



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. 125A OF 2019**

**IN THE MATTER OF THE ESTATE OF CHRISTOPHER THAIRU (DECEASED)**

**MARY WAMBUI.....APPELLANT**

**VS.**

**TERESIA NJOKI THAIRU.....RESPONDENT**

***(Appeal from the original proceedings and Ruling of the Senior Principal Magistrate's Court at Limuru Succession Cause No. 13 of 2017 delivered on 18<sup>th</sup> July, 2019 by Hon. E. Olwande, SPM)***

**JUDGMENT**

1. Before the Senior Principal magistrate's Court at Limuru, **MARY WAMBUI (Mary)** filed a citation addressed to **TERESIAH NJOKI THAIRU (Teresiah)** and her eight children to accept or refuse letters of administration of the estate of **CHRISTOPHER THAIRU KIEYA DECEASED**, or to show cause why the letters of administration should not be issued to Mary. That citation was supported by the affidavit of Mary. By that affidavit, Mary deponed that the deceased was survived by Teresiah, as a widow, her eight children and Mary as the second wife of the deceased and her two children.
2. Teresiah responded to citation by filing her affidavit dated 29<sup>th</sup> March, 2017 and by affidavit of **Stephen Njenga Muiruri (Stephen)**. Stephen was brother of the deceased. Teresiah and Stephen, by their respective affidavits deponed that Mary was neither a wife nor beneficiary of the deceased. Further, in those affidavits they deponed that Teresiah and deceased were married in a traditional ceremony and the minutes of the dowry negotiations, dated 8<sup>th</sup> February, 1981 was attached. Subsequently, on 28<sup>th</sup> August, 1993 the deceased solemnized his marriage to Teresiah at St. Francis of Assisi Limuru. That solemnization of their marriage was evidenced by a certificate of marriage. Teresiah through her affidavit acknowledged that the deceased had two children out of wedlock with Mary.
3. Mary filed a supplementary affidavit dated 5<sup>th</sup> May, 2017 in response to the depositions of Teresiah and Stephen. Mary by her affidavit acknowledged that Teresiah was the first wife of the deceased. Mary in her further deposition alleged the marriage certificate solemnization of marriage between deceased and Teresiah was forged. Mary in her affidavit alluded to several attempts made to mediate, through family members and local administration, her dispute with Teresiah. Mary deponed that she got married to the deceased in 1980 and that union was blessed with two children. That at the time of his death deceased lived with her for close to four years. On that basis, Mary sought that she be permitted to apply for grant of letters of administration intestate.
4. The trial court directed the citation proceeding be heard by way of affidavit and by viva voce evidence.
5. After receiving the evidence of Mary and her one witness and Teresiah and her three witnesses the trial magistrate, *Hon. E. Olwande* delivered the Ruling on 28<sup>th</sup> June, 2018. By that Ruling that trial court held Mary failed to provide sufficient material that would support a presumption of marriage between her and the deceased. The trial therefore made a finding that Mary was not entitled to inherit the deceased's property. The trial court however made a finding that Mary's two children were children of the deceased.
6. Mary moved the trial court by an application dated 24<sup>th</sup> July, 2018 seeking review of the Ruling dated 28<sup>th</sup> June, 2018. Mary based her application for review on the grounds that she discovered documents which she did not possess during the trial and further, that her then advocate failed to inform her of the witnesses she ought to have called to testify in her favour and that had she been informed she would have called deceased's older brother and the chairman of the funeral arrangements at Maai Mahiu.
7. Teresiah opposed the application through an affidavit dated 16<sup>th</sup> January, 2019. Teresiah deponed that Mary should have tendered the said documents at the hearing.

8. The learned trial magistrate by her considered Ruling of 18<sup>th</sup> July, 2019 dismissed Mary's application for review. The following captures the learned magistrate's findings:-

*“The applicant, (Mary) seems to be asking for a second chance to present evidence which she left out. The question is; ‘is this new important evidence which despite the exercise of due diligence she would not have of?’ My answer to this question is, No.”*

9. Mary has filed this appeal against that finding by the trial court. This is first appellate court. What is expected of this Court was stated in the case SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT & OTHERS (1968) in the following terms:-

*“...I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. ...”*

10. Mary in seeking review of the trial court's Ruling invoked the provisions of section 80 of the Civil Procedure Act Cap. 21, viz:-

*“Any person who considers himself aggrieved:-*

*a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

*b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”*

11. It is under Order 45 of the Civil Procedure Rules that one who is seeking review will look to in order to consider whether he/she meets the conditions of seeking review. **Order 45 Rule 1** of the Civil Procedure Rules in the following terms:-

*“(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. (Emphasis mine)*

12. Mary has brought forward seven grounds of appeal. Those grounds require me to consider whether the trial court failed to take into account the principals of review of an order or judgment; or failed to take into account whether the evidence presented by Mary was new and important evidence, and whether the trial court failed to consider the new evidence Mary sought to produce.

13. All those grounds will be considered wholesomely because they lead to consideration of whether Mary met the threshold of granting review of the trial court's Ruling. While doing so, I will keep in mind the provisions of Order 45(1) of the Civil Procedure Rules to wit:-

v Mary should not have preferred an appeal;

v Mary must have discovered new and important matters or evidence which after exercise of due diligence was not within her knowledge and not could produce it when the decree/order was made; and

v That there was a mistake or error apparent on the face of the record.

14. Mary based her application for review on the following grounds:-

a. THAT the Citor is now in possession of new documents and information that was within her knowledge due to illiteracy and was not placed before court and would wish this Court to view the same.

b. THAT had this material information been placed in evidence before court, this Court would have given a different verdict as it sheds light on her status in this matter.

c. THAT the Citor was not aware of the citation hearing date when she could have brought witnesses to support her case and searched for documents evidencing her marriage.

d. THAT she had witnesses to call who have sworn supporting affidavits and had she been properly advised she could have called them to give their evidence on her part as contained in the affidavits.

e. THAT no prejudice will be suffered by the Citee if this application is allowed.

15. Mary sought review of the Ruling to enable her produce the deceased's Eulogy Obituary and photographs. She also sought to call witnesses who did not testify at the citation hearing, one of them being the eldest brother of the deceased, and the chairman of the funeral committee at Maai Mahiu. Those two swore affidavits whereby they stated Mary was the wife of the deceased.

16. Mary gave two reasons why the evidence she sought to produce was not produced and why she did not call the two witnesses. She deposed in her affidavit in support of the application that she later discovered the documents she wished to produce and in respect of the witnesses she wished to call she, that her then advocate did not inform her of the witnesses she should call.

## ANALYSIS

17. Mary initiated the matter before the trial court by citing Teresiah. Teresiah responded by denying that Mary was her co-wife. Teresiah, by her affidavit annexed her marriage certificate as proof of her marriage to the deceased when their marriage was solemnized in a church. Teresiah also filed an affidavit of Stephen, deceased brother, who denied knowledge of Mary as a wife of the deceased.

18. Mary responded to Teresiah's deposition by her detailed affidavit dated 5<sup>th</sup> May, 2017. It is clear from that affidavit that Mary was aware of the case she was to meet. In other words, she understood that she had a burden to prove she was a wife of the deceased.

19. In making the application for review Mary failed to state why the eulogy, the obituary and photographs were not obtained at the hearing. She also failed to state why with exercise of due diligence she could not produce these documents at the hearing.

20. In respect of the witnesses Mary wished to call them on the basis that had she been informed the citation was for hearing, she would have availed those witnesses.

21. Mary's grounds of seeking review fails the test of Order 45, that is, no sufficient reason is shown for review and it is doubtful that Mary did not know of the hearing. How else does she explain calling her one witness *Njeri Koigi* at the hearing?

22. There are two cases which I wish to rely on and which indeed speak to this appeal.

23. The first is ***OTIENO, RAGOT & COMPANY ADVOCATES VS. NATIONAL BANK OF KENYA LIMITED (2020) eKLR*** as follows:-

*“Order 45 Rule 3(2) provides that an application for review shall, ‘...not be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree was passed or made without strict proof of such allegation. Other than the confusion in dates, no sufficient reason was given by the respondent as to why the letters were not filed before the taxing officer. This to my mind was an oversight on the part of the respondent but it was not a mistake apparent on the face of the record.’*

*Order 45 rule 1 does not excuse every error or mistake, even if inadvertent. It excuses those mistakes and allows a party to introduce documents which it could not lay its hands on even after the exercise of due diligence...*

*The discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence...*

*It was quite clear therefore that the respondent having found out why the Judge decided against it went back to the drawing board and fished out evidence that would bolster its case. This was too late in the day as the horse had already bolted from the stable.”*

24. The second is ***NASIBWA WAKENYA MOSES VS. UNIVERSITY OF NAIROBI & ANOTHER (2019) eKLR*** vis:-

*“17. In TOKESI MAMBILI AND OTHERS VS SIMION LITSANGA the Court of Appeal held:-*

*‘i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.’ (Emphasis added)...*

*19. A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial...*

*22. To qualify to be new evidence so as to fall within the ambit of order 45 Rule 1 of the Civil Procedure Rules, the new evidence must be of such a nature that it could not have been within the knowledge of the applicant despite the exercise of due diligence. The advocate knew the nature of the application confronting his client and the legal grounds to challenge it. He filed grounds of opposition and appeared in court. This being a matter of law, it was for the lawyer to guide his client. It cannot be said he did not know what he was responding to.”*

25. I have considered the appeal before me and I find no sufficient reason to justify interfering with the trial court's Ruling. The application

or review was bereft of merit it failed to meet the threshold of review of order/judgment.

**CONCLUSION**

26. In view of the above finding, this appeal fails and is dismissed with costs.

**JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 28TH DAY OF OCTOBER, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Nancy

For Appellant (Mary Wambui) : - Mrs. Muhuhu

For Teresiah Njoki Thairu : - N/A

**COURT**

Judgment delivered virtually.

**MARY KASANGO**

**JUDGE**