



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO. 138 OF 2018**

**ESTATE OF THE LATE JOHN GITAU GICHURU.....1<sup>ST</sup> PLAINTIFF**

**RICHARD GATIMU GITAU..... 2<sup>ND</sup> PLAINTIFF**

**DAUDI NDATHA GITAU..... 3<sup>RD</sup> PLAINTIFF**

**JOE WAWERU GITAU..... 4<sup>TH</sup> PLAINTIFF**

**-VERSUS-**

**HAMILTON HARRISON & MATHEWS ADV.....1<sup>ST</sup> DEFENDANT**

**JOAN NJOKI NDUNGL.....2<sup>ND</sup> DEFENDANT**

**RULING**

1) On 28<sup>th</sup> February 2020, this court delivered its ruling whereof it made orders striking out this suit at the instance of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaintiffs have now taken out the motion dated 17<sup>th</sup> November 2020 in which they seek to have the aforementioned decision to be reviewed and set aside. The plaintiffs/applicants filed the affidavit sworn by David Ndatha in support of the motion.

2) When served with the motion, the 1<sup>st</sup> defendant filed the replying affidavit sworn by Richard Omwela to oppose the application. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits plus the rival written submissions together with the authorities cited. It is the submission of the plaintiffs/applicants that the ruling and order of this court should be reviewed and set aside on account of mistakes or errors apparent on the face of the record.

4) It is also argued that there are sufficient reasons to justify issuance of the order of review. The applicants pointed out that there is an error apparent on the face of record in that this court misapprehended the point in that the court struck out this suit on the basis that the matters raised herein were directly and substantially in issue in Succession Cause no. 20 If 1983.

5) It is argued that this suit is an action in tort while the other is a succession cause. It is argued that the court in a succession cause has no jurisdiction to exercise civil jurisdiction in a civil suit.

6) The applicants further pointed out that this court struck out the plaint on the basis that the suit was based on a 'without prejudice' documents. It is argued that the error is glaring in that the 'without prejudice' document is a matter of evidence.

7) The other ground which was ably argued by the applicants is that the court struck out the plaint on the basis that the plaint was prematurely amended to substitute the plaintiff without leave of court. The applicants stated that prior to close of pleadings, parties to a suit have control over amendments to the pleadings and the court has control over amendments after close of pleadings.

8) It is argued by the applicants that at all material times that they amended their plaint before close of pleadings under Order 8 rule 3 of the Civil Procedure Rules.

9) The applicants further argued that this court made an error apparent on record by finding that there is an absolute bar against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants to bring the present suit. They pointed out that the 3 applicants are the children of John Gitau Gichuru, deceased hence they are persons beneficially interested in the estate property under Order 31 rule 1 of the Civil Procedure Rules.

10) It is argued that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants have a claim or complaint for loss of the estate property and a cause of action against third parties' conspiracy to defraud. It is argued that the Court of Appeal in **Njoroge vs= Mbiti (1986) KLR 519** held inter alia that an Action by beneficiaries to preserve the assets of the deceased is sustainable in law.

11) It is the submission of the applicants that by failing to consider a binding decision of the Court of Appeal in determining the issue, this court made a glaring error apparent on record.

12) In response to the applicants' arguments, the 1<sup>st</sup> respondent is of the submission that the applicants have not met the threshold for the grant of an order for review pursuant to the provisions of Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules.

13) It is stated that the errors pointed out are not apparent on the face of record. It is also stated by the 1<sup>st</sup> respondent that the appeal was filed after unreasonable delay of 9 months from the date of the ruling sought to be reviewed and the applicants have failed to offer any explanation.

14) It is not in dispute that on 28<sup>th</sup> February 2020, this court delivered its ruling in which it issued an order striking out this suit. This court also identified and found that the issues raised in this suit are directly and substantially in issues in the succession cause. This court further stated that the succession court has jurisdiction to hear and determine those issues.

15) The applicants suit was found to be an abuse of the court process. This court also found that the applicants introduced documentary evidence which were exchanged on a 'without prejudice' basis which documents had been ordered expunged in another action. The court also found that one Persiah Muthoni Masinde was improperly enjoined to this suit without prior leave being obtained.

16) The last issue touch on the locus standi of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs/applicants to institute this suit.

17) I have already set out the grounds put forward by the applicants and the attendant responses. The matter before this court is an application for review. In the case of **National Bank of Kenya Ltd vs= Ndungu (1997) e KLR** the court held *inter alia*

**“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.”**

18) The question which should be answered is whether the instant application meets the threshold of an application for review.

19) I have already set out the arguments of the parties on each ground raised. In the first ground, the applicants aver that this court erred by stating that the issues raised in this suit can as well be determined in the succession cause.

20) With respect, I am not persuaded by the applicants' argument. The error pointed out is not obvious nor apparent. It took the applicant a laborious process of submitting lengthy written submissions to bring out this point. Arising out of the submissions, it is clear that there is no obvious stand on the issue, there should be more than one opinion on the same. This court's decision on this ground could be erroneous thus can only be challenged on appeal but not by way of review.

21) The second ground is to the effect that this court made an error when it struck out the suit on the basis that the applicants introduced documentary evidence which were exchanged on a "without prejudice" cover. In my view, this is a matter which cannot be determined by way of review. It is not an error which is self-evident. The court is being invited to re-evaluate and reassess evidence on record and then depart from its holding. That is not permissible in an application for review since that is the domain of the appellate court. The finding on this ground also covers the other grounds.

22) The respondents have urged this court to find that the application for review was filed after unreasonable delay which was not explained by the applicants. The decision sought to be impugned by way of review was delivered on 28<sup>th</sup> February 2020. The application for review was filed on 17<sup>th</sup> November 2020 about 9 months to bring the application for review. The applicants have stated that they delayed in filing the application because the court issued the decree or order on 29<sup>th</sup> September 2020.

23) I am satisfied that the applicants have explained the reasons for the delay. Therefore, the delay in filing the review application is explained hence excusable.

24) In the end, I find the applicants' motion to be incompetent and without merit. The same is ordered struck out and dismissed with costs being awarded to the defendants/respondents.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 21<sup>st</sup> day of May, 2021.

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendants