



**In re the Estate of John Keen (Deceased) (Succession Cause 123 of 2017)
[2022] KEHC 13137 (KLR) (Family) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE 123 OF 2017

AO MUCHELULE, J

SEPTEMBER 27, 2022

IN THE MATTER OF THE ESTATE OF JOHN KEEN (DECEASED)

ZOLA SINET KEEN.....APPLICANT

VERSUS

ANTONY SIMEL KEEN.....1ST RESPONDENT

PAMELA SOILA KEEN.....2ND RESPONDENT

BERNARD OLONANA KEEN.....3RD RESPONDENT

SOMOIRE KEEN.....4TH RESPONDENT

ROSEMARY SANAU KEEN.....5TH RESPONDENT

HILDA SOILA KEEN.....6TH RESPONDENT

AND

M.W.....1ST EXECUTOR/INTERESTED PARTY

H.J.I.L.....2ND EXECUTOR/INTERESTED PARTY

R.S.K3RD EXECUTOR/INTERESTED PARTY

P.S.K.....4TH EXECUTOR/INTERESTED PARTY

RULING

1. The jurisdiction to review an order and judgment is provided under Order 45 rule 1 of the *Civil Procedure Rules* which states as follows:-

- “(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

2. It is clear from the above that, the power granted to a court to review its decision can be exercised if the applicant is able to demonstrate that there has been 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 the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record; or for other sufficient reasons. The application must have been made without unreasonable delay.
3. The background of this application is that the deceased John Keen died testate on December 25, 2016. He left several families and a substantial estate. A grant of probate was issued on April 4, 2017, and has not been confirmed. In the deceased’s Will dated December 2, 2015, it was stated that the school fees, medical expenses and other necessities and necessities of life for his named grandchildren be provided for by the trustees/executors at their discretion.
4. There is no dispute that the applicant Zola Sinet Keen is the deceased’s grandchild. In the application dated December 14, 2020 she sought orders that her university fees of Kshs 4,818,126/- and accommodation of Australian dollars 26,400 be paid by the executors as she was a student at the University of Sidney in Australia. Her case was that the executors of the deceased’s Will had failed and/or refused to pay for her fees and accommodation and that she stood to be discontinued if payment was not made. The executors opposed the application by stating that as far as they were concerned the applicant had completed her studies for which the estate had been paying, and therefore there was no further obligation to release any more money.
5. In the ruling delivered on July 19, 2021 the court declined to order the executors to pay any more fees or accommodation. This was because, given the previous averments by the applicant and her father, she ought to have completed her studies. The two had not provided any evidence that the applicant was still in school and therefore in need for fees or accommodation.
6. The instant application is dated September 15, 2021. The applicant seeks the review of the ruling dated July 19, 2021 and order the payment of her university fees and accommodation. Her case was that she had informed her then advocates M/S Oregoo and Odhiambo Advocates that she was still in the university, having changed her course from Bachelor of Science to Bachelor of Arts/Advanced Studies which was a more suitable career path; that at the time of the filing of her application dated March 2, 2020 she was in third year of studies which she completed on November 22, 2020; and that her fourth year of studies were to run from February 22, 2021 to August 9, 2021. She stated that owing to delay



in payment of fees she had been diagnosed with left basal ganglia/corona radiata infarction which had led her to seeking leave of absence from university to recuperate. Out of leniency, the university had permitted her to rejoin the second semester of the fourth year studies in the hope that the impugned ruling was going to be in her favour. She blamed her then advocates for not having brought all this information to the attention of the court.

7. The executors 2nd and 5th respondents Pamela Soila Keen and Rosemary Sanau Keen, through the replying affidavit of the former, opposed the application on the ground that all the information deponed to by the applicant was within her knowledge at the time of her application dated December 14, 2020, and that, even after they had opposed that application by stating that as far as they were concerned she had completed her university education, she had not sworn any further affidavit to state what she now states. They further deponed that her medical condition was pre-existing, and, lastly, that her father had got inheritance from the deceased that could cater for her fees and accommodation in Australia. Her father Edward Meitamei Keen was the deceased's son.
8. It was evident from the applicant's application that the facts relied on for review were not new facts as they were known to her at the time of the application dated December 14, 2020. This is what she deponed:-

“ 19. That it is regretted that the information provided in support of the application dated December 14, 2020 did not set out the facts as they really are. I verily believe that the failure to provide the correct information was an error of inadvertence and/or misdirection on the part of my lawyers and ought not be visited on me.”

She is saying that she gave all relevant information to her advocate, but that he withheld some of it.

9. It is material that the affidavit in support of her then application was sworn by her and not by her advocate. She was aware of her application and she was the one who tendered evidence to support her case. She cannot blame her then advocates for withholding evidence. To put it differently, she was possessed of the relevant and material evidence at the time of the application dated December 14, 2020, but she did not make it available to the court to persuade it to decide the application in her favour.
10. In *Pancras T Swai v Kenya Breweries Ltd* [2014]eKLR, The Court of Appeal noted with approval the decision in *Francis Origo & Another v Jacob Kumali Mungala*, Civil Appeal No 149 of 2001 in which the court had dismissed the application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them. In the instant case the important evidence that the applicant is relying on for the application for review was always within her knowledge. Consequently, the remedy for review is not available to her.
11. Even if she were to argue that her circumstances are a sufficient reason for review, it is now settled that the expression “any other sufficient reason” under can only be considered wherein it is an analogous to the two specified reasons of “discovery of new and important matter or evidence” and “on account of some mistake or error apparent on the face of the record” (*Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019]eKLR).
12. In conclusion, I dismiss the application dated September 15, 2021 with costs.

DATED AND DELIVERED AT NAIROBI 27TH SEPTEMBER 2022

A.O. MUCHELULE

JUDGE

