



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 132 OF 1982**

**IN THE MATTER OF THE ESTATE OF STEPHEN HARUN KIRIKU M'MUTUNGI (DECEASED)**

**PATRICK KIRIKU NJERU.....1<sup>ST</sup> APPLICANT**

**SOLOMON KIRERA MUTUNGI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**GRACE CIRINDI KIRIKU.....1<sup>ST</sup> RESPONDENT**

**RAYMOND KIRIKU.....2<sup>ND</sup> RESPONDENT**

**JOY KIRIKU.....3<sup>RD</sup> RESPONDENT**

**JACQUELINE KIRIKU.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicants moved the Court by way of a chamber summons dated 12<sup>th</sup> March, 2021 pursuant to **Section 3A** of the Civil Procedure Act, **Order 10 Rule 11** of the Civil procedure Rules, **Rules 49, 63 and 73** of the Probate and Administration Rules. They sought the review and/or setting aside of the certificate of confirmation of grant issued on 16<sup>th</sup> July, 2018 and the inclusion of all the children of the deceased as beneficiaries. They also sought costs of the application.

2. Their application was premised on the grounds on the face thereof and further supported by affidavits sworn by the applicants dated 12<sup>th</sup> March, 2021. In his affidavit, the 1<sup>st</sup> Applicant averred that he is one of the children of the deceased who died on 22<sup>nd</sup> September, 1981. He averred that the deceased was survived by one wife and four children who were all minors at the time of his demise. He stated that subsequent to his demise, his mother the 1<sup>st</sup> respondent petitioned for letters of administration intestate in 1982 assuring him that if he consented to her being appointed the absolute heir of the deceased, she would apportion and distribute the estate equally to all the children of the deceased.

3. The 1<sup>st</sup> Applicant agreed to sign the consent whereupon the grant was confirmed on 16<sup>th</sup> July, 2018 and thereafter the entire estate was transferred to the 1<sup>st</sup> respondent as the sole beneficiary of the deceased. The 1<sup>st</sup> applicant claimed that his consent was procured by undue influence, intimidation, coercion and duress. Further, that the 1<sup>st</sup> respondent abused her influence over her children and coerced them to sign the consents for the confirmation of grant. He averred that the 1<sup>st</sup> Respondent colluded with his siblings the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents herein to sell and/or transfer prime properties to other third parties thereby disinheriting all of them. Further that the properties known as L.R No Kibirichia/1155 and L.R No. 187 Ntima/Igoki are at risk of being mismanaged and wasted away. He urged the court to review the confirmed grant as he is entitled to a share of the estate of his father.

4. In his affidavit, the 2<sup>nd</sup> applicant stated that he is a brother to the deceased and a co-administrator to his estate. He maintained that he has no interest in the estate and was only appointed as a co-administrator to protect the interests of the children of the deceased together with his younger brother Julius Muringi Mutungi (now deceased) on 13<sup>th</sup> October, 1992. He claimed that as a co-administrator he never consented to the schedule of distribution attached to the certificate of confirmation of grant dated 16<sup>th</sup> July, 2018.

5. He alleged that the 1<sup>st</sup> respondent has already sold one property and is presently in search of potential buyers for the other remaining properties without the consent of the 1<sup>st</sup> Applicant. He accused the 1<sup>st</sup> Respondent of discreetly attempting to disinherit her children and

urged the court to cure that mischief by allowing the application for review of the confirmed grant.

6. The application was opposed by way of a two replying affidavit sworn by the 1<sup>st</sup> respondent and the 2<sup>nd</sup> Respondent on his own behalf and on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> respondents both dated 1<sup>st</sup> April, 2021. In her response, the 1<sup>st</sup> respondent averred that she is the widow of the deceased who died when all his children were minors. She stated that upon his demise, she singlehandedly raised her children by partly relying on proceeds from the estate of the deceased.

7. She contended that she made the application for confirmation of grant with the consensus of all beneficiaries and her co-administrator. She refuted claims by the applicants that she unduly influenced her children to sign the consents for the confirmation of grant. She asserted that she had no intention of disinheriting her children who are beneficiaries of the estate of the deceased. Further, that the decision for her to be the sole beneficiary was for easier preservation and distribution of estate property. She asserted that there has never been any dispute as to the beneficiaries' entitlement to estate property.

8. On the alleged sale of estate property, the 1<sup>st</sup> respondent claimed that L.R No. Kibirichia/1155 was sold off in 2017, long before the confirmation of grant and what was remaining was the transfer to the buyer. She refuted allegations by the applicants that she intends to plunder and sell off estate property insisting that there has always been consensus before any sale or sub-division of the property. She averred that the rest of the children are not opposed to the 1<sup>st</sup> applicant having his share of the net estate after the expenses are catered for. She sought dismissal of the application which she termed as malicious and unnecessary.

9. In his replying affidavit, Raymond Kiruki the 2<sup>nd</sup> respondent herein, stated that he is one of the children of the deceased. That prior to the confirmation of grant, there was an agreement between all the children of the deceased and their mother on how they wished the estate to be managed. He stated the distribution of the estate had began but the process has been lengthy and is not yet complete. He averred that no property had been sold since the confirmation of grant confirming that L.R No. Kibirichia/1155 was sold in 2017 with the consent of all beneficiaries.

10. The 2<sup>nd</sup> respondent maintained that their mother relies partly on estate property and partly on him and his sisters for her upkeep. He was not opposed to the 1<sup>st</sup> applicant's share of the net estate being identified and transferred to him upon the estate meeting all the necessary costs incurred in the process.

11. On 9<sup>th</sup> June, 2021 when the application came for hearing the learned counsels for the parties herein made oral submissions in support of their respective cases. Mr. Baston Woodland learned counsel for the Applicants reiterated the contents of the two affidavits in support of the application. He further stated that under the Law of Succession Act all beneficiaries should be provided for, arguing that the children of the deceased have not been provided for by virtue of their exclusion from the schedule of distribution. He asserted that since the confirmation of grant, the property has remained with the 1<sup>st</sup> respondent and has never been distributed to the children of the deceased. He urged the court to grant the review orders sought.

12. Mr. Kioko learned counsel for the Respondents submitted that the orders of review sought cannot be granted by this Court as the only remedy available once a grant has been confirmed is revocation of grant. He argued that the grant was confirmed with the consent of all beneficiaries including the 1<sup>st</sup> applicant and the 2<sup>nd</sup> applicant who swore an affidavit in support of the confirmation. He asked the court to dismiss the application as it was frivolous.

13. I have considered the application herein, the response thereto and the oral arguments made by respective counsels representing the parties. It is my view that the following two substantive issues are up for determination:

- i. Whether the application meets the threshold for granting Review orders.
- ii. If the application meets the threshold, what orders should the Court issue

14. I note that the applicant erroneously filed this application pursuant to **Order 10 Rule 11** of the Civil Procedure Rules which deals with setting aside judgment in default of defence or appearance. The correct law is **Order 45** of the Civil Procedure Rules which is applicable to proceedings under the Law of Succession Act pursuant to **Rule 63** of the Probate and Administration Rules. The application of **Order 45** of the Civil Procedure Rules in succession proceedings was considered in **John Mundia Njoroge & 9 Others vs Cecilia Muthoni Njoroge & Another [2016] eKLR** where the court stated as follows:-

*“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, and consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.”*

15. **Order 45 Rule 1** of the Civil procedure Rules provides as follows on the requirements for an application for review:-

**1. (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.

16. Consequently, for this court to exercise its jurisdiction under the said Order and grant a review, there must be either be:

- a. Discovery of new and important matter of evidence which, after exercise of due diligence, was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or the Order made
- b. Mistake or error apparent on the face of the record
- c. Any other sufficient reason which may make the court to review its order.
- d. The application for review must be filed without unreasonable delay.

17. The first ground is discovery of new and important matter of evidence. In their pleadings, the applicants did not raise any issue of discovery of new and important matter of evidence which was not within their knowledge and could not be produced in 2019 when the grant was confirmed. The oral arguments made by Counsel did not allege the discovery of any new evidence. The applicants have therefore not proved that there was discovery of new and important matter of evidence which after due diligence was not within his knowledge and could not be produced at that time.

18. Another consideration is whether the applicants proved that there was a mistake or error apparent on the face of the record. The error must not be matter of argument, or allegation or implied, it must be apparent on the face of the record. It must be obvious on the face of the record. From the record the applicants have not alleged an error apparent on the face of the record. This ground consequently fails.

19. I have also considered whether the applicants have shown sufficient reason to warrant a review to make this Court review its order. From the pleadings, the 1<sup>st</sup> applicant deposed that prior to the confirmation of grant, his consent was procured through undue influence, intimidation, coercion and duress. The question that begs an answer therefore, is whether the applicants were able to prove this allegations.

20. Undue influence is described in Black's Law Dictionary 10<sup>th</sup> Edition at pg 1760 as:

**“the improper use of power or trust in a way that deprives a person of free will and substitutes another's objective; the exercise of enough control over another person that a questioned act would not have otherwise been performed, the person's free agency having been overmastered”**

21. In All Card v Skinner, [1887] 36 Ch D 145 which decision was quoted with approval by the Court of Appeal in In Nabro Properties Limited Vs Sky Structures Limited (Z.R. Shah ) Southfork Investments Limited) [1986] eKLR, Lindley L J held that undue influence can be classified into two groups and the first group being cases in which there has been some unfair and improper conduct, some coercion from outside, some form of cheating and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor.

22. The second group consists of cases in which the position of the donor to the donee has been such that it has been duty of the donee to advise the donor, or even to manage his property for him (thus a person abusing his position)

23. From his affidavit, the 1<sup>st</sup> applicant alleged that his mother wielded a lot of power and influence over her children. That she convinced them to sign the consents making her the sole heir of the estate of the deceased. On her part, the 1<sup>st</sup> respondent was adamant that the decision for her to be the sole beneficiary was for easier preservation and distribution of estate property. She asserted that the process of distribution was ongoing with the involvement of all her children including the 1<sup>st</sup> applicant.

24. It is trite law that he who alleges must prove the allegation. The burden is therefore on the applicants to prove the existence of the duress, undue influence or coercion. This is in consonance with the burden of proof under **Section 107** of the Evidence Act which provides that: -

**“Whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he asserts must prove that those facts exist. When a person is required to prove the existence of any fact it is said that the burden of proof lies on that person.”**

25. I have perused the pleadings and proceedings before and during the confirmation of grant. I note that the although not represented by his own advocate at the time, the 1<sup>st</sup> and 2<sup>nd</sup> applicants filed affidavits in support of the confirmation of grant dated 9<sup>th</sup> October, 2017 and 30<sup>th</sup> May, 2018 respectively. Although undue influence, duress and coercion were pleaded, they were not supported by any evidence. In law, allegations, however serious they may sound, cannot suffice without evidence in support thereof.

26. The last consideration is whether the application for review has been filed without unreasonable delay. The order which the applicants

seeks to be reviewed was issued on 16<sup>th</sup> July, 2018. This application was filed on 12<sup>th</sup> March 2021 over 2 and half years after the grant was confirmed. **Order 45 rule 1** is clear that an application for review should be made without unreasonable delay.

27. The applicants did not tell the Court when they discovered that they had been coerced or that they had acted under duress or undue influence. The delay relates to when such a discovery is made and how long it takes to move to court after that discovery. In this case, no attempt was made to explain the delay. In my view, a two year delay which is not explained is inordinate and therefore unreasonable delay.

28. That notwithstanding, it is evident that the deceased died intestate and having left several beneficiaries who survived him, who were all entitled to a share of his estate. Consequently, the administrator of the estate of the deceased is hereby directed to ascertain the share due to each beneficiary within 60 days from the date hereof for purposes of reviewing the distribution of the estate.

No orders as to costs.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 27<sup>TH</sup> DAY OF JULY, 2021**

.....

**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of .....Advocate for the Applicants**

**In the presence of .....Advocate for the Respondents**