REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

SUCCESSION CAUSE NO. 49 OF 2016

IN THE MATTER OF THE ESTATE OF RICHARD

KIPLANGAT TANUI.....DECEASED

IN THE MATTER OF MONICAH

CHEROTICH TESOT.....PETITIONER/RESPONDENT

VERSUS

IN THE MATTER OF MOSES ARAP LASOI.....OBJETOR/APPLICANT

RULING

1. The Applicant/Petitioner filed an Application byChamber Summons dated 15th August, 2018 brought under Section 80 and 3A of the Civil Procedure Act, Cap 21, Order 45 of the Civil Procedure Rules, 2010 and Rule 59 and 73 of the Probate and Administration Rules seeking orders that:

i. THAT this application be certified urgent and service be dispensed with in the first instance.(spent)

ii. THAT pending the hearing and determination of this application there be stay of execution of all the consequential orders arising from the certificate of confirmation of grant.

iii. THAT this Honourable Court do review its ruling delivered on the 4th April, 2018.

iv. THAT such further order be made as this Honourable Court deems fit and just in the circumstances of the case.

v. THAT cost of this application be provided for.

2. After perusing the Application Notice of Motion, Replying Affidavit, parties' submissions together with legal authorities relied upon, I find that the issues for determination are as follows:

i) Whether the applicant has established a case for review of the orders hereto?

ii) Whether the application dated 15th August, 2018 is competent?

3. Section 3A provides for the inherent powers of the court and states that nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

4. **Section 80** provides for review and states that 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 is 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.

5. **Order 45 provides** for application for review of decree or orders and expresses that 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.**

6. Order 45 of the Civil Procedure Rules is designed to facilitate the exercise of the court's inherent powers and to protect the rights of persons directly affected by decisions which they were not made parties to.

7. The legal position flows from Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya which gives the court power to review its own orders where an appeal has not been preferred against its orders for sufficient cause.

8. In the Court of Appeal decision in **Accredo Ag & 3 Others Vs. Steffano Uccelli & Another (2017) eKLR** it was held that;

> **"The aggrieved person instituting a review must satisfy the court that:**
>
> **a) There has been 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**
>
> **b) There is some mistake or error apparent on the face of the record, or**
>
> **c) There exists sufficient reason to review the decree/order."**

9. On issue 1 the Applicant seeks review of the court's order on ground that there exists a new and important matter or evidence which was not produced by him when the order was being made.

10. The Applicant argues that the report from the Deputy County Commissioner dated 18th February, 2015 regarding the marriage status of the deceased and the letter of condolence dated 15th November, 2012 addressed to him constitutes new and important matter that has direct effect on the ruling of the court.

11. He further argues the said new information was availed to his previous advocate on record who did not produce it at the time of the trial and urges the court not to allow the consequences of the mistake of his advocate to be visited upon him.

12. On the other side, the Respondent argues that the court after analysing the facts, evidence on record and the applicable law, it found that the Respondent was duly married to the deceased. With regard to the condolence letter conveying condolence message to the family, friends and relatives of the deceased does not amount to new and important matter or evidence.

13. It is also argued that the Applicant has not demonstrated to the court reasons as to why the said document was not presented during the hearing and yet the Applicant had it in his possession since 15th November, 2012. Additionally, it has not been shown what impact the information would have on the delivered ruling.

14. Relying on the arm of new and important matter, it is expressed that after the exercise of due diligence, the information 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. In the instant case, the applicant acknowledges that he was in possession of the said new information at the time of the trial but his then advocate on record decided not to produce it.

15. It is my opinion that the applicant had an able advocate on record to handle his matter in his best interest. Before the trial that resulted to the orders being sought for review, the advocate exercised his due diligence and it is my opinion that the advocate not using the alleged new documents was well discussed by the client.I also agree with the Respondent that the Applicant has not proved what impact the alleged new information would have on the ruling.

16. Order 45 Civil Procedure Rules, 2010 dictates that an application of this nature ought to be presented in court without unreasonable delay. It is noted that the said application was brought to court 4months after the ruling was delivered. The Applicant argues that his previous advocate on record is to blame for the occasioned delay and secondly; it took quite some time to be furnished with typed proceedings and ruling. The Respondent on the other hand contends that the unreasonable delay has not been explained.

17. I agree with the Respondent that indeed the 4 months' lapse is inordinate delay. The Applicant's reason that he was furnished with typed proceedings and ruling late hence late filing of the application is not true. The Applicant sought for certified copies of proceedings and ruling on 10th July, 2018 that is 3 months from the date of the challenged ruling delivered on 4th April, 2018. Therefore, iI find that the delay is not justified.

18. In **National Bank of Kenya Limited Vs. NdunguNjau Civil Appeal No.211 of 1996**. It was 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 provisions of law cannot be ground for review."**

19. I find that the judge made a conscious decision on the matter in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion, that would be a ground of appeal and not review.

I agree with the Respondent that the Applicant should have lodged an appeal instead of seeking a review.

20. It follows therefore that an issue which has been vigorously contested as in this case cannot be reviewed by the same court which adjudicated upon it.

21. I therefore find that that the Applicant has not proved his case for review as required by law.

22. On the second issue as to whether the application dated 15th August, 2018 is competent?, Order 9, rule 9 states as follows;

> **" When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-**
>
> **a) Upon an application with notice to all the parties; or**
>
> **b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."**

23. Order 9 rule 9 clearly stipulates two scenarios; one it has to be upon an application with notice to all parties; or upon a consent filed between the outgoing advocate and the proposed advocate.

24. I agree with the Respondent that no such steps were followed by firm of Mitey & Associates Advocates, the present advocates on record for the Respondent. Guided by the said provision of law I find that the firm of Mitey & Associates lacks the requisite locus standi to draw the instant application. Therefore, it follows that the application ought to be struck out.

25. I accordingly find that the application dated 15th August, 2018 lacks merit and the same is dismissed.

26. Since this is a family dispute, each party to bear its own costs of the Application.

Delivered and signed at Bomet this 5th day of August 2020.

A.N. ONGERI

JUDGE