IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 23 OF 2014

BETWEEN

JAMENY MUDAKI ASAVA..………....…………….………APPELLANT

AND

1. **BROWN OTENGO ASAVA**
2. **AUTHUR MWANZI ASAVA……….…..……………RESPONDENTS**

(Appeal from the ruling of the High Court of Kenya at Kakamega Chitembwe, J.) dated 27th February 2014

in

SUCCESSION CAUSE No. 278 of 2007)

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JUDGMENT OF THE COURT

This is an appeal from the ruling of the High Court of 27th February 2012, (Chitembwe, J.) in ***Succession Cause No. 278 of 2007*** in the matter of the Estate of Kenzia Dalitsu alias Ketsia Dalidzu ***(Deceased),*** where a dispute arose in respect of the distribution of the sole property of the Estate, namely, ***L.R. No. Kakamega/Mbale/532 (the disputed plot),*** between the appellant and the respondent who are brothers.

The background to the dispute is that, following the demise of the deceased, the appellant filed for Grant of Letters of Administration intestate for the estate of the deceased, his mother, on 10th April 1990 which was issued on 17th December 1991 and confirmed on 3rd September 2002.

The respondents and objectors applied for the revocation of the Grant in their summons dated 11th February 1991, contending that the Grant was obtained without their knowledge and concealment by the appellant of the fact that the respondents were also heirs. On 3rd August 2006 the High Court annulled the Grant and the confirmation of Grant of Letters of Administration to the appellant.

Following the revocation, the respondents applied for, and obtained a Grant of Letters of Administration

of the deceased's estate on 6th August 2007. In their application they had listed the following as the beneficiaries of the Estate:

1. Brown Otengo Asava

2. Authur Mwanzi Asava

3. Jameny Mudaki Asava

It was their proposal that the disputed plot, the sole asset in the deceased's estate, be distributed equally amongst the three brothers.

In response to this, on 11th November 2008 the appellant filed for revocation of this Grant for reasons that the respondents had already received their share of inheritance from their father's estate, and that the disputed plot which was the only asset listed in the deceased's estate was specifically intended for the benefit of the appellant as the last born child. That it would amount to a double inheritance for the respondents, if they were to share the disputed plot with the appellant.

On 10th May 2012, the High Court ruled that the disputed plot was to be shared equally amongst the three brothers. The appellant was dissatisfied with the decision of the High Court and in an application filed on 24th July 2012, sought a review of the decision of the High Court of 10th May 2012, and also seeking the following orders:

a) This Honourable court be pleased to review the ruling made on 10/5/2012.

b) That upon granting prayer (a) above, a stay be granted pending the hearing and determination of this application.

c) The Land Registrar of Kakamega Land Registry be barred for registering new entries or resulting numbers from LR KAKAMEGA/MBALE/532 pending the hearing and determination of their application.

d) Costs of this application be provided for.

In his affidavit in support of the application, the appellant repeated his argument that, since the respondents had already received their own parcels of land, the disputed plot which was in the deceased's name was intended for the benefit of the appellant.

The High Court dismissed the application for review when it found that no new information had been presented by the appellant for the consideration of the court to warrant a review of the court's ruling of 10th May 2012.

It is this ruling that has provoked the appeal to this Court by the appellant on the following grounds:

1. The trial Judge erred in law and in fact in failing to appreciate that the respondents had been given their respective shares of land which was larger namely that KAKAMEGA/LYADUYWA/1268 and 1265 and the Court ought to have taken the benefit into consideration.

2. The trial judge erred in law and in fact in failing to appreciate that the appellant was entitled to land parcel no. KAKAMEGA/MBALE/ 532 exclusively.

3. The trial judge erred in law and in failing to appreciate the ingredients of review.

4. The trial judge erred in law and in fact in holding that the matter was res judicata.

In his submissions, ***Mr. Athunga***, learned counsel for the appellant submitted that, the learned judge was wrong to conclude that the disputed plot was to be distributed equally for reasons that the parties had all benefitted from their father, Luka Azava's estate in that, the 1st respondent had already received parcel L. R No. Kakamega/Lyaduywa/1268 comprising 0.36 hectares, the 2nd respondent had received parcel L.R No. Kakamega/Lyaduywa/1265 comprising 0.29 hectares, while the appellant had only received parcel L.R No. Kakamega/Lyaduywa/1269 comprising 0.07 hectares from their father, and that since the disputed plot was registered in the deceased's name and comprised 0.37 hectares was the appellant's entitlement.

Counsel contended that from the judgment there was an error apparent on the record as that the learned judge failed to equally distribute the properties to each of the beneficiaries, and in the result, the respondents had received larger portions of the deceased's property than the appellant. For this reason, the appellant was entitled to exclusive ownership of the disputed plot. Counsel further argued that, the issue of res judicata did not arise as the initial application was for revocation of the grant of letters of letters of administration to the deceased's estate.

Ms. M. Bikeyo, learned counsel for the respondents opposed the appeal, and submitted that the application for review did not meet the threshold required under ***Order 45*** of the ***Civil Procedure Rules***. That no new information or evidence had been placed before the court, that there was no error apparent on the face of the record nor was there any misrepresentation. No sufficient grounds were placed before the court to warrant a review. Counsel submitted that what the appellant was seeking to challenge was the court's decision of 10th May 2010, on the basis that the court failed to appreciate that the properties were not equally distributed, as the properties initially distributed were in respect of their father's estate, while the disputed plot was in respect of their mother's estate. Counsel submitted that this was not new information, but amounted to a challenge of the court's ruling, and as such ought to have been the subject of an appeal. Counsel concluded by stating that at no point did the High Court state that the matter was res judicata.

We have considered the record of appeal, the submissions of counsel and the law and will begin by considering when a court may review its judgment or order.

Order 45 of the ***Civil Procedure Rules*** is unequivocal on the basis upon which a court can review its orders. The conditions are a) there must be a discovery of a new and important matter which after the exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed, or the order was made; or b) there was a mistake or error apparent on the face of the record; or there were other sufficient reasons; and c) the application must have been made without delay.

The appellant's complaint before the High Court was that there was new and important information that was not disclosed to the court at the hearing of the application.

In the ruling on review the learned judge stated,

> ***"In my ruling of 10/5/2012, I held that the three sons were each given their own land. The applicant herein was given*** Plot KAKAMAGA/LYDUYWA/1269 ***which he sold while the respondents got plot number 1265 and 1268. The applicant has not denied that he got 1269. If each of the beneficiaries had already been allocated land, the only logical conclusion is for plot 532 to be shared equally. This was the proposal made by the respondents in essence therefore, all the issues raised have already been dealt with by the court."***

And with that, the learned judge dismissed the appellant's application on the basis that no new information had been presented by the applicant to review the ruling of 10th May 2012.

The question that arises is whether there was any new information, or an error on the face of the record that the High Court overlooked or failed to take into account. From the affidavit in support of the appellant's application for review, the central issue was the appellant's contention that he being the last

born the disputed plot ought to have been given to him.

From our re-evaluation of the background of this case, and the material before us, the information in question was all times available to the court, and the court would have taken into account in arriving at its determination. It was not fresh or important information or evidence that was not in the appellant's knowledge at the time of the decision.

On the argument that the learned judge did not distribute the acreage of the combined properties of the deceased and her deceased husband equitably resulting in an error on the record, we are not satisfied that the appellant has demonstrated how this error arises. The issue was not canvassed before the High Court at any time during the main hearing, or indeed in the application for review. If there was an error, it ought to have been obvious and unambiguous to us, but as we can discern no such error from the record, the only conclusion that can be reached is that the High Court rightly dismissed the application for review for failure by the appellant to meet the threshold requirements that would warrant an order of review.

As a corollary to this, the appellant's dissatisfaction with the manner in which the court distributed the disputed plot, seems to us to be a challenge of the decision of the High Court, which perhaps ought to have been ventilated on appeal, rather than as a review as was the case here.

At this juncture, we consider it opportune to repeat the sentiments expressed by this Court in ***Origo & Another vs Mungala*** ***[2005] 2 KLR 307*** ,

> ***"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. "***

In conclusion, we find no reason to interfere with the ruling of the court below. Accordingly, the appeal is dismissed, with costs to the respondents.

Dated and delivered at Kisumu this 19th day of October, 2015.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

<u>DEPUTY REGISTRAR</u>