



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CORAM: A.K NDUNG'U J**  
**SUCCESSION CAUSE NO. 33 OF 2004**  
**IN THE MATTER OF THE ESTATE OF OTORO ORANGI**  
**(DECEASED)**

**WILLIAM SUNDA OTORO.....RESPONDENT**

**VERSUS**

**JAMES NYABUTO ORANGI .....1<sup>ST</sup> PROTESTOR/APPLICANT**

**SCOLASTICA KWAMBOKA GISACHO.....2<sup>ND</sup> PROTESTOR/APPLICANT**

**RULING**

1. This ruling is in respect of the application dated 24.7.2019. Vide this application, James Nyabuto Orangi seeks orders;

1. Spent.

2. That pending the hearing and determination of this application and considering the new and compelling evidence, the honourable court be pleased to vary, review and or set aside its ruling delivered on 28.5.2019.

3. That this honourable court be pleased to make any other order as it may deem just and expedient.

4. Costs of this application be in the cause.

2. The application is grounded on the affidavit of the applicant sworn on the 24.7.2019 and on 6 grounds listed on the face of the application. The gist of the affidavit and the grounds is that William Sunda Otoro (respondent) failed to disclose to the court that he had fraudulently transferred land parcel Bassi/Boitangare/888, a property of the deceased to himself in 2009 yet the deceased had died in 1990. It is further stated that William then transferred the said parcel to Elias Okindo Nyamari in the same year (2009).

3. It is urged that based on the above, the court was thus misguided and misled into the verdict reached in its ruling dated 28.5.2019. The concealment of this material fact threatens the legitimate interests of the objectors/beneficiaries. It is therefore urged that the ruling of this court dated 28.5.2019 be varied, set aside or reviewed.

4. The application is opposed and in a replying affidavit sworn by William Sunda Otoro (William) on 16.9.2019, it is averred that land parcel Bassi/Boitangare/888 was shared equally with his two elder brothers, Petro Orangi Otoro and Lawrence Gisacho Otoro. James Nyabuto Orangi and his brother Cosmas Nyamwaro Otoro sold their father's portion to raise fees. William too sold his share to the same purchaser and so too, the children of the 2<sup>nd</sup> applicant herein. This purchaser is Elias Okindo Nyamari.

5. It is William's case that nothing new has been discovered by the applicants that was not within their knowledge to warrant the filing of this application for review.

6. There is a further affidavit sworn by Elias Okindo Nyamari (Elias) who states that Parcel No. Bassi/Boitangare/888 is his property since 27.3.2004 which he lawfully purchased from the family of Otoro Orangi (Deceased).

7. It is Elias case that before the purchase, the said land had been shared equally by the 3 sons of the deceased. The 1<sup>st</sup> to sell his share to

him was Cosmas Nyamwaro Otoro and James Nyabuto Orangi (1<sup>st</sup> applicant). The next to sell was William (respondent) and last by Scholastica Kwamboka Gisacho (the 2<sup>nd</sup> applicant). All the parties authorized William to transfer the land to him (Elias). Elias maintains he is the owner thereof.

8. The application was canvassed by way of written submissions.

9. I have had occasion to consider the application, the supporting affidavits and grounds relied upon. I have had due regard to the responses in the affidavits filed. I have considered learned submissions by counsel.

10. Of determination is whether the applicants have achieved the threshold for orders of review of the court's ruling and orders of 28.5.2019.

11. This court has powers of review under the **Law of Succession Act** within the provisions of **Rule 63(1)** of the **Probate and Administration Rules**. Rule 63(1) provides;

*“Rule 63(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, 10, 11, 15, 18, 25, 45 and 49, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.”*

12. The threshold to be achieved in an application for review under **Order 45** of the **Civil Procedure Rules** requires a party to establish that;

- a) There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him when the decree was passed or the order made.
- b) There exists a mistake or error apparent on the face of the record.
- c) There exists any other sufficient.
- d) That the application is made without undue delay.

13. The Law on review of court orders/judgements is now well settled. In **Rose Kaiza –vs- Angelo Mpanju Kiza [2009] eKLR**, the Court of Appeal held that not every new fact will justify interference with the judgement of the court. The crucial aspect to consider is that the alleged new fact ***was not within the knowledge of the party despite exercising due diligence.***

14. The court quoted from a commentary by Mulla on similar provisions of the **Indian Civil Procedure Code, 15<sup>th</sup> Edition at page 2726**;

*“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 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.”*

15. In **D.J Lowe & Co. Ltd –vs- Banque Indosuez [1998] eKLR**, the Court of Appeal again called for caution when exercising discretion to review and required a party to show that he was not negligent or indifferent. The court stated;

*“Where such a review application is based on fact of fresh evidence, the court must exercise greatest care as it is easy for the party who has lost, to seek the weak part of his case and the temptation to lay and produce 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.”*

16. This court (Visram J, as he then was) had occasion to delve into this area of Law in **James M. Kingaru & 17 Others –vs- J.M Kangari & Muhu Holdings Ltd and 2 Others [2005] eKLR** where the court stated;

*“Applications on this ground [review] must be treated with caution. Review cannot be sought to supplement the evidence or to introduce new evidence. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial.”*

17. In our instant application, the review sought is pegged on discovery of new and compelling evidence that ***the applicant/respondent never disclosed to the court to the effect that*** he (respondent) had illegally transferred Plot No. Bassi/Boitangare/888 belonging to the deceased to his name in 2009 after the death of the deceased. This land was subsequently transferred by the respondent to Elias Okindo Nyamari.

18. I need to point out at the earliest that an application for review cannot predicated on what evidence a respondent in such an application failed to produce or misled the court on. A correct reading of **Order 45** of the **Civil Procedure Rules** will clearly show that the applicant in an application for review approaches the court to be allowed, inter alia, to produce evidence which has been discovered and which, after

exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made.

19. The applicants herein were joint administrators of the estate of Otoro Orangi. As administrators, it was expected of them to diligently gather the assets of the deceased including Plot No. Bassi/Boitangare/888. No attempt whatsoever is made to show exercise of due diligence in seeking to obtain this evidence.

20. Indeed, in the further affidavit sworn by Elias Okindo Nyamari, the applicants herein are named as part of the persons who sold Plot No. Bassi/Boitangare/888. Inexplicably, the applicants chose not to respond to these grave allegations about their participation in the sale of Parcel No. Bassi/Boitangare/888. This raises suspicion that the circumstances surrounding this property were known to them as at the time the matter was heard in court and more importantly, even assuming that the contrary is true, as administrators they were expected to exercise due diligence for this fact to have come to their knowledge.

21. That was a duty bestowed on them by law. **Section 83(e)** of the **Law of Succession Act** provides as follows;

*“S 83 Personal representatives shall have the following duties—*

*(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.”*

22. A microscopic view of the application lays bare the fact that the same is couched in a manner suggesting fraud, misrepresentation and concealment of material facts on the part of William in so far as property Plot No. Bassi/Boitangare/888 is concerned.

23. And whereas the application as analysed above falls short of the threshold for review, it has brought to the fore grounds upon which an application for revocation of the grant under S.76 of the Law of Succession Act could stand.

24. The dealings with the Plot Bassi/Boitangare/888 by William raise considerable concerns as they appear to be shrouded in illegality.

25. William was initially issued with letters of administration in respect of the estate of the deceased herein and he listed property Bassi/Boitangare/93 as the only property of the deceased. The certificate of confirmation of grant issued to him lists in the schedule parcel Bassi/Boitangare/93 as the only asset of the deceased. This certificate is dated 24.11.2006.

26. In light of the above, it is inconceivable how property Bassi/Boitangare/93 was transferred from the deceased to William on 20.11.2009, the said property having not been subjected to succession proceedings and in the same breadth, the transfer to Elias Okindo Nyamari arouses genuine legal concerns.

27. An interesting angle is introduced to the matter by the affidavit of Elias. He states the property Bassi/Boitangare/93 was his since 27.3.2004 and he states *“... which I lawfully purchased from the family of the late Otoro Orangi.”*

28. Suffice it to note that the initial grant of letters of administration intestate of all the estate of Otoro Orangi was issued to William on 24.3.2004, the same date Elias purports to have bought the property Bassi/Boitangare/888.

29. **S 82 (b) (ii)** of the **Law of Succession Act** clearly provides that no immovable property shall be sold before confirmation of grant. Thus, as at 24.3.2004, William or anybody else for that matter would not have capacity to sell real property of the deceased before confirmation of grant.

30. The matter is compounded by the fact that in the P&A 5 dated 18.2.2004 and filed in court on 24.2.2004, the only listed property is Bassi/Boitangare/93 and it is thus apparent that at no time did anyone have capacity to deal with property Bassi/Boitangare/888.

31. Before I wander too far away, from the application at hand, I need to put into perspective that I have laid out the above facts to show that a case exists about the propriety of the dealings in Plot Bassi/Boitangare/888.

32. I have deliberately taken the step to pin point the apparent illegalities in the dealings with Plot Bassi/Boitangare/888 principally because this court cannot shut its eyes to the circumstances surrounding this property as brought out in the present application and it is in the interest of justice that the issues be flagged out and the matter be left to the parties to move the court as they may deem necessary and appropriate.

The court's grave concern that this is a very old litigation notwithstanding, the parties should be allowed to ventilate the issues surrounding plot Bassi/Boitangare/888 should they desire so to do.

33. Sadly, I have not been moved in the appropriate manner to deal with the issues at hand. In my view an application under **S 76** of the **Law of Succession Act** would have been necessary or, at least, an application to include Plot No. Bassi/Boitangare/888 as part of the assets of the deceased should have been made. Alternatively a suit by any of the administrators at the Environment and Land Court may suffice.

34. By moving this court under a review application, the applicants misdirected their energies and failed to achieve the threshold required in Law.

It is worth noting that Elias Okindo Nyamari would be one necessary party in any action challenging the ownership of Plot Bassi/Boitangare/888. That would be a point to consider by the parties in any further action in the matter.

35. In the end I reach the finding that the application for review has no merit and must fail. I dismiss the same. In light of the relationship between the parties, each party is to bear its own costs.

**Dated and Signed at Kisii this 30<sup>th</sup> day of July 2020.**

**A.K NDUNG’U**

**JUDGE**