

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1515 OF 2006

IN THE MATTER OF THE ESTATE OF HASMUKH PRANJIVAN MAKHECHA (DECEASED)

PRADEEP IAN MAKHECHA.....APPLICANT

VERSUS

ORIENTAL COMMERCIAL BANK LTD.....1ST RESPONDENT

WAMBUGU GITONGA

T/A MAKHECHA & GITONGA ADVOCATES.....2ND RESPONDENT

RULING

1. Under **Order 45 rule 1(1)** of the **Civil Procedure Rules**, any person aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or from which no appeal is 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 the judgment to the court which passed the decree or made the order (**Tokesi Mambili & Others –v- Simon Litsanga, Civil Appeal No. 90 of 2001 at Kisumu**). The application should be brought without unreasonable delay.

2. In the application dated 22nd October 2019 by the applicant Pradeep Ian Makhecha (the administrator of the estate of the late Hasmukh Pranjivan Makhecha T/a Makhecha & Co. Advocates) he seeks that the application for revocation dated 20th February 2018 by the 1st respondent Oriental Commercial Bank Ltd (formerly known as Delphis Bank Ltd) and the resultant ruling delivered on 25th March 2019 be reviewed by being struck out and or expunged on the grounds that they are *res judicata* **HCCC No. 474 of 2007 (O.S)**, or, alternatively, they are *subjudice* **HCCC NO. 474 OF 2007 (OS)**.

3. The application was opposed by the respondents. It is not in dispute that the 2nd respondent had not joined Makhecha & Co. Advocates in 2002 when the Kshs.6,107,132/80 became due against the firm.

4. It is material that when the 1st respondent filed the application dated 20th February 2018 with it was a supporting affidavit to which was annexed the judgment in **HCCC No. 474 of 2007 (OS)**. In the originating summons in the case the 1st respondent had sought the determination of the issue that the applicant as the administrator of the estate of the deceased owed it Kshs.6,107,132/80 following a transaction involving LR No. 12502 in Kwale which the 1st respondent had sold to third parties, and in which the firm of advocates of the deceased had acted for the 1st respondent. The dispute had been resolved in favour of the 1st respondent.

5. I have given these details to show that **HCCC 474 of 2007 (OS)** was not a new matter. It was pleaded by the 1st respondent in the application dated 20th February 2018. The applicant filed a response to the application by raising grounds of opposition and a notice of preliminary objection. Both were filed on 2nd August 2018. The applicant was represented. He did not raise the defence of *res-judicata* in the response. The issue of *subjudice* was not raised.

6. For the applicant to succeed in the application to review the ruling of 11th March 2019, he has to show that he had made discovery of a new and important matter or evidence (**Pancras T. Swai –v- Kenya Breweries Limited [2014]eKLR**). In this case, however, the applicant was aware of the judgment in **HCCC No. 474 of 2007 (OS)**, he had the opportunity to respond that the application was *res judicata* or *subjudice* owing to the judgment, but he did not.

7. In short, I find no merit in the application and dismiss it with costs.

DATED and DELIVERED at NAIROBI this 28TH day of JULY 2020.

A.O. MUCHELULE

JUDGE