



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE & ADMINISTRATION NO. 122 OF 2011

IN THE MATTER OF THE ESTATE OF:

CLEOPHAS MARK ONDEWE MUGWANG'A.....DECEASED

BETWEEN

CAROLINE ATIENO ONDEWE.....PETITIONER/ APPLICANT

AND

1. WILFRED ODWORI KEFA

2. ANTONY PILLY MULIRO

3. CHRISTOPHER NDUNGU

4. DESTERIO NGAYI ODUORI....INTERESTED PARTIES/RESPONDENTS

RULING

1. The petitioner/applicant herein moved the court by way of Notice of Motion dated 19th December 2019 under Order 45 Rule 1 & 2 of the Civil Procedure Rules Rule 73 Probate and Administration Rules. She is seeking for a review of the orders issued on 10th December 2019.
2. The application is premised on the following grounds:
 - a) That the court relied on a document that was not signed by the petitioner.
 - b) That the affidavit in support of the petition for the letters of administration was not signed by the petitioner.
 - c) That the petitioner while applying for the letters of administration did not include the interested parties.
 - d) That there are sufficient grounds to review the orders issued on 10th December 2019.
3. The application was opposed on the following grounds:
 - a) That there was no way the file could have been signed without form P & A. 5.
 - b) That the applicant has not produced another form P & A. 5 to challenge the one on record.
4. Order 45 of the Civil Procedure Rules provides as follows in Rules 1 & 2:

Application for review of decree or order [Order 45, rule 1.]

(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

2. To whom applications for review may be made [Order 45, rule 2.]

(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

5. The applicant is saying that she has made the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within her knowledge at the time when the decree was passed or the order made. This, she alleges is the discovery of a forged form P & A. 5 on record.

6. I have perused the submissions by both parties and the record, the following facts emerge:

a) That the impugned form P. &A. 5 was her own document which she had filed alongside other documents notably the chief's letter which included the interested parties as purchasers. In the form P. &A. 5 she had included them in the liability section.

b) Her argument could have made sense if she was contending that she was not the one who filed this succession cause.

7. The application is devoid of merits and the same is dismissed with costs.

DELIVERED and SIGNED at BUSIA this 30th day of September, 2020

KIARIE WAWERU KIARIE

JUDGE