



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: Mrima, J.]

SUCCESSION CAUSE NO. 345 OF 2015

(Formerly Kisii High Court Succession Cause No. 452 of 2011)

IN THE MATTER OF THE ESTATE OF THE LATE JACOB SIMBA ABADHO (DECEASED)

BETWEEN

BENSON OGUTU SIMBA.....PETITIONER

VERSUS

PIUS OLIMA SIMBA.....PROTESTOR

RULING

1. Arising from the judgment of this Court delivered on 30/10/2019 the Protestor herein, *Pius Olima Simba*, (hereinafter referred to as '**Pius**') filed a Notice of Motion dated 22/11/2019 (hereinafter referred to as '**the application**').

2. The application sought the following orders: -

1. That service of this process be dispensed with and the same be heard ex-parte in the first instance due to its urgency.

2. That pending the hearing and determination of this application inter-partes this honourable court be pleased to grant a temporary stay of implementation orders of the judgment and decree herein.

3. That this honourable court be pleased to review and/or vary in part the implementation aspect of the judgment herein delivered on 30th October, 2019 and the resultant decree due to discovery of mistake and/or new material evidence that was not available as at the time of the trial and determination of the substantive suit herein.

4. The costs of this application be in the cause.

5. That any other /further relief that this honourable court may deem fit and/or proper to grant in the circumstances.

3. The application was made on several grounds which appeared on the body thereof. It was supported by the Affidavit of Pius which was sworn and evenly filed on 22/11/2019.

4. The Petitioner opposed the application. He filed Grounds of Opposition dated 02/12/2019 on 03/12/2019.

5. The application was heard by way of written submissions. Both parties filed their respective submissions and referred to some decisions in support of their rival positions.

6. I have carefully considered the application, the Grounds of Opposition, the submissions and the decisions thereto.

7. The application is for review of the judgment. It is grounded on **Order 45** of the **Civil Procedure Rules** (hereinafter referred to as '**the Civil Rules**'). The matter involves succession proceedings under the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**the Succession Act**').

8. Proceedings under the **Succession Act** are special and are strictly governed by the provisions of the **Constitution**, the **Succession Act** and the **Probate and Administration Rules**. **Section 63** of the **Probate and Administration Rules** (hereinafter referred to as '**the P&A Rules**') provides for the applicability of certain rules in the **Civil Rules** to succession proceedings. The provision provides for the applicability of the **Civil Rules** on review of judgements and orders. That provision is however still under the *repealed Civil Procedure Rules* which repeal was by the enactment of the **Civil Rules**.

9. There is therefore need for amendment of **Section 63** of the **P & A Rules** to reflect the change envisaged in the **Civil Rules**. Be that as it may, the application having been brought under the provisions of the **Civil Rules** is still competent by dint of **Article 159(2)(d)** of the **Constitution**.

10. **Order 45 Rule 1** of the **Civil Rules** provides as follows: -

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.

11. Pius deponed that he did not appeal the judgment. The application therefore falls under **Rule 1(1)(a)**.

12. Having satisfied myself that the application is competent, I will now ascertain whether the application is merited.

13. The main ground on which the application was made was the discovery of new evidence. Pius contended that had the evidence been available during the trial it would have fundamentally affected the determination of the matter. The evidence was that the deceased had gifted *Noreah Oghenda* a parcel of land known as Number 2996 in East Kanyoor Sub-Location which land later devolved to *Charles Odhiambo Auma*. Pius further contended that since *Charles Odhiambo Auma* had earlier on benefitted from the deceased herein then that gift was to be taken into account in the distribution of the remainder of the estate of the deceased subject of the judgment.

14. The proposition by Pius is sound and anchored in law. However, under **Order 45** of the **Civil Rules** this Court must ascertain whether the evidence met the criteria in law. The legal bar being that '*...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....*'

15. The Supreme Court in **Col. Tom Martins Kibisu vs. Republic Sp. Ct. Petition No. 3 of 2014 (2014) eKLR** dealt with a Petition on retrial of a criminal case which Petition had been filed under the provisions of **Article 50(6)(b)** of the **Constitution**. The said provision states that: -

A person who is convicted of a criminal offence may petition the High Court for a new trial if-

(a)

(b) new and compelling evidence has become available.

16. The Court interpreted the words '*new and compelling evidence*' as follows: -

[42] We are in agreement with the Court of Appeal that under Article 50(6), "new and compelling evidence" means "evidence which was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial"; and "compelling evidence" implies "evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict." A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, a prima facie, material to, or capable of affecting or varying the subject charges; the criminal trial process, the conviction entered; or the sentence passed against the accused person." (emphasis added).

17. To me the words '*new and compelling evidence*' used in **Article 50(6)(b)** of the **Constitution** carry similar purport to the words '*the discovery of new and important matter or evidence*' used under **Order 45 Rule 1(1)(a)** of the **Civil Rules**.

18. On that score two important issues come to the fore. They are whether the evidence which Pius attempted to avail *vide* the application was '*new*' and '*important matter or evidence*'.

19. In **Col. Tom Martins Kibisu vs. Republic** (supra) the Court held that new evidence must be '*evidence which was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial*'. The evidence in this case involves minutes of

meetings held on 12/08/2019 and 05/09/2019 by the Assistant Chief of East Kanyuor Sub-Location. I have carefully perused the said minutes. The Attendance List of those who attended the meeting held on 05/09/2019 indicated that Pius was one of those who attended that meeting. The name of Pius appeared as No. 22 of the List. The Attendance List was produced by Pius in support of the application.

20. Given that Pius attended the meeting held on 05/09/2019, it defeats logic for Pius to come to Court alleging that he had discovered new evidence. That evidence, whatever its worth, was not new to Pius. Pius was well aware of the meeting and the outcome at the time he testified and called several witnesses. I have as well perused the affidavit sworn by Pius in support of the application. The affidavit does not allude to why Pius could not have produced the minutes at the trial.

21. As to whether the evidence raised an important matter or evidence, such evidence must attain the bar '*... that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict...*'

22. The evidence was to the effect that the deceased gifted Noreah Ogenda a parcel of land which Noreah Ogenda eventually passed to *Charles Odhiambo Auma* who was one of the beneficiaries under the impugned judgment. If it is true that the deceased legally gifted the said land to Noreah Ogenda then the matter ended there. The land did not belong to the deceased any more. It became the property of Noreah Ogenda. Whatever Noreah Ogenda did to her legal gift did not in any way matter to the deceased. Even at the demise of the deceased the gift to Noreah Ogenda did not form part of the estate of the deceased.

23. I am therefore unable to be persuaded that the intended evidence was of '*... high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict...*'.

24. I now find and hold that the application fell short of attaining the required legal standard to be allowed. It is hereby dismissed with costs assessed at Kshs. 30,000/=.

25. Orders accordingly.

SIGNED BY:

A.C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at MIGORI this 24th day of September, 2020.

S. J. CHITEMBWE

JUDGE