REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 692 OF 1994

IN THE MATTER OF THE ESTATE OF NERIMA MUYA MASANGA (DECEASED)

DANIEL OMUKA MALALA..... PETITIONER/APPLICANT

VERSUS

BENARD MUYA NELIMA .....1ST RESPONDENT

ASMIN NANZALA OWANG'.....2ND RESPONDENT

RULING

1. The petitioner/applicant has filed an application dated 25/9/2018 seeking for review of this court's judgment (Chitembwe J.) delivered on 27/2/2014 on the grounds that a crucial document was not produced during the protest proceedings. The applicant contends that had the said document been produced the court would have arrived at a proper and just decision. Further that his witness who testified as DW2 in the protest proceedings was a witness during the making of the said document though the witness did not refer to it when he gave his evidence during the hearing.

2. The application was opposed by the respondents through the replying affidavit of **Benard Muya Nelima**, the 1st respondent and the oral submissions of their advocate, Mr. Akwala. The objectors contend that the application has been brought up after more than 4 years after the delivery of the judgment. That there is no explanation for the delay. That the applicant has not explained why he nor his witness DW2 mentioned the document during the hearing. That on the 14/8/2018 the applicant filed a notice of appeal to the Court of Appeal which he has not pursued. That the application is an appeal by the back door and allowing the same will amount to sitting on an appeal of another Judge.

3. The applicant denied that he has filed a notice of appeal. I have checked the documents in the court record. The notice dated 14/8/2018 indicates it to be a notice of appeal against Justice Musyoka's ruling delivered on 17th July, 2018 in which ruling the learned Judge allowed the respondent's application dated 14/6/2017. The said ruling was therefore not in relation to Justice Chitembwe's judgment dated 27/2/2014 which is the subject matter of the review application. There is thereby no evidence that the applicant has filed a notice of appeal against the said judgment.

4. The application is made under Sections 3 and 3A of the Civil Procedure Act. Rule 63 of the Probate and Administration rules sets out the rules of the Civil Procedure Rules that are applicable in Succession proceedings. Section 3 and 3A of the Civil Procedure Rules are not among them. However Order 45 is one of them. The application should therefore have been made under Order 45 of the Civil Procedure Rules which provides for review of judgments.

5. Order 45 of the Civil Procedure Rules provides as follows:-

> ***"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 misstate 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."***

From the provisions of the rule a review can be allowed on grounds of:-

1. Discovery of view and important evidence.

2. On account of some mistake or error apparent on the face of the record.

3. Any sufficient cause.

6. The grounds under which a court may grant review on the first ground were explained in the case of **Rose Kaiza Vs Angela Mpanjuiza (2009) eKLR** where the Court of Appeal held that:-

> ***"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."***

7. It is clear that the discovery ought to be new and important evidence which after due diligence was not within the knowledge of the applicant or could not have been produced when the decree was being made. In such applications the court must exercise caution to prevent a party who has lost in a case from re-opening the case in the guise of new evidence. In **D. J. Lowe & Company Ltd –Vs- Bonquo Indosuez, Nairobi Civil Application No. 217 of 1998** the Court of Appeal sounded the caution in the following words:-

> ***"Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing***."

8. The applicant depones in his supporting affidavit that it was to his knowledge that the agreement that was not produced during the hearing was backbone of his claim in the deceased's estate. However that failure to produce the document was due to the laxity of his then lawyers who were on record. That his witness who testified in the case DW2 was a witness to the said agreement.

9. It is clear from the supporting affidavit of the applicant that he has been in possession of the subject document all through. The contents of the document were to his knowledge when he filed the protest in court. The document therefore does not contain new evidence that was not to his knowledge when he testified in court. He and his witness did not refer to the document when they testified in court. The document was not mentioned anywhere in the pre-trial proceedings. Having been in possession of the document all through and having had knowledge that it was the backbone of his case.

10. The applicant blames his advocates who were on record for not producing the document during the hearing. He urgues that this was an error by his advocates.

11. The ground for review on account of error apparent on the face of the record was explained the case of **National Bank of Kenya Limited Vs Ndungu Njau (1997) eKLR** where 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 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. In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."***

12. There was no evidence that the advocates for the applicant were aware of the document and that they deliberately refused to produce it in court during the hearing. The act of the advocates of not producing the document during the hearing does not amount to an error apparent on the face of the record.

13. The objection proceedings were heard and concluded over 4 years ago. There is inordinate delay of over 4 years before the application for review was made. There is no explanation for the delay.

14. The applicant had the option of appealing against the judgment of the court. He did not. I do not find sufficient grounds for review. The application is no more than an attempt to frustrate the execution of the court's decree. I have no doubt the application is a disguised appeal by the back door. To allow the application would amount to sitting on an appeal of another Judge which is against the law. The application is for dismissal.

15. The upshot is that there is no merit in the application dated 29/9/2018. The same is dismissed with costs to the respondents.

Delivered, dated and signed at Kakamega this 22nd day of May, 2020.

J. NJAGI

JUDGE

In the presence of:

No appearance for the Applicant

No appearance for the Respondents

Applicant - Absent

Respondents - Absent

Court Assistant – Polycap

30 days right of appeal.