delivered by Lenaola J on 31st January 2012. She further sought orders to restrain the Respondents from demolishing structures on the suit parcel of land. The application is supported by the annexed affidavit of the Applicant. The application is opposed. The Respondents, Margaret Mumbi Kiuna and Lucy Njeri Kiuna swore replying affidavits in opposition to the application. The Respondents filed grounds in further opposition to the application.

At the hearing of the application, this court heard oral rival submission made by Mr. Maina for the Objector and by Mr. Njoroge for the Respondents. Mr. Maina submitted that the reason the Applicant was applying to review the decision of Lenaola J was that the Learned Judge had misdirected himself by addressing issues in the ruling that were not the subject of the dispute. Learned counsel explained that the issue as to whether the Applicant was entitled to make the application for revocation of grant was no longer an issue for determination because this court (Kimaru J) had earlier on 17th May 2010 issued directions that the parties file further affidavits indicating their preferred mode of distribution of the estate of the deceased. It was on the basis of this direction that the Applicant filed written submission that formed the basis upon which the Learned Judge delivered his ruling. Mr. Maina submitted that the Learned Judge should have restricted himself to the issue of distribution and not delve on the issue of the revocation of grant because that issue had already been dealt with by the court. He urged the court to exercise its discretion and review and set aside the ruling of Lenaola J and proceed further to make an order for distribution of the estate of the deceased.

Mr. Njoroge for the Respondents opposed the application. While conceding that the court had issued

directions on 17th May 2010, he submitted that the ruling of the Learned Judge was made on the basis of the said directions. He submitted that what the Applicant was essentially seeking in the application for revocation of grant was for the properties of the deceased which had already been distributed to be again redistributed. He submitted that the issue of whether there should be another distribution other than the original distribution was canvassed before the Learned Judge. He argued that the ruling delivered by the Learned Judge addressed all the issues that were placed before him for determination. Mr. Njoroge submitted that the issues the Applicant was seeking to argue before this court by way of an application for review were actually issues which form a proper basis for an appeal before the Court of Appeal. He submitted that the properties that comprise the estate of the deceased were distributed long time ago when the grant was confirmed in 1993. He urged the court to dismiss that application with costs.

Under **Order 45 Rule 1** of the **Civil Procedure Rules**:

“(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 reasonable delay.”***

This court can review its decree or order if it is established that there is discovery of new and important matter which was not brought to the knowledge of the court at the time the order or decree was passed or where it is established that there is a mistake or error apparent on the face of the record. The court can also review its order or decree for any sufficient reason or where the ends of justice so demand. An important requirement is that the application for review must be filed without unreasonable delay.

In the present application, the ruling that is sought to be impeached in the application for review was delivered by Lenaola J on 31st January 2012. The Applicant lodged the present application on 21st December 2012. This was nearly a year after the ruling was delivered. The Applicant complains that the Learned Judge addressed issues which had been settled when the court earlier issued directions on how the application of revocation of grant was to be considered. She complains that the Learned Judge failed to address the core of her complaint which was essentially in regard to how the properties that comprise the estate of the deceased were to be distributed to the beneficiaries. The Respondents are of the contrary view. They argued that the Learned Judge had considered all the issues that were placed before him for determination, including the question of distribution.

This court has evaluated the facts of this application. It was apparent that the Applicant is challenging the ruling of Lenaola J on the basis of its merits. Although it appeared as if the Applicant is seeking to review the decision of the Learned Judge on the basis that there was an error or mistake on the face of the record, upon perusing the ruling of the Learned Judge, it was clear to this court that the Learned Judge addressed all the questions that were placed before him in the written submission that were filed by counsel for the respective parties to this application. The issue of whether there should be a redistribution of the properties that comprise the estate of the deceased was considered by the Learned Judge. In the considered view of this court, there is no error or mistake apparent on the face of the record that would lead this court to review the decision of the Learned Judge. The direction issued by this court on 17th May 2010 was not brought to the attention of the Learned Judge in the written submission that were filed by the parties. In any event, even if the said directions came to the knowledge of the Learned Judge, this court is of the view that the ruling he rendered may not have been any different.

Further, this court is of the opinion that the issues raised by the Applicant in the application are not issues for review but rather issues which constitute appropriate grounds for appeal. There was no error or

mistake apparent on the face of the record that would make this court exercise its discretion and review or set aside the ruling of Lenaola J. What the Applicant should do is to either appeal against the said decision or in the alternative proceed in the manner directed by Lenaola J in Paragraphs 15 and 17 of the said ruling. The Respondents shall have the costs of this application.

DATED AT NAIROBI THIS 6th DAY OF NOVEMBER 2013

L. KIMARU

JUDGE