REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 383 OF 2006

IN THE MATTER OF THE ESTATE OF NICHOLAS KIPTUM (DECEASED)

IN THE MATTER OF AN APPLICATION FOR REVIEW

BETWEEN

VIOLET KHASOHA MUSIDIA..1ST APPLICANT

SILIYA KHASIALA...2ND APPLICANT

-AND-

MARY NYOKABI..1ST RESPONDENT

HELLEN MUSIMBI MUSILA...2ND RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion **dated 4 December 2019.** It was filed by the two applicants under **Section 61 of the Law of Succession Act, Chapter 160** of the **Laws of Kenya** and **Order 45 Rules 1-6 of the Civil Procedure Rules.** It seeks orders that the Judgment of **Hon. Mshila, J.** dated **29 April 2013,** read and delivered by **Hon. Fred A. Ochieng,** be reviewed; and that the Court do make a finding that the properties of the estate be accounted for. The applicants also prayed that the beneficiaries of the deceased be equally provided for.

[2] The applicants averred that a single beneficiary cannot be allowed to deplete the entire estate at the expense of the other beneficiaries; and that there is therefore need for a full inventory of the estate to be given and accounts furnished by the executors; hence the need for review. The applicants relied on the Supporting Affidavit sworn by the 1st applicant on **4 December 2019** in which she deposed that the deceased estate comprised the properties set out at paragraph 6 of her affidavit; and averred that the same ought to be available for equal distribution to the beneficiaries of the deceased.

[3] Thus, the 1st applicant explicitly averred, at paragraph 9 of her affidavit, that she disagrees with the Judgment dated **29 April 2013** in so far as the Court held that only Parcel No. L.R. No. 8384/10 – Ngoisa Farm, measuring approximately 5 acres, was available for distribution. And, in a Further Affidavit sworn by the 1st applicant on **13 December 2020**, she annexed copies of Certificates of Search in respect of the subject properties in a bid to demonstrate intermeddling by the respondents. They accordingly urged for a review and setting aside of the Judgment dated **29 April 2013** to pave way for redistribution of the estate.

[4] The application is unopposed and **Mr. Chemwok,** learned counsel for the applicants, urged the Court to allow it on that basis. Thus, no submissions were filed by either party.

[5] **Section 47** of the **Law of Succession Act,** is explicit that:

> **"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient…"**

[6] Consequently, the discretion of the Court to grant the orders sought in the instant application is unfettered; the primary consideration

being the interest of justice. Indeed, in **Rule 73** of the **Probate and Administration Rules** it is provided that:

> **"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

[7] Moreover, **Rule 63** of the **Probate and Administration Rules** recognizes that the provisions of **Order 45** of the **Civil Procedure Rules** are some of the specific provisions of the **Civil Procedure Rules** applicable to probate matters. It states that:

> **"Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), … shall apply so far as relevant to proceedings under these Rules."**

[8] Order 45 Rule 1 of the **Civil Procedure Rules**, on the other hand provides that:

> **(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.**

[9] Needless to say therefore that a party seeking review is under obligation to demonstrate that:

> **[a]** there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at that time;
>
> **[b]** there is some mistake or error apparent on the face of the record; or
>
> **[c]** that there is any other sufficient reason; and
>
> **[d]** that the application has been brought without unreasonable delay.

[10] Accordingly, in **National Bank of Kenya Limited vs. Ndungu Njau** [1997] eKLR, the Court of Appeal held that:

> **"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 the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review..."**

[11] The main ground relied on in support of the application is the contention, not that there is discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at the time that the Judgment dated **29 April 2013** was delivered, but that the Court arrived at an erroneous decision. This is manifest at paragraphs 10, 11, 12, 14, 16 and 17 of the 1st applicant's Supporting Affidavit. It is noteworthy however that, in arriving at the decision that the only property available for distribution is **Parcel No. L.R. No. 8384/10 – Ngoisa Farm,** the Court applied its mind, not only to the applicable law, but also to the evidence presented before it, including the List of Assets as given in the Affidavit in Support of Petition, Form P&A 5.

[12] As to what amounts to an error apparent on the face of the record, the Court of Appeal, in the case of **Nyamogo & Nyamogo Advocates vs. Kago (2001) 1 EA 173**, had this to say:

> **"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal..."**

[13] Accordingly, the Court having found that the deceased had disposed of most of his properties by an oral will; that the Court had **"no mandate to question the validity of the disposition nor interfere with the same"** the only option open was for the petitioners to appeal

that decision if, as they now say, they were dissatisfied therewith.

[14] In the premises, I find no merit in the Notice of Motion dated **4 December 2019.** The same is hereby dismissed with no order as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF APRIL 2021

OLGA SEWE

JUDGE