



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: SICHALE, J. MOHAMMED & OLE KANTAL, JJ.A)

CIVIL APPEAL NO. 27 OF 2019

BETWEEN

HARRISON AMOLLOH OKUMU.....APPELLANT

AND

PEREZ OKUMU.....1ST RESPONDENT

HENRY OKUMU.....2ND RESPONDENT

BEATRICE ADHIAMBO OBIERO.....3RD RESPONDENT

CURRYIAN ANYANGO.....4TH RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Mombasa (Thande, J.)

dated 19th October, 2018

in

H.C Succession Cause No. 46 of 2014)

JUDGMENT OF THE COURT

Background

1. Whenever a litigant is aggrieved by a decision of the court, he/she generally has two options namely, to either appeal against the decision or seek review of the impugned decision. The distinction between the two options was succinctly captured by Platt, J.A in William Karani & 47 others vs. Wamalwa Kijana & 2 others [1987] eKLR as follows:

“Both Section 80 and Order XLIV commence by [be a means of curing gross or obvious errors when an appeal is allowed by the Act, from a decree or order, but no appeal has been preferred; and secondly in cases where no appeal is allowed at all. The broad division then is between the appeal procedure as the general method of curing errors, with its scope to deal with errors of evidential fact or law, or mixed fact and law, and the review procedure, to cure a narrower compass of defects, which cannot be allowed to stand in justice, simply because there is no appeal. From the nature of section 80 and order XLIV both procedures cannot be adopted at once.” [Emphasis supplied].

See also this Court’s decision in Mulembe Farm Limited & Another vs. John B. Masika & 3 others [2011] eKLR.

2. Similarly, the grounds for review are narrower in scope compared to an appeal. The grounds are discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay. See this Court’s decision in Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited [2020] eKLR.

3. Based on the distinction above, it follows that a ground which would be ideal for an appeal may not necessarily be a good one for an application for review. See *Abasi Belinda vs. Frederick Kangwamu and Another* [1963] E.A. 557. It is this very issue that is at the centre of this appeal, that is, whether the grounds advanced by the appellant for review of the High Court's ruling dated 2nd February, 2018 were well suited for the orders sought.

4. To place the above mentioned issue in context, a synopsis of the pertinent facts is necessary. Following the demise of **Clement Otieno Okumu** (Deceased) on 4th December, 2013, a grant of probate of his written Will was issued and confirmed on 26th June, 2014 and 27th February, 2017 respectively. **Perez Okumu** (the 1st respondent), **Henry Okumu** (the 2nd respondent) and **Beatrice Adhiambo Obiero** (the 3rd respondent) are the executors of the Deceased's Will. **Curryian Anyango** (the 4th respondent) is named in the Will as a former wife of the deceased.

5. It was subsequently discovered that the Deceased held three (3) bank accounts with **Standard Chartered Bank Limited** which were not included in his Will. Consequently, the appellant filed summons dated 10th July, 2017 seeking the rectification of the confirmed Grant to factor in the said bank accounts. Of importance, he called upon the High Court to determine whether the bank accounts in question formed part of the Deceased's intestate Estate.

6. Upon hearing the arguments advanced by the concerned parties, the High Court (**Thande, J.**) in a ruling dated 2nd February, 2018 issued the following orders:

“

i. The proceeds of Saving Account No... Fixed Deposit Account No... and Current Account No... all at Standard Chartered Bank Limited form the deceased's intestate estate.

ii. ...

iii. Perez Clement Okumu, the widow of the deceased shall have a life time interest in the balance of the proceeds of the said accounts and upon her death or remarriage, the same shall devolve upon the children of the deceased in equal shares.

iv. ...”

7. The above mentioned decision did not go down well with the appellant, the 3rd and 4th respondents. They each filed identical applications dated 19th February, 2018 and 20th February, 2018 respectively seeking *inter alia*, review of the ruling dated 2nd February, 2018. In particular, they sought the setting aside of limb three (3) of the orders which granted the 1st respondent a life interest in the funds in the bank accounts (the Funds). They also prayed for the Funds to be distributed in accordance with **Section 40** of the **Law of Succession Act**. In other words, for the Funds to be divided according to the number of children in each house with the surviving wife in each house being added as an additional unit.

8. The applications were premised on the grounds that firstly, there was an error apparent on the face of the record. In that regard, the appellant and the 3rd and 4th respondents deposed that the learned Judge distributed the intestate Estate of the Deceased on the presumption that the Deceased had only one wife (the 1st respondent). However, the Deceased was polygamous and had three (3) wives and a girlfriend whose children had been recognized in his Will. Secondly, there was discovery of new and important evidence which could not be adduced before the ruling dated 2nd February, 2018 was delivered. The new piece of evidence were letters from the Kabondo Elders Development Organization dated 1st March, 2016 and the Chief, Wang'chieng Location dated 11th December, 2013. The letters indicated that the Deceased had three wives, that is, the 1st & 4th respondents and **Rusanael Akumu Otieno**.

9. According to the appellant, the 3rd and 4th respondents, that particular evidence could not be reasonably adduced when the High Court was considering the application for rectification of the confirmed Grant which culminated in the ruling dated 2nd February, 2018. This is in view of the fact that the only question that fell for consideration by the High Court was whether the bank accounts at **Standard Chartered Bank Limited** formed part of the intestate Estate of the Deceased as opposed to distribution of the Funds therein.

10. The 1st and 2nd respondents strenuously opposed the applications by calling into question the *locus standi* of the appellant and the 3rd and 4th respondents to lodge the same. They also contended that the fact that the Deceased had former wives was not a new issue since the letters sought to be relied upon were already in the court record and had been considered by the High Court in an earlier application by the 4th respondents for revocation of the Grant of Probate. In any event, the 1st and 2nd respondents argued that the Deceased was categorical in his written Will that: he had only one wife, the 1st respondent; that he was separated from the 4th respondent, **Rusanael Akumu** and his girlfriend, **Pauline Amimo**; and that he had disinherited his former wives and girlfriend.

11. Faced with the divergent positions, the learned Judge by a ruling dated 19th October, 2018 dismissed the applications. In her own words she stated as follows-

“The Applicants have argued that the funds ought to have been distributed in accordance with Section 40 of the Act. To them, the Court applied the wrong provision of the law in the distribution of the funds and thereby reached an erroneous conclusion of law...Contrary to what the Applicants would have this Court to believe, the said letters which are already on record cannot be said to be new and important evidence that could not have been availed at the time the subject order was made.

The issue of the wives of the deceased was settled by the deceased himself in the Will who clearly stated that he had only 1 wife, Perez. This Court has in its previous rulings of (sic) pronounced itself on the marital status of the deceased. What the Applicants seek in their identical applications is for this Court to reopen the issue and find that the deceased had 3 wives and proceed to

distribute the funds accordingly. To do so would be tantamount to the Court sitting on appeal of its own decision, an undertaking over which this Court is devoid of jurisdiction.”

12. It is that ruling which the appellant is challenging on the grounds that the learned Judge erred in law and fact by-

- a) *Holding that the High Court had pronounced itself on the marital status of the Deceased;*
- b) *holding that the High Court’s application of Section 40 of the Law of Succession Act could only be a subject of an appeal;*
- c) *holding that the Deceased had one wife yet there were other two former wives;*
- d) *disinheriting the children of the deceased’s former wives; and*
- e) *dismissing the review application.*

Submissions by Counsel

13. By consent of the parties the appeal was disposed by way of written submissions filed on their behalf. The appellant submitted that by virtue of **Rule 63** of the **Probate and Administration Rules**, which imports the application of **Rule 45** of the **Civil Procedure Rules**, he had an option to either appeal or file an application for review of the ruling dated 2nd February, 2018, as he did. As far as he was concerned, the learned Judge had misconstrued **Section 80** of the **Civil Procedure Act**, **Rule 45** of the **Civil Procedure Rules** as well as the applicable principles in an application for review of a decision. Towards that end, reference was made to this Court’s decisions in **Muyondi vs. Industrial Commercial Development Corporation & Ano. [2006] 1 E.A. 246** and **Francis Origo & Ano. vs. Jacob Kumali Mungala [2005] 2 KLR 307**.

14. Counsel went on to argue that the error which was apparent on the face of the record as pertaining the ruling dated 2nd February, 2018, was that the learned Judge directed the Deceased’s intestate Estate to be distributed in accordance with **Section 35(1)** of the **Law of Succession Act** whilst in point of fact, the Deceased had more than one wife in his lifetime. As per the appellant, the error was one of fact as opposed to appreciation of the law. The appellant further contended that the facts were before the learned Judge hence such an error could be corrected through review. To buttress that line of argument the case of **National Bank of Kenya Ltd. vs. Ndungu Njau [1997] eKLR** was cited.

15. The learned Judge was faulted for holding that the issue of the Deceased’s marital status had been determined which, according to the appellant, was not the case. In the appellant’s view, reliance on the Deceased’s Will by the learned Judge to find that the Deceased had one wife contravened **Section 29(a)** of the **Law of Succession Act** which recognizes former wives of a deceased husband.

16. The appellant contended that the learned Judge in declining to review the ruling dated 2nd February, 2018 disinherited the children of the former wives of the Deceased who had been recognized and provided for by the Deceased in his Will. Moreover, the appellant submitted that the learned Judge had overreached her discretion in directing the distribution of the intestate estate by the ruling dated 2nd February, 2018. This was in view of the fact that the issue before the learned Judge was limited to a determination of whether the bank accounts which were not included in the Will formed part of the Deceased’s intestate Estate. The appellant urged this Court to allow the appeal.

17. Supporting the appeal, the 3rd respondent relied on a cross-appeal which she filed on 1st April, 2019 and reiterated the submissions made by the appellant. She added that there was no dispute or argument as to whether the Deceased had been survived by three wives, two of whom were his former wives having been separated from him. The 3rd respondent further submitted that the learned Judge proceeded erroneously to hold otherwise and direct distribution of the intestate Estate based on the misconception that the Deceased had only one wife (the 1st respondent). The 3rd respondent further argued that the learned Judge erred in assuming that the Deceased’s children belonged to one wife by invoking **Section 35** of the **Law of Succession Act** and holding that the 1st respondent holds a life interest over the intestate Estate. The 3rd respondent further submitted that the funds which are subject of the intestate Estate should be distributed as prescribed under **Section 40** of the **Law of Succession Act**.

18. On their part, the 1st and 2nd respondents opposed the appeal and argued that the alleged error being pointed out by the appellant is one which has to be established by a long-drawn process of reasoning and on points where there may conceivably be two divergent opinions. In other words, as the 1st and 2nd respondents put it, the Court will be forced firstly, to consider all the necessary evidence in order to determine how many legal wives the Deceased had. Secondly, to determine whether or not any of the individuals seeking to inherit from the Deceased’s Estate can do so. The 1st and 2nd respondents submitted that all in all, the error alluded to by the appellant and the 3rd and 4th respondents cannot be described as an error apparent on the face of the record. In that regard, reliance was placed on the case of **Francis Njoroge vs. Stephen Maina Kamore [2018] eKLR**.

19. According to the 1st and 2nd respondents, the appellant did not demonstrate that he had made a discovery of new and important matter which would warrant the review sought. The 1st and 2nd respondents further submitted that it was common ground that the former wives of the Deceased were mentioned in his Will which was before the court and at the disposal of the appellant. The 1st and 2nd respondents submitted that the Deceased in his Will categorically disinherited his former wives and girlfriend. In point of fact, the 3rd respondent in her own evidence testified that her mother (**Rusanael Akumu**) who was one of the former wives of the deceased, was not only aware of the succession proceedings but also had no intention of laying any claim to the Estate.

20. In conclusion, the 1st and 2nd respondents submitted that the learned Judge correctly applied the law and rightly dismissed the appellant’s and cross-appellant’s applications for review. Counsel urged us to uphold the impugned decision.

Determination

21. We have considered the grounds of appeal, submissions filed on behalf of the parties, the authorities cited and the law. Whether or not a court should accede to an application for review of its decision is a matter of discretion. As such, the appellant by this appeal is calling upon this Court to interfere with the discretion of the High Court in the impugned ruling. Before we can do so, we ought to be satisfied that the appellant has met the requisite criteria enunciated in **Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others** [2014] eKLR. The criteria being that we ought not to interfere with the exercise of discretion unless we are satisfied that the learned Judge misdirected herself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the learned Judge was clearly wrong in the exercise of her discretion and occasioned injustice.

22. It is not in dispute that the ground that the appellant relies on to implore us to allow this appeal is that there was an error apparent on the face of the record where the ruling dated 2nd February, 2018 was concerned. What then constitutes an error apparent on the face of the record? In **Nyamogo & Nyamogo vs. Kogo** [2001] EA 174, this Court addressed that question as follows:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.” [Emphasis supplied].

23. Similarly, Sir Dinshah Fardunji Mulla in **Mulla, The Code of Civil Procedure, 18th Edition** at page 3665 had this to say:-

“An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review.....error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The scope of the power of review as envisaged under O 47, r 1, Code of Civil Procedure (India's equivalent of our Order 45 of the Rules) is very limited and the review must be confined strictly only to the errors apparent on the face of the record. A re-appraisal of the evidence on the record for finding out the error would amount to an exercise of appellate jurisdiction, which is not permissible by the statute. ...” [Emphasis supplied].

24. Applying the above to the instant appeal, did the ground levelled by the appellant amount to an error apparent on the face of the record to warrant the review sought? We do not think so. To begin with, our reading and appreciation of the grounds of appeal together with the submissions by the appellant, leaves no doubt that the alleged error was that the learned Judge presumed, wrongly so, that the deceased had one wife. Thus, in the appellant's view, based on that misconception the learned Judge directed the distribution of the intestate estate in accordance with **Section 35(1)** as opposed to **Section 40** of the **Law of Succession Act**. In as much, as the appellant contends otherwise, the error alluded to goes to the application of the particular sections of the law by the learned Judge to the particular case, which the appellant deemed was erroneous. Therefore, the same cannot be properly classified as an error apparent on the face of the record. Our position is fortified by the sentiments of this Court in **Pancras T. Swai vs. Kenya Breweries Limited** [2014] eKLR as follows:-

“The appellant's right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the Court was wrong either on account of wrong application of the law or due to failure to apply the law at all.”

25. Besides, the questions of whether the Deceased had more than one wife; whether his former wives in light of his Will were entitled to a claim in the intestate Estate; whether the children of the Deceased's former wives had been disinherited as a result of the 1st respondent being vested with a life interest over the funds; and whether the High Court had previously made a finding on the marital status of the Deceased would require elaborate arguments and evidence to determine, which removes such grounds from the purview of an application for review. In that regard, we are guided by the case of **Mary Wambui Njuguna vs. William Ole Nabala & 9 others** [2018] eKLR where this Court expressed-

“We also need to underscore the fact that when a court is sitting on review, it is not sitting on appeal of its own decision. It is for that reason that the alleged errors must be apparent on the face of the record without inviting any interrogation or protracted arguments thereon.”

26. Counsel for the appellant contended that the learned Judge exceeded her mandate in distributing the intestate Estate in the impugned ruling; and that she violated **Section 29(2)** of the **Law of Succession Act** which recognizes former wives of a Deceased by granting the 1st respondent with a life interest over the Funds, were not raised in the application for review. We are cognisant that such grounds would require protracted arguments to be established and are therefore not suitable for an application for review.

27. In the end, we find no reason to interfere with the learned Judge's exercise of discretion in dismissing the applications for review. As a result, the appeal and cross appeal lack merit and are hereby dismissed but with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR