



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 4 OF 2020

SABERA MAKENA.....1ST APPLICANT

PAULINE KALANYU.....2ND APPLICANT

REGINA MWAKIRIA.....3RD APPLICANT

VERSUS

DANIEL BAARIU.....RESPONDENT

RULING

1. By Judgment delivered on 24th September 2020, the Court directed that a fresh grant be issued as per the mode of distribution in the said Judgment. The Court was sitting on appeal from a Ruling delivered in the lower Court, in Tigania Succession Cause No. 82 of 2017 refusing to revoke the grant that had been issued therein.

2. Being aggrieved by the said Judgment, the Applicants moved the Court by way of a Notice of Motion application dated 8th October 2020 seeking to have the said Judgment reviewed. They seek the following orders: -

i) Spent

ii) THAT this Honourable Court be and is hereby pleased to set aside the judgment delivered by this Court dated 24th September 2020, and any orders issued pursuant thereto, pending the hearing and determination of this application.

iii) THAT this Honourable Court be and is hereby pleased to set aside the judgment delivered by this Court dated 24th September 2020 and any orders issued pursuant thereto pending the hearing and determination of the instant succession.

iv) THAT this Honourable Court be and is hereby pleased to grant leave to the Applicants herein to file an application for review and the application herein be deemed as duly filed and properly on record.

v) THAT this Honourable Court be and is hereby pleased to order that the leave issued herein vide paragraph 4 to operate as leave to bring the 2nd and 3rd Applicants to be on record.

vi) THAT this Honourable Court be and is hereby pleased to grant orders for review of the Judgment delivered by this Court dated 24th September 2020.

vii) THAT this Honourable Court be and is hereby pleased to order the matter herein be re-opened and/or be re-heard and all relevant parties to give evidence.

viii) THAT the CCIO Meru County and/or the SCCIO Igembe South/North be and is hereby ordered to investigate thoroughly the allegations of all the Appellants that all pleadings and documents filed in Succession Cause No. 82/2017 at Tigania Chief Magistrates Law Courts were forgeries and fraudulent.

ix) THAT the CCIO Meru County and/or the SCCIO Igembe South/North be and is hereby ordered to assist in implementing and effecting the orders of this Honourable Court.

x) THAT costs be provided for.

Appellant's Case

3. The application was premised on the ground on the face of it and was supported by the supporting affidavit of SABERA MAKENA, the 1st Applicant. She avers that she is a daughter to the deceased and that the 2nd and 3rd Applicants who are also beneficiaries were fraudulently withdrawn from the proceedings of the lower Court; That one of the beneficiaries of the deceased's estate Bernard Mwiti Ntombura has passed on early this year and substitution on his behalf needs to be done; That the Judgment of the Court needs to be set aside in order to allow the Court to consider new evidence and that the sub chief's letter dated 30th June 2017 used to file the Petition indicates the date of death of the deceased on 3rd August 2002 and that the earlier letter from subchief had the correct date of death but was accompanied by a fake death certificate indicating the date of death to be 10th December 2002 and that she is the one who procured the burial permit and applied for the death certificate upon the death of the deceased; She denies having consented to the Petitioner being the Administrator and that the signature on the consent is not hers and that the form excludes other beneficiaries; That the Petitioner together with Francis Kiliungu (a total stranger) fraudulently filed notices of withdrawal of the 2nd and 3rd Applicants from the suit; That the Petitioner and Francis Kiliungu filed minutes of a fake meeting in which Francis Kiliungu, the 'purchaser for value' was to finance the instant succession suit. That the said Francis Kiliungu could not have purchased the land from the Petitioner as compensation for financing the succession matter in Court as this would violate the provisions of Section 82 (b) (i) providing that no immovable property shall be sold before confirmation of grant and that the sale agreement filed in Court was fake; That it is strange that the sureties in the Petition are the same persons in the meetings alluded to in exhibit SM5 and they are also the witnesses in the said sale agreement; That it is necessary to interrogate the documentation used in the Petition; That the Court should allow the constitutionally charged authorities to verify and authenticate the extent of perjury committed by the Petitioners herein and the conspiracy to defraud the estate of the deceased to the detriment of other beneficiaries; They urge that the confusion and delay in informing the Court herein on the fact and issues in the review application should not be deemed their fault but that of their previous advocates who were on record on their behalf; That the confirmation of grant herein is defective, improper and erroneous as it was made from proceedings and documentation which are tainted by fraud and concealment of material facts.

Respondent's Case

4. The application was opposed by the Respondent vide the Notice of Preliminary Objection dated 19th October 2020 asserting that the Court does not have jurisdiction to entertain new evidence; that equity does not aid the indolent; that the death certificate of a deceased doesn't matter much; that the Applicants have all along been raising dangerous cards to be used after the game; that appeal and review cannot be concurrently against the same decision; that the application as filed negates the principles of estoppel; that a High Court cannot set aside the lower Court's judgment while relying on created new evidence; that the applicants' practice is by the backdoor; that litigation must come to an end; that a party cannot review a lower Court's proceeding/ruling/judgment in the superior court after high court judgment; that the application is an abuse of court process; that the application for review will not change the distribution; that the applicants' remedy lies elsewhere.

5. The Respondent filed submissions dated 24th February 2021. He submits that the first issue for determination is on whether or not the Court can entertain an application for review. The Respondent has highlighted the fact that the application is hinged on alleged discrepancies in the documents filed in the succession cause and that in particular, the Applicants are challenging the authenticity of the Deceased's death certificate, chief's letter, consent appointing administrator, notices of withdrawal, minutes and agreements for sale. He further highlights the fact that the Applicants had previously filed an application for revocation of grant but they later withdrew the said application. He further highlighted that at the Appeal, the grant was revoked on the basis that the 1st Applicant's signature in the consent was forged and this contention was neither denied nor controverted.

6. The Respondent further submits that all the documents now being challenged by the Applicants have never been questioned in the succession cause despite them having been in possession of the documents. The Respondent further submits that the 1st Applicant did not apply to have any additional evidence taken during Appeal which would have been the only way to interrogate the allegation of forgery by way of cross examination. The Respondent submits that none of the grounds under Order 45 Rule 1 of the Civil Procedure Rules existed in the Applicant's application and furthermore, the death certificate annexed to the Applicants' application was issued on 4th September 2017 and as such, the Applicants have been in possession of the same and this does not constitute new and important matter or evidence which after the exercise of due diligence was not within their knowledge and could not be produced by them during the hearing. Relying on the case of ***Dubai Bank Kenya Limited vs Kwanza Estates Limited (2015) eKLR*** he submits that the Applicants' conduct and pursuit of the purported new evidence does not appear to have been zealous but instead, the purported new material appears to have been a calculated move to keep the Respondent from enjoying the fruits of its success in litigation. He submits that the Applicants have not proffered any sufficient reason to explain why they did not submit the said documents to the Directorate of Criminal Investigations before the lower Court and the Appellate Court rendered their decisions. The Respondent contends that the application is an afterthought and an abuse of court process and that the 2nd and 3rd Applicant have never been interested parties in the Appeal and it is ridiculous that they are suddenly interested in the estate of the deceased. He submits that the principle of finality dictates that litigation must come to an end and that the application is an academic exercise since whether it is allowed or not, it will not change the distribution.

7. He further submits that to allow the application would be tantamount to reopening litigation after the Court had rendered itself on appeal and is now *functus officio*. He relied on the case of ***Leonard Mutua Munyao & Another v Attorney General & Another (2018) eKLR*** to urge that re-opening should not be allowed more so in the case where a party failed to exercise due diligence. He submits that the Applicant approached the Court with unclean hands it being that they participated in the proceedings all the way from the lower Court while in possession of the alleged 'new ammunition.' He submits that equity does not aid the indolent. He submits that the Applicants have other sinister motives and do not want this matter to rest. He submits that the Applicants should ventilate their issue on appeal rather than on this application. He prays that the application be dismissed.

Issues for determination

8. The major issue for determination is whether or not to grant the application for review.

Determination

9. To begin with, this Court has to determine the question of jurisdiction. As was held in the *locus classicus* of **Owner of the Motor Vessel "Lilian S" Vs Caltex Oil (Kenya) Limited**, Nyarangi J, jurisdiction is everything. The Application before the Court is one for review of Judgment. **Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya** which is replicated in **Order 45 Rule 1 of the Civil Procedure Rules, 2010** provides for the instances when an application for review may be made. The said instances are limited to the following: -

Any person who considers 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 allowed

10. It is therefore clear that a litigant may only apply for review if he has not filed an appeal, either because the rules do not allow for it or because he has opted not to do so. In the present case, no appeal has been preferred against the Judgment of the Court of 24th September 2020 which Judgment is the subject of the instant application for review. This Court therefore finds that it has jurisdiction to entertain the application for review on its merits.

Grounds for Review

11. Turning to the grounds upon which an application for review may be premised, Order 45 of the Civil Procedure Rules lists the following three instances: -

i) Where there is a 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 was made.

ii) On account of some mistake or error apparent on the face of the record.

iii) For any other sufficient reason.

12. The gravamen of the Applicants' Application is that following delivery of Judgement herein on 24th September 2020, a new and material fact has been discovered to wit, the original death certificate of the deceased. The Applicant also claims that the grant is not reflective of the actual beneficiaries as two of her sisters, being the 2nd and 3rd Applicants were removed from the proceedings through a fraudulent notice of withdrawal. She also claims that she did not consent to the Petitioner's appointment as Legal Administrator and further, that Francis Kiliungu M'Nja who is listed as a beneficiary is a stranger to the deceased's estate.

13. At paragraph 22 of the 1st Applicant's affidavit, the Applicant states the following: -

THAT I further reiterate and aver that the review application herein is further premised on the fact that the certificate of confirmation of grant herein is defective, improper and erroneous as it was made from proceedings and documentation which are tainted by fraud and concealment of material facts.

14. In essence, the Applicant is seeking for revocation of the grant. This is the third time the Applicant is seeking for revocation of grant, although in the instant case, it has been done in the form of an application for review. The first time was by way of filing the application dated 15th November 2018 in the lower Court. The second time was by way of filing the Appeal determined by the Judgment of 24th September 2020 which appeal was challenging the Ruling of the lower Court refusing to revoke the grant.

15. This Court is not convinced that there is any new evidence which, despite the exercise of diligence, could not have been obtained at the time of hearing of the lower Court matter, let alone the Appeal. Instructively, it is the 1st Applicant herein who filed the Appeal at the lower Court. The issues being raised in the instant application ought to have been raised at the very least, at the said Appeal stage. The Appellant claims that the death certificate of the deceased used at the time of filing the Petition was fake as it indicated the death certificate of the deceased as 10th December 2002 whereas the deceased died on 3rd August 2002. Admittedly, it is the Applicant herself who procured the deceased's burial permit and death certificate. The fact that she was the one who procured these documents is indicative of the fact that the same were well within her knowledge and possession and cannot therefore be said to be new evidence which could not be obtained at the time of the hearing. It is not good enough for the Applicants to claim that the omission to raise these issues at an earlier opportunity should be attributed to their former Advocates. It is the client who gives instructions to the Advocate and not vice versa. These are matters of fact which can only be brought to the attention of the Advocate by the client and the Court is not convinced that the Applicants have sufficiently demonstrated that this information could not have been obtained earlier. In any event, the date of death of a deceased person may not per se influence the mode of distribution as this is determined by the number and interests of the beneficiaries. Furthermore, the new letter by the sub-chief through which the chief purportedly disowns the earlier letter is dated 7th October 2020. The instant application was filed on 9th October 2020, only 2 days later. Indeed, if the Applicants were diligent enough, this letter ought to have been obtained earlier. A Court of law cannot be swayed by every other purported discovery when the parties have all along been aware of the perceived anomalies informing their contestations. Needless to say, equity does not aid the indolent but the vigilant.

16. Further, the Applicant states that the 2nd and 3rd Appellants who are her sisters were disenfranchised of their share in the deceased's estate as a consequence of the fraudulent notice of withdrawal dated 23rd November 2018 and 13th February 2019 filed by the Petitioner. According to this Court, this issue is not among the 3 grounds upon which an application for review may be allowed. This is a question that would require interrogation of facts and the law on the procedure for withdrawing a Notice for Withdrawal which was allegedly filed

fraudulently. The Judgment of the Court also pronounced itself to the effect that there was on record a Notice of Withdrawal.

17. On the question of fraudulent activities entered into by the purported Francis Kiliungu and the Petitioner, this is also a question of fact which will require this Court to properly adjudicate were it sitting on appeal. The Judgment of the Court clearly addressed its mind on this issue and found that there was indeed a valid sale agreement between the deceased and the said Francis which was signed during his lifetime. The Court found that the agreement was valid for all intents and purposes. By seeking review on this point, the Applicants are essentially urging that the Court exercised its discretion wrongly. This is a ground for appeal and not review.

18. It appears that the Applicants did not fully appreciate the delineations of when to file an appeal and when to file an application for review. The difference between grounds for appeal and grounds for review were well distinguished in the case of *National Bank of Kenya v Ndungu Njau, (1996) KLR 469*, where the Court of Appeal held as follows: -

“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to explore.”(Emphasis added).

19. The above finding replicates itself in the Supreme Court of India case of *Afit Kumar Rath- Vs- State of Orisa & Others* (Supreme Court cases) 596 at page 608 which was cited with authority in the other case of *Khalif Sheikh Adan v Attorney General Garissa ELC Case No. 20 of 2018 [2019] eKLR* by E. C. Cheron J. In the said case, the Court held as follows with respect to the power to review a decision: -

“The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could be produced by him at the time when 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 any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law which states in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule.”

20. This Court observes that the Judgment of the Court indeed addressed most if not all of the matters raised by the Applicants. This is an indication that the Applicants are merely dissatisfied with the manner in which the Court exercised its discretion and are not seeking to correct any error apparent on the face of the record. The only new matter that has been raised is on the death certificate which this Court has found that it does not fit into the ground for review. The Appellant’s case is one which ought to have been brought by way of appeal and not review.

Doctrine of Functus Officio

21. The Respondent urged that to allow the application would be tantamount to re-opening the litigation after the Court had rendered itself and is now *functus officio*. Considering that the Court had already pronounced itself on most of the issue raised in the instant application, i.e. the question of Francis Kiliungu as a stranger, the validity of the sale agreement between Francis Kiliungu and the deceased and the withdrawal of the 2nd and 3rd Applicants from the proceedings, this Court indeed agrees with the Respondent that it is *functus officio*.

22. Authorities have time and again frowned upon litigants who make attempts to re-open cases by introducing new merit based and contested facts which would in essence invite the Court to conduct a re-trial post-judgment with the intention of altering the decision already rendered by the Court. This is of course subject to a party’s right to proffer an appeal.

23. In the Court of Appeal case of *Telkom Kenya Limited Vs John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) 2014 eKLR* which case was cited by L A Achode J in the other case of *Re Estate of Kinuthia Mahuti (Deceased) Miscellaneous Application P&A No. 158 of 2017, 2018 eKLR*, Githinji, Karanja, & Kiage JJA observed as follows: -

“...Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century...”

24. In the case of *Jersey Evening Post Limited Vs Al Thani (2002) JLR 542 at 550* which case was cited and applied by the Supreme Court in *Raila Odinga & 2 Others Vs Independent Electoral and Boundaries Commission & 3 Others 2013 eKLR* where it was held as follows: -

“...A court is functus officio when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available...”

25. Going by the above, this Court finds that it is indeed *functus officio* and cannot entertain the Applicant’s application as it is.

26. The Court observes that the Applicants have filed a complaint with the Directorate of Criminal Investigations concerning the purported forgeries and fraudulent activities. This Court will not make any findings or comments on that matter since that is the jurisdiction of the DCI under the well established criminal law structures in place. Should a finding be made under the criminal law processes, the Applicants will seek advice from their counsel on how to use any such information.

ORDERS

27. In the end, this Court does not find merit in the application dated 8th October 2020 and, consequently, makes the following orders: -

i) The Application for review dated 8th October 2020 is hereby dismissed in its entirety.

ii) There shall be no orders as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF APRIL, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kubai, Orwa & Co. Advocates for the Applicant

M/S Elijah K. Ogoti & Co. Advocates for the Respondent.