



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 400 OF 2006**

**IN THE MATTER OF THE ESTATE OF WAMBUA NGUITHA MAITHA (DECEASED)**

**DOMINIC NZIOKA WAMBUA.....APPLICANT**

**VERSUS**

**FLOSLIA MARY MBISA WAMBUA**

**JOSEPHINE KALEE WAMBUA .....RESPONDENTS**

**RULING**

**The Application**

The Respondents, Flosia Mary Mbisa Wambua and Josephine Kalee Wambua, have filed the instant application by way of a Notice of Motion dated 8th February 2015, seeking orders that the ruling delivered herein on 2nd December 2015 be reviewed and substituted for an order of this court. The said ruling was delivered by Jaden J., pursuant to an earlier application dated 14th March 2012 that had been filed by the Applicant, Dominic Nzioka Wambua. The learned Judge in the said ruling revoked the confirmed grant that had been issued herein to the Respondents, who are siblings of the Applicant.

The grounds for the application are stated in the supporting affidavit sworn on 8th February 2015 by the 1<sup>st</sup> Respondent and in written submissions dated 6th June 2016 filed by the Respondents' Advocates, Mutisya & Company Advocates. These are that the ruling delivered on 2nd December 2015 revoked a grant that was issued on 19<sup>th</sup> December 2012, when there is no such grant issued on the said date in this cause, as the grant herein was issued on 9th December, 2011.

Further, that there are issues pertinent to this case that were never considered by the Honourable Judge, and material evidence that was inadvertently left out which would persuaded the court to determine the case in the Repondents' favour including the fact that the parcels were Applicants' mother Mbithe Ngombalu Wambua in the schedule of distribution had been sold to treat her, and that Dominic Wambua hid the title to Mavoko Town Block3/2266 for the purpose of blocking subdivision of the said land, which subdivision would help the Respondents get money to treat their mother. Lastly, that Dominic Nzioka Wambua failed to disclose to the court that he has been selling parcels of land forming part of the estate of the late Wambua Nguitha since the year 2007, and all the beneficiaries benefited in the estate equally as per the schedule of distribution.

The Respondents further averred that they have no problem with Dominic Wambua being appointed as one of the administrators of the estate of Wambua Nguitha, and their proposal is that Dominic Wambua be appointed as an administrator of the estate of the late Wambua Nguitha, along with Flossia Mary

Mbisa Wambua and Josephine Kale Wambua, and the schedule of distribution remain as it is or is rectified as regards the controversial parts.

### **The Response**

The Applicant's response is in a replying affidavit he swore on 9th May 2016 and submissions dated 8th August 2016 filed by his Advocates, Mulwa Isika & Mutia Advocates. According to the Applicant, it is clear that the grant that the court was being asked to revoke had been confirmed on 19.12.2011, and this court lacks powers to grant the orders sought as it will be tantamount to overturning a decision of a judge with similar jurisdiction. It was submitted that all the issues raised by the Respondents were addressed in the ruling delivered by Jaden J.

On the proposal made by the Respondents, the Applicant submitted that he came to court because the distribution had not been done in a fair and just manner, and retaining the schedule of distribution will amount to closing out the issues he raised concerning the estate and sanitizing a grant which was improperly obtained. The Applicant submitted that the solution lies in this Court appointing new administrators and issuing a fresh grant for the administration of the estate.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the Respondents and Applicant. The issue to be decided is whether the ruling delivered by this Court (Jaden J.) on 2nd December 2015 is amenable to review. The provisions of Order 45 of the Civil Procedure Rules avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. The said Order is one of the Orders of the Civil Procedure Rules that is listed in Rule 63 of the Probate and Administration Rules as applying to succession causes.

Order 45 rule 1 of the Civil Procedure Rules provides the circumstances under which an order can be reviewed. The said provisions state that:

**“ any person considering himself aggrieved by:**

**a. a decree or order from which an appeal is allowed but from which no appeal has been preferred or**

**b. a decree or order from no appeal is hereby allowed**

**and 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.”**

The conditions that must be met in an application for review of a decree or order are therefore as follows:

- i) There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
- ii) Where there is mistake or error apparent on the face of the record,
- iii) For any other sufficient reason,
- iv) The application must be made without unreasonable delay.

The main grounds raised by the Respondents are that there was an error on the face of the record of the said ruling, and there is new evidence that this Court should consider and review the ruling. The error relates to the date the grant that was revoked was issued by this Court and the Respondents claim that the said grant was issued on 9<sup>th</sup> December 2011 and not on 19<sup>th</sup> December 2012 as stated in the ruling.

The Court of Appeal in **National Bank of Kenya Ltd v Njau, (1995 – 1998) 2 EA 249** which was also followed in the case of **Nyamogo v Nyamogo Advocates v Kogo, (2000) 1 EA 173**, held that an error should be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points of which there may conceivably be two opinions.

It is noteworthy in this respect that the Summons for Revocation and Annulment of grant dated 14<sup>th</sup> March 2012 filed by the Applicant, and pursuant to which the impugned ruling was made, did correctly indicate that the grant that was sought to be revoked was the grant issued to the Respondents that was confirmed on 19<sup>th</sup> December 2011, as is indicated in the Certificate of Confirmation of Grant issued by this Court to the Respondents. The mistake appears to have originated from the Certificate of Confirmation of Grant issued by the Court, which indicated that the grant was confirmed on 19<sup>th</sup> December 2011, yet the certificate is shown to have been issued on 9<sup>th</sup> December 2011. The record of the proceedings on the other hand shows that the confirmation took place on 9<sup>th</sup> December 2011.

It is my view that although indeed there was an error that was made in the ruling as to the date of issue of the grant herein, the same is a clerical and typographical error that can be corrected by the court, and does not go into the substance of the ruling to warrant a review.

As regards the new evidence that the Respondents claim to be in possession of, the material time under Order 45 Rule 1 of the Civil Procedure Rules with regard to the existence of the new evidence is the time when the decree was passed or the order made, and that such evidence was not within a person's knowledge or could not be produced by him. No explanation has been given why the evidence the Respondents consider material was not adduced during the hearing of the application dated 14<sup>th</sup> March 2012 in response to the Applicant's application for revocation of grant, and it my finding that the same cannot be found to be new evidence for purposes of review.

The above findings notwithstanding, I note that both the Respondents and Applicant are in agreement that there is need for new administrators to be appointed with respect to the estate of the Deceased. To this extent, the ruling given herein by Jaden J. on 2nd December 2015 is reviewed only to the extent of correcting the date of the grant that was revoked to be the confirmed grant issued to the Respondents on 9<sup>th</sup> December 2011, and by making additional orders that the Respondents, Applicant and beneficiaries of the estate of the Deceased shall file a consent on the persons to be appointed as the new administrators of the estate of Wambua Nguitha Maitha (Deceased) within 60 days of the date of this ruling, following which further directions shall be given as to the distribution of the Deceased's estate.

The Respondent's Notice of Motion dated 8<sup>th</sup> February 2015 therefore succeeds only to the extent of the foregoing orders. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 27<sup>th</sup> day of July 2017.

**P. NYAMWEYA**

**JUDGE**