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| Case Number: | Civil Appeal 152 of 2016 |
| Date Delivered: | 18 Oct 2018 |
| Case Class: | Civil |
| Court: | Court of Appeal at Nakuru |
| Case Action: | Judgment |
| Judge: | Sankale ole Kantai, Fatuma sichale, Agnes Kalekye Murgor |
| Citation: | Duncan Waruingi Kagiri & 2 others v George Mwangi Kagiri [2018] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Civil |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | Miscellaneous Succession Cause12 of 2007 |
| Case Outcome: | Appeal dismissed |
| History County: | Nakuru |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: MURGOR, SICHALE & KANTAI JJ, A)**

**CIVIL APPEAL NO. 152 OF 2016**

**BETWEEN**

**1. DUNCAN WARUINGI KAGIRI**

**2. MAINA KAGIRI**

**3. JOHN MAINGI KAGIRI.....APPELLANTS**

**AND**

**GEORGE MWANGI KAGIRI.....RESPONDENT**

**(Being an appeal from the ruling of the High Court at Nakuru (Wendoh, J.) delivered on 1st October, 2014 In Miscellaneous Succession Cause. No. 12 of 2007)**

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**JUDGMENT OF THE COURT**

***Duncan Waruingi Kagiri, Maina Kagiri and John Maingi Kagiri, the appellants*** are aggrieved by a ruling of the High Court (Wendoh, J.) that dismissed their application seeking a review of a ruling by Ouko, J. (*as he then was*), which dismissed their *Miscellaneous Succession Cause No 12 of 2007.*

The Notice of Motion dated 15th May 2012 that was brought under ***order 45 rule 1*** and ***2*** and ***order 51 rule 1*** of the ***Civil Procedure Rules*** was premised on the grounds that after the appellants became aware of the respondent's Succession Cause No. 70 of 2005 following a visit by surveyors to their land, they filed *HCCC No. 117 of 2007* at Nakuru objecting to the respondent's succession cause. They contended that *HCCC No. 117 of 2007* was subsequently withdrawn by consent on 3rd March 2010, by which time they had also filed *Miscellaneous Succession Cause No. 12 of 2007* seeking revocation of the grant of Letters of Administration in Naivasha Succession Cause No. 70 of 2005, which application was dismissed by Ouko, J. on 1st October 2014. As such, it was their case that they brought the review application on the premises that the court dismissed *Miscellaneous Succession Cause No 12 of 2007* on the mistaken belief that *HCCC No. 117 of 2007* was still pending in court.

Having considered the application, the affidavits and the parties' submission, Wendoh, J dismissed the review application as it lacked merit, and did not meet the threshold requirements necessary for an order of review under ***rule 45*** of the ***Civil Procedure Rules***.

The appellants were aggrieved and filed this appeal on grounds that the learned Judge fell into error when she wrongly found that the application was filed after inordinate and unreasonable delay; in ruling that there was no evidence that showed that *HCCC No. 117 of 2007* was withdrawn, despite the appellants having adduced evidence of its withdrawal; in failing to appreciate that the appellants were not involved in Naivasha Succession Cause No. 70 of 2005, or the subsequent distribution of the deceased's estate, and in disregarding the appellants' case which they aver was proved on a balance of probabilities.

Relying on the written submissions filed on 2nd July 2018, the appellants' submitted that, they had sought for an order of review following the non-disclosure to the court of the withdrawal of *High Court Case No. 117 of 2007*, which was the basis of the dismissal of the *Miscellaneous Succession Cause No. 12 of 2007*; that the dismissal prematurely determined the appellants' cause, and denied them an opportunity to be heard; that the learned Judge wrongly concluded that the review application was brought after an inordinately long period, which delay was occasioned by their advocate's failure to attend court on the date of the ruling, and that the advocate's inadvertence ought not to have been visited upon them.

The appellants also complained that the learned Judge failed to appreciate the appellants' evidence that they were not involved in the distribution of the estate in Naivasha Succession Cause No. 70 of 2005 until the surveyors visited the succession property Land Parcel Nyandarua/ Tulaga/181, and that the signatures appearing adjacent to their names were not their signatures. They faulted Ouko, J for concluding that no report of the forgeries was made, and asserted that the fact that certain properties were registered in their names was conclusive evidence of their having participated in the distribution. They maintained that they learnt of the succession cause when a surveyor visited the succession property.

Also relying on their written submissions filed on 29th June 2018, the respondent argued that under the review application, the learned Judge was not rehearing the appellants' case, but was merely reviewing Ouko, J's decision. In their view, the question turned on whether there were new matters of significant importance that had been discovered, which with all due diligence would not have been available at the hearing of the application, or whether there was evidence of some mistake on the face of the record, or some other sufficient reason. They argued that no new or important materials were placed before the court for consideration; that the appellants did not point to any error on the face of the record, and that the contention that *HCCC No. 117 of 2007* was withdrawn was inconsequential. Finally it was asserted that, the remaining issues complained of were matters for which an appeal ought to have been preferred.

We have considered the parties pleadings and the submissions together with the impugned ruling, and are of the view that what falls for consideration is whether the learned Judge rightly declined to exercise her discretion to grant an order of review. See ***Shah vs Mbogo (1968) EA 93*** for the proposition that an appellate Court will not ordinarily interfere with exercise of discretion by a trial Judge unless it is shown their relevant principles were ignored or irrelevant matters introduced by the trial Judge.

***Order 45*** of the ***Civil Procedure Rules*** is unequivocal on the basis upon which a court can review its orders. The prerequisites for an order of review are that; 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 be made without unreasonable delay.

To begin with, the appellant's complaint is that the dismissal of *Miscellaneous Succession Cause No. 12 of 2007* by Ouko, J resulted from the non-disclosure to the court of the withdrawal of *HCCC No. 117 of 2007*, leading the learned Judge to mistakenly believe that it was still pending before the court, and that had Ouko, J been aware of its withdrawal, he would not have dismissed the application.

In addressing the question of whether an apparent error or omission exists on the part of the court in the case of ***National Bank of Kenya Limited vs Ndungu Njau*** ***Civil Appeal No 211 of 1996*** this Court stated;

**"A review may be granted whenever the court considers it 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 of review that another Judge could have taken a different view of the matter. Nor could 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."**

In her ruling on review, the learned Judge distilled the appellants' submissions on the issue of *HCCC 117 of 2007* thus;

**"… that the applicants then filed HCC 117/07 at Nakuru, objecting to the filing of the succession case but that on 3/3/2010 it was withdrawn vide a consent order in the said case; that the court dismissed this cause because HCC 117/07 was still pending and that the dismissal of this cause was a mistake; that at the time both counsel knew that HCC 117/07 had been withdrawn and it was inadvertence on the part of counsel that the case was dismissed; that had the court known of the**

**dismissal of HCC 117/07, it would not have dismissed this case."**

In answer to the summation the learned Judge then observed that;

**"… it was not disputed that HCC 117/07 and HC Misc. Succ. Appl. 12/07 had been filed and that Misc 12/07 seeks revocation of grant just like the one before the court and orders that the respondent had alleged that such application for revocation was pending, the applicants had denied it but not shown any proof. The court observed that it was not sure of the status of that originating summons but that the bringing of several applications was an abuse of the court process. The court went ahead to dismiss the application based on the 3 grounds that were urged."**

A review of Ouko, J's ruling, confirms that the appellants' motion was not dismissed on the basis of the withdrawal or not of *HCCC No. 117 of 2007*, but because the learned Judge was uncertain as to its status by the time of determining the application. Instead, the learned Judge dismissed the application for the reasons that firstly, there was no evidence to support the contention that the magistrate's court at Naivasha lacked pecuniary jurisdiction, and secondly, that there was nothing to show that the grant was improperly issued.

Since the court relied upon the reasons set out to dismiss the application, we are satisfied that, the appellants' assertion that the learned Judge dismissed their application on the mistaken belief that *HCCC No. 117 of 2007* had not been withdrawn was unwarranted and misplaced. We further find that as a consequence, nothing demonstrated that there was an error or omission on the face of the record or indeed on the court's part.

That said, have the appellants demonstrated that any new and important materials were discovered that were not brought to the attention of the court" To come within the ambits of this requirement, the applicants set out the new and important matters that had come into their knowledge of which the court ought to have been aware by the time of making its determination.

We have reviewed the appellants' motion, and we can find nothing new or different in the averments that the court ought to have taken into account. However, when the averments are considered, what becomes clear is that the appellants' complaints are concerned with their lack of participation or involvement in Succession Cause No. 70 of 2005, that the signatures appearing on the relevant forms were not theirs; that the signatures were forgeries, and that the fact that the succession properties were registered in their names was not conclusive evidence of their participation.

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

**"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. "**

Whether or not the learned Judge rightly or wrongly concluded that they participated in the Succession Cause No. 70 of 2005, are matters that go to the substance of the dispute, which ought to be ventilated on appeal, rather than under review as was the case here. In effect, the review court was being required to re-adjudicate upon issues already determined by that court, which was tantamount to requiring it to sitting on appeal over the same matters in the same court, which the review court was not empowered to do. Needless to say, we do not consider these to have been matters that qualified as new and important material and consequently, we find that an order for review on this basis did not arise.

Finally, as to whether the delay was inordinate, we have considered the application, and save for a mention in passing at paragraph 11 of the motion that *"… the counsel for the applicant and the respondent knew that H.C. civil suit NO. 117 of 2007 had been marked withdrawn yet they did not make it clear to the court…"* which was with reference to the appellants' submissions on the application for review, and not the alleged failure of counsel to attend court when the ruling was delivered, it becomes apparent that no reason was advanced to explain the delay.

As such, there being no material upon which the learned Judge could rely in order to exercise her discretion, we find that she rightly declined a review on this basis, and accordingly cannot be faulted in the circumstances.

In sum, we can find nothing to show that a review under ***order 45 rule (1)*** and ***(2)*** was warranted, and there is therefore no reason to interfere with the ruling of the court below. Accordingly, the appeal is dismissed, with costs to the respondent.

**Dated and delivered at Nakuru this 18th day of October, 2018.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**