REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

SUCCESSION CAUSE NO.6 OF 2008

IN THE MATTER OF THE ESTATE OF M'IKUNYUA MARURU Alias M'IKUNYUA MARURI (DECEASED)

DAMARIS KARAMANA M'IKUNYUA.....APPLICANT/OBJECTOR

VERSUS

DOUGLAS MURIUNGI IKUNYUA.....1ST PETITIONER/RESPONDENT

ELIAS KINOTI IKUNYUA.....2ND PETITIONER/RESPONDENT

RULING

1. By summons under certificate of urgency dated 19th August 2020 pursuant to Section 47 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules and Order 45 Rule 1 of the Civil Procedure Rules, the applicant seeks in the main the discharge, review, vacation and/or setting aside of the ruling delivered on 18/02/2020 and reconsideration/determination of the applicant's application dated 26/04/2019 afresh on the basis that the applicant is a daughter to the deceased herein.

2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Damaris Karamana M'Ikunyua, the applicant herein, sworn on 19/08/2020. It is contended in that affidavit that due to typographical errors, the applicant was referred to as a grand-daughter to the deceased instead of a daughter to the deceased. That the said inadvertent mistake in her misdescription by her counsel misled the court to treating her as a grand-daughter while the mother Maritha Nkina Ikunyua was erroneously treated as a daughter to the deceased rather than a wife to the deceased thus leading the court in reaching an erroneous determination. It was added that as a consequence of the said misdescription, the applicant and her siblings were discriminated upon as they got comparably a less share of the deceased estate than the other beneficiaries. The court is urged not to visit the mistake of the advocate upon his client and but to grant the orders sought.

3. The application was opposed by the replying affidavit of Douglas Muriungi Ikunyua, the 1st respondent herein sworn on 23/09/2020 who deponed that the applicant has not met the threshold for grant of the orders sought and therefore her application should be dismissed. It is further asserted that the issue as to whether the applicant is a daughter or a grand-daughter of the deceased is neither here nor there as she fully participated in these proceedings hence the contention by the applicant that the alleged inadvertent mistake in her description may have misled the court to erroneously treat the applicant as a grand-daughter to the deceased is merely speculative, an abuse of the court process and untenable. He contended that applicant ought to have appealed against the impugned ruling instead of filing this application which is an appeal disguised as an application for review. He accused the applicant as being hell bent on delaying the matter further considering it has been in court for the last 11 years with a conclusion that no sufficient reasons have been advanced to the satisfaction of the court to warrant the issuance of the orders sought.

4. The application was directed to be canvassed by way of written submissions on 24/09/2020. In her submissions filed contemporaneously with a supplementary affidavit, the applicant reiterated her position that she was discriminated against in the distribution of her deceased father's estate and urged the court to allow her application with the stress being that the court is enjoined to exercise its inherent powers as envisaged under section 47 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules and Article 159(2) of the Constitution to render substantive justice. She relied on **R v Public Procurement Administrative Review Board & 2 others (2018) eKLR, Nuh Nassir Abdi v Ali Wario 7 2others (2013) eKLR, Millicent Muthoni Kigira v Joshua Otieno Ndere (2021) eKLR and Master Power Systems Limited v Civicon Engineering Africa & anor (2019) eKLR** in efforts to demonstrate what principles apply on applications for review asserting that the power is discretionary purposed to achieve the useful purpose towards administration of justice and that a mistake of counsel ought not be visited upon the client.

5. The respondents' submissions were to the effect that the applicant had not made out a case for review as there was no discovery of new and important matter or evidence which after the exercise of due diligence was not within her knowledge and could not be availed at the time the order was made. An assertion was then made that the application having been made after inordinate delay of 6 months, it is an abuse of the court process, an afterthought and therefore unmerited. The respondents maintain that the applicant ought to have preferred an appeal against the impugned ruling as opposed to filing the application for review with the court being urged to dismiss the application as it has not met the conditions stipulated under Order 45 of the Civil Procedure Rules for review. The respondents cited the case of **Pancras T. Swai v**

Kenya Breweries Limited (2014) eKLR in support of their proposition that the a mistake in exposition of the law is never a ground for review but appeal and the decision in **Muyodi vs ICDC (2006) 1EA 243,** on the duty of an applicant for orders of review.

6. The established position of the law remains that for the applicant to succeed in her application for review, she must establish to the satisfaction of the court any one of the following four main grounds as stipulated under Order 45 of the Civil Procedure Rules:

> **i. That there is discovery of new and important matter of evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or**
>
> **ii. That there was a mistake or error apparent on the face of the record; or**
>
> **iii. That sufficient reasons exist to warrant the review sought.**
>
> **iv. That the application was filed without unreasonable delay.**

7. I understand the applicant here to say the only reason for seeking review to be that the court erroneously referred to her as a granddaughter instead of a daughter of the deceased which led to her getting the share she got which she considers inadequate. That error is attributed to an alleged inadvertent in so describing the applicant in her affidavit. That is what the court is called upon to determine as new and important matter of evidence that could not be availed, due diligence notwithstanding, at the time the decision was made. I do not agree with the applicant that this was a new matter availed after the decision nor an error apparent on the face of the record. A cursory look at the application yielding the ruling sought to be reviewed show clearly that at ground 1 of the summons, as well as paragraph 2, 6 & 7 of the affidavit in support thereof clearly described the applicant as a daughter. Even the alleged reference to the word granddaughter cannot be true because the same was duly corrected by an eraser by pen. I find the reasons advance to be untrue and maybe just a red-herring intended to hoodwink and mislead the court.

8. However, even if I was to delve in the question whether the court misapprehended the fact or improperly exposed the law, then the law would still dictate that the same be canvassed in an appeal and not by way of review. The court of appeal in **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR** delved deeply into the jurisdiction to review and set a in very firm exposition as follows: -

> **"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. Nor can 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".** (emphasis provided)

9. Moreover, even the part of the rule that may appear omnibus by use of the word *sufficient reason* can only be interpreted to be a reason that furthers justice and its demands. In **Official Receiver & Liquidator v. Freight Forwarders Kenya Ltd (2000) eKLR,** the court of appeal in defining what the phrase means and must be Taken to mean, observed: -

> **"Indeed, these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot, without at times running counter to the interests of justice, be limited to the discovery of new and important matters or evidence, or the occurring of a mistake or error apparent on the face of the record."**

10. In this matter I have not found any sufficient reason to review the ruling by my brother Gikonyo j, dated the 18.2.2020. This is one of those files that begs the question whether it never comes a time when the court must put its feet down and say litigation, even in fluidness and dynamism of disputes between family members like the instant one, must come to an end. It is sad that a grant which was issued on 3 rd June 2008 and first confirmed on the 9th February 2009 is yet to be implemented by distribution of the estate merely for the sake of a plethora of applications.

11. In aggregate, I find this not to be a proper case for the exercise of the court's limited jurisdiction to review its decision. As I have endeavored to demonstrate above, the grounds upon which the application is premised are more or less the very same ones that were before the court when the decision sought to be reviewed was delivered. Those issues were conclusively and finally determined in the impugned ruling delivered on 18/02/2020. This court therefore became functus officio as was candidly stated by the Supreme Court in ***Menginya Salim Murgani vs. Kenya Revenue Authority [2014] eKLR*** **that:**

> ***"It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law."***

12. On the need to be prompt in bringing the application, I note that the application was filed on 19/08/2020 yet the impugned ruling was delivered on 18/02/2020. That length of delay in my view cannot be said to be reasonable considering that no justifiable explanation has been offered for the same. I therefore find and conclude that the applicant wholly failed to establish any of the aforementioned grounds for grant of the orders sought and the applicant, cannot succeed but must fail. I dismiss it and direct, for the last time that each party bears own costs. I say last, because the conduct of the applicant here seems not intended to conclude the matter but rather temporize it. That must be discouraged and if the same applicant was to file another application which ends in failure, I will not hesitate to award costs against her

13. Having come to the said decision, I now direct that the administrator moves with speed to transmit the shares of all beneficiaries to them within 90 (ninety) days from today. The matter will be mentioned on 24/11/2021to confirm compliance by the administrators.

DATED, SIGNED AND DELIVERED AT MERU, VIRTUALLY BY MS TEAMS, THIS 25TH DAY OF JUNE 2021

PATRICK J O OTIENO

JUDGE

In presence of

Miss Masamba for petitioner/respondent

No appearance from the Objector/applicant

PATRICK J O OTIENO

JUDGE