.IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU

& J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 22 OF 2014

BETWEEN

FRED WAFULA NGICHABE ……………………………….....1ST APPELLANT

BATHOLOMEW JUMA WAFULA …………………………..... 2ND APPELLANT

PETRONILLA WAFULA MAKOKHA …………………..…. 3RD APPELLANT

AND

EVANS WAFULA WEPUKHULU …............................ 1ST RESPONDENT

DAVID WAFULA WEPUKHULU ……………………...….2ND RESPONDENT

MOSES MAUNDENDE WEPUKHULU……………....……3RD RESPONDENT

AMOS WANAMBISI WEPHUKHULU ……………......…..4TH RESPONDENT

ALBERT NGUTUKU WEPHUKHULU …………………...5TH RESPONDENT

FREDRICK NYONGESA WEPUKHULU ….……...……6TH RESPONDENT

WILBERFORCE MUTAMBO MALOTELO …………....7TH RESPONDENT

WANAMBISI STEPHEN JUMA …………..……………….8TH RESPONDENT

(Being an appeal from a ruling given in the High Court of Kenya at Kakamega, (Hon. S. Chitembwe, J) dated 26th February 2014

in

Succession Cause No. 124 of 1986)

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JUDGMENT OF THE COURT

[1] This is an appeal brought by **Fred Wafula Ngichabe, Batholomew Juma Wafula** and **Petronilla Wafula Makokha** *(herein the 1st 2nd and 3rd appellants respectively),* against the ruling delivered by Chitembwe J on 26th February 2014. In the ruling the learned Judge dismissed a Notice of Motion dated 5th October 2012, lodged by Evans Wafula Wepukhulu, *(1st respondent herein)* in which the 1st respondent had sought an order for stay of execution, review and or setting aside of the orders made on 15th May 2012.

[2] The motion subject of the impugned ruling was precipitated by orders made by the learned judge following the hearing of a Summons dated 24th September 2011 for revocation or annulment of grant of letters of administration issued to the 1st respondent for the estate of the late Wepukhulu Wanambisi Maundende *(hereinafter referred to as the deceased).* David Wafula Wepukhulu, Moses Maundende Wepukhulu, Amos Wanambisi Wepukhulu, Albert Ngutuku Wepukhulu, Fredrick Nyongesa Wepukhulu, Francis Mukangala Wepukhulu, Wilberforce Mutambo Malotelo, and Wanambisi Stephen Juma *(the 2nd to 8th respondents respectively),* lodged the summons for revocation of the grant.

[3] In the summons, the 2nd to 8th respondent sought the following orders:

a) That a restriction/inhibition be placed on parcel numbers LR. E./Bukusu/N. Sangalo/661, 1483, 1484, 1485, 1702, 1703, 1704, 1705 and any other title created therefrom pending the hearing and determination of the objection.

b) That the grant of letters of administration to the Petitioner issued on 27th August 1986 and confirmed on 24th July 1987 be revoked forthwith.

c) That the registration of the Petitioner, the resultant registration, subdivision of land parcel number LR. E Bukusu/N.Sangalo/661 pursuant to orders in this cause or in Bungoma SRMCC No. 93 of 1988, or any other order be and are hereby cancelled and or set aside so as to restore entry No.1 of 3.3.1969 in LR. No. E. Bukusu/N.Sangalo/661 in the name of Wepukhulu Wanambisi Maundende.

d) That fresh grant be issued in the name of some of the objectors.

e) That the proceedings in Bungoma HCCC No.55 of 2010 and HCCC No. 68 of 2010 be stayed pending the hearing and determination of the objection.

f) That the vesting orders in Bungoma SRMCC 193 of 1988 be set aside and the file be deemed closed.

[4] The 2nd to 8th respondents' application was premised on the ground that the grant issued to the 1st respondent was obtained fraudulently by the making of a false statement or concealment of material information, and that the 1st respondent had failed to properly administer the estate. It was contended, *inter alia,* that the deceased had three wives; that LR. No. E. Bukusu/N. Sangalo/661 measuring approximately 107 acres being the only asset in the deceased's estate should have been distributed equally among the three households; that instead the 1st respondent registered himself as the sole and absolute owner of the land; and that the 2nd to 7th respondents who are sons of the deceased and equal bona fide beneficiaries together with the 1st respondent, have been excluded from the distribution of the estate.

[5] Further, it was alleged that the 1st and 2nd appellant had illegally, using a court order that had been set aside by the High Court, caused LR. No. E. Bukusu/N. Sangalo/661 the only asset in the estate of the deceased to be subdivided into LR. No E. Bukusu/N. Sangalo/1483, 1484 and 1485; and that LR. No E. Bukusu/N. Sangalo//1483 was further subdivided into LR. Nos E. Bukusu/N. Sangalo/1702, 1703, 1704 and 1705.

[6] The High Court (Chitembwe J) having heard the summons application, allowed the application essentially granting all the prayers sought, as well as further orders for a fresh grant to be issued in the joint names of David Wafula Wepukhulu and Moses Maundende Wepukhulu, and directing that the two administrators do file an application for confirmation indicating the proposed distribution within 30 days. These were the orders *(hereinafter referred to as original orders)* that were subject of the 1st respondent's motion for stay of execution, review and or setting aside.

[7] The 1st respondent's motion was supported by two affidavits sworn by the 1st and 2nd appellants respectively. The 1st appellant averred that he was the registered proprietor of LR. No. E. Bukusu/N. Sangalo/1485 having purchased the property from the deceased in 1974; that the land was a subdivision of LR. No. E. Bukusu/N. Sangalo/661; that the deceased land was subdivided into three portions: LR No. E. Bukusu/N. Sangalo/1485 that the deceased sold to 1st appellant; LR. No. E. Bukusu/N. Sangalo/1484, which the deceased sold to one Peter Khisa Wamukota; and LR. No. E. Bukusu/N. Sangalo/1483, which the deceased retained. The 2nd appellant stated that the subdivision and transfer of the land was done in 1977 following consent from the Land Control Board.

[8] The 2nd appellant also deponed that he purchased LR. No. E. Bukusu/N. Sangalo/1703 and 1705 from the deceased; that the two parcels were among the four subdivisions from the deceased's property known as LR No E.Bukusu/N. Sangalo/1483; that the deceased sold the other subdivision LR No. E. Bukusu/N. Sangalo/1704 to one Eliud Were, and retained LR No E.Bukusu/N.Sangalo/1702; that the deceased died in December 1980 before transferring LR No. E.Bukusu/N. Sangalo/1703 and 1705 to 2nd appellant; that the 2nd appellant sued 1st appellant as the administrator of the deceased's estate and obtained judgment in his favour including a transfer and vesting order of the land into his name. The court was therefore urged that reinstating the deceased's land to LR. No. E. Bukusu/N. Sangalo/661 was an exercise in futility, and an abuse of the court process.

[9] In his ruling the learned judge noted that the application dated 24th September 2011 was resolved through a consent agreed upon by the parties that had the effect of revoking the grant confirmed on 24th July 1987, and restoring the land to its original number as well as setting aside the vesting order issued in Bungoma SPMCC 193 of 1988. Further that the decision of the court in Bungoma SPMCC 193 of 1988 was set aside in Kakamega HCCC No.133 of 1989 and the vesting order was therefore of no effect.

[10] The learned Judge therefore declined to vary or set aside his original orders and directed that since the applicants were in occupation of a portion of the deceased's land, and the grant had not been confirmed, they were at liberty to apply to be recognized as liabilities to the deceased's estate to the extent of their respective portions of land which they were occupying.

[11] The appellants have raised 5 grounds in their memorandum of appeal, in which they fault the learned judge: for declining to set aside the original orders; holding that the appellant's titles were obtained by specific performance through Bungoma S.P.M.C.C No. 193 of 1988; failing to analyze all the evidence placed before him by the appellants; upholding the respondent's consent to set aside the grant which had been confirmed on 24th July 1987, without considering the interest of the appellants; by protecting the abuse of the due process of the court by staying the proceedings of Bungoma HCCC No.

55 & 68 of 2010.

[12] Hearing of the appeal proceeded through written and oral submissions. Mr. J.S Khakula represented the appellants, while Mr. G. Fwaya represented the respondents.

[13] In their submissions the appellants took issue with the learned Judge's refusal to review or vary the original orders, maintaining that this was an error of law and an abuse of the due process of the court; that since by the time of the deceased's death, LR. No. E. Bukusu/N. Sangalo/661 to which the proceedings related had already been subdivided, the consent to resurrect LR. No. E. Bukusu/N. Sangalo/661 had an ulterior motive which was to hide what the deceased had already done with a view to denying the appellants their rights over land which they had purchased; that the administrator could not by consent undo what had been done before the death of the deceased, that by the time the deceased died in December 1980 title No LR. No. E. Bukusu/N. Sangalo/661 had been closed on subdivision and only LR. No. E. Bukusu/N. Sangalo/1702 remained in the deceased's name, while LR. No. E. Bukusu/N. Sangalo/1703, 1704 and 1705 were in the names of the appellants.

[14] It was submitted that a consent judgment was in the nature of a contract and a contract to do an illegality or pervert justice was void and ought not to be countenanced. Further, it was pointed out that the appellants were not party to the consent to resurrect LR No. E. Bukusu/N. Sangalo/661, and that a consent judgment could only bind those who were party to it.

[15] Further, it was posited that the learned judge who was sitting in Kakamega erred in staying proceedings in Bungoma HCCC No. 55 and 68 of 2010, and setting aside the vesting order without according the parties a hearing, or making an inquiry as to whether any person had received a benefit under the vesting order, and therefore failed to take into account that the 2nd appellant was a beneficiary of the said vesting order since LR. No. E. Bukusu/N. Sangalo/ 1703 & 1705 were registered in his name pursuant to the vesting order.

[16] The Court was referred to **section 93** of the **Law** of **Succession Act** for the proposition that revocation of grant does not invalidate a transfer that has already been done by the administrator and subsequent rights already acquired. It was argued that registration of LR. No. E. Bukusu/N. Sangalo/1483, 1484, 1703, 1704 and 1705 were done when there was a valid grant, and revocation of that grant should not affect the titles.

[17] For the respondent it was submitted that the only asset in Kakamega Succession Cause No. 124 of 1986 was LR No E. Bukusu/N.Sangalo/661; that the Search Certificate and Green card for that title showed that the entry regarding the closure of LR No. E. Bukusu/N.Sangalo/661 on subdivision together with subsequent entries on subdivision were cancelled by the Land Registrar; that LR No. E. Bukusu/N.Sangalo/661 was subsequently transferred to the 1st respondent through transmission;

[18] Further, it was submitted that the vesting orders issued in SRMCC No. 193 of 1988 was set aside in HC Civil Appeal No. 133 of 1989; that by the time the consent was entered into the appellants' names titles had already been cancelled; that the transfer to the 2nd appellant was done after the cancellation of the new subdivisions. Therefore the appellants being persons claiming a benefit from the estate of the deceased had to do so during the distribution of the estate.

[19] We have considered this appeal, the rival submissions made by the parties and the authorities cited. The appeal is not against the original orders made by the learned judge but against the ruling made in the application for review of the original orders. The learned judge dealt with the application under powers conferred by **Order 45 Rules 1, 2** and **3** of the **Civil Procedure Rules.** Therefore our mandate

in this appeal is not to consider whether the original orders issued by the learned judge were proper or lawful but whether the learned judge in refusing to review the original orders, properly and judicially exercised his power of review as set out under Order 45 of the Civil Procedure Rules.

[20] Order 45 Rule I sets out the circumstances under which a judge can review previous order made by the same court as follows:

Application for review of decree or order:

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.

[21] The above rule sets out the circumstances under which a court can review its decree or order. These fall into three categories: The first category is self-explanatory in that the matter relied upon must not only be new and important but one which could not have come to the knowledge of the applicant even with due diligence.

[22] In regard to the second category concerning mistake or error apparent on the face of the record, this Court in **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR,** explained "*a mistake or error apparent on the face of the record"* as follows:

"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 for 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 law cannot be a ground for review".

[23] With regard to the third category concerning *"any other sufficient reason"* this Court has ruled that the words *"any other sufficient reason*" must be viewed firstly in the context of **section 80** of the **Civil Procedure Act** which confer an unfettered right to apply for review and, secondly, on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order **(See Pancras T. Swai v Kenya Breweries Limited [2014] eKLR; and Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR.**

[24] The grounds upon which the notice of motion dated 5th October 2012 was anchored was stated on the motion as follows:

1. The said order was made without the benefit of all relevant factors.

2. By the time of death of the person to whose estate these proceedings relate Land Title No. E. Bukusu/N. Sangalo/661 had already been closed on creation of titles E Bukusu/N Sangalo/1483, 1484, and 1485 and No. 1485 already alienated to 1st interested party.

3. The Proprietor of land title No. E. Bukusu/N. Sangalo/1485 will suffer loss.

4. The objector/Respondents will not suffer any prejudice if the prayers sought herein are granted as prayed.

[25] The affidavits sworn in support of the motion by 1st and 2nd respondent explained the circumstances in which they acquired title to the suit property. Nowhere in the grounds or affidavit was discovery of new matter or evidence alleged, nor was any mistake or error apparent on the face of the record alleged, or any sufficient reason that would be grave enough to justify review of the court order.

[26] The record of appeal before us did not contain a record of the proceedings in the High Court relating to the application. The Court did not therefore have the benefit of perusing the arguments made before the learned judge during the application for review. Indeed it was not clear whether the original orders were issued on 15th May or 18th May 2012. Be that as it may, from the judgment of the learned judge, the arguments made before him in regard to the application for review simply related to the purchase of the deceased's land by the appellants. These were not matters that were not within the knowledge of the appellants. Indeed, the appellants, who were interested parties in the application for review, maintained that they followed all the due process.

[27] Although the learned Judge did not specifically address the requirements of **Order 45** of the **Civil Procedure Rules,** he noted that the order sought to be reviewed was actually the result of a consent agreed upon by the parties, and that the effect of the consent was to revoke the grant that had been confirmed and restore the land to its original position. The learned Judge further made a finding that the appellants' title deeds were obtained pursuant to a vesting order issued in Bungoma SPMCC No. 193 of 1988, which order was subsequently set aside by the High Court in HCCA No. 133 of 1989. It was not therefore open in the application for review to go beyond the orders made in Bungoma SPMCC 193 of 1988 to address any beneficial interest conferred by the vesting order.

[28] The learned Judge came to the following conclusion:

"The consent recorded by the parties was meant to facilitate the distribution of the deceased's estate. The applicants seem to be in occupation of some portion of the land. The grant has not been confirmed and the applicants shall be at liberty to apply to be recognized as liabilities to the deceased's estate to the extent of their respective portions of land, which they occupy.

I therefore do not need to set aside or vary the orders made by the Court. The orders were meant to fast track the distribution process. The applicants cannot rely on the decision in Bungoma SPMCC 193 of 1988. Their titles were revoked by the court. The application dated 5/10/2012 lacks merit and the same is dismissed."

[29] In the circumstances of this matter we cannot fault the learned judge. The appellants failed to satisfy the requirements of Order 45 of the Civil Procedure Rules. Their contention was that there was an error of law and abuse of due process in the issuance of the original orders. These were matters that could only be dealt with by way of an appeal against the original orders and not by way of an application for review. Accordingly, we find no merit in this appeal and dismiss it with costs to the respondents.

Dated and delivered at Eldoret this 7th day of December, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

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