



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

(FAMILY DIVISION)

SUCCESSION CAUSE NO 2581 OF 2011

IN THE MATTER OF THE ESTATE ESTHER WAMBUI W/O JOHN Alias

ESTHER WAMBUI NYAMU Alias ESTHER WAMBUI MAINA (DECEASED)

GAIL MAINA.....1ST APPLICANT

MICHAEL ALFRED MAINA.....2ND APPLICANT

JOHN MAURICE MAINA.....3RD APPLICANT

VERSUS

JANE WAIRIMU OKUMU.....1ST RESPONDENT

ALEXANDER KARIUKI MAINA.....2ND RESPONDENT

R U L I N G

1. After lengthy submissions following three related and protracted applications by the parties and which applications were argued together the court delivered its ruling on the 19th of December 2019.
2. The ruling appears to have aggrieved one set of the parties; the current applicants who moved the court in an application dated 30th December 2019 seeking for 13 orders. The subject of this ruling is prayer 6 of the said application which has to be considered first due to its nature.
3. Prayer 6 seeks to have this court recuse itself from hearing the application for review and refers the matter to the Presiding Judge of the family Division so that he may appoint a different Judge to hear the application, in the alternative for the matter to be placed before the Hon. The Chief Justice for directions and advice on numerous acts of judicial misconduct by this court (read judge) which led to gross miscarriage of justice.
4. Prayer 6 is predicated on grounds that this court made draconian orders; there is gross error on the face of the record; the Judge was condemned by the report of the Magistrates and Judges Sharad Rao led vetting board, of incompetence such as the one exhibited in the conduct and “mistake Ridden ruling”.
5. The application is supported by the affidavit of one Michael Alfred Maina and for purposes of the prayer in question he urges only two points namely; that a close friend drew his attention to recommendations made by the Sharad Rao team regarding the conduct, person, temperament and integrity of the Judge and the belief that the court made serious mistakes apparent on the face of the record and is thus incompetent.
6. The above application was objected to by the respondents in an affidavit sworn by Jane Wairimu Okumu dated 17th February 2020. And as relates to prayer 6 which is the subject of this ruling, it is deposed in the said affidavit that the applicants are out to seeks a review of this court’s ruling through a different forum which amounts to forum shopping; further no tangible evidence has been adduced to support the allegations of incompetence on the part of the court; as regards the alleged Sharad Rao’s report, that it is common Knowledge that the said board cleared this Judge of any misconduct and wrong doing and declared the judge fit to continue serving as a judge High Court of Kenya and therefore the disposition on the judge’s character smirks of dishonesty, malice and bad faith.
7. Before analysing the prayer subject matter; the grounds, the supporting affidavit, affidavit in opposition and submissions by both

counsels. It is important to make reference to the entire application as it throws light to the motive behind the prayer and will inform this court's determination.

-Prayers 2-5 seek to injunct and prohibit the respondents from dealing with property subject matter.

- Prayer 8 seeks to have court visit the site.

- Prayer 9 seeks for viva voce evidence.

- Prayer 10, 11 and 12 seek for variation and setting aside this Court's orders.

In a nut shell the 13 Prayers within the application seek for two substantive Orders; recusal of the judge and review of the judge's ruling.

8. Order 45 of the Civil Procedure Rules stipulates that;

“(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 whom from the discovery of new and important matters 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 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 judgement to the court which passed the decree or made the order without unreasonable delay.

(2)(1) An application for review of a decree or order of a Court, upon some other 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. (emphasis added)

9. As rightly observed by counsel for the respondent the applicants' assertion and information is misguided, and utterly wrong, as the judge herein contrary to the assertion made against her was cleared by the Sharad Rao led Judges and Magistrates Vetting Board of any misconduct and wrong doing and was declared fit to serve as a High Court Judge, which she has done for several years now, and which information is well within the public domain. Indeed the applicants' counsel has many a time appeared before the very judge and without expressing any difficulties.

10. The court is also of the view that the averments touching on the conduct, person, temperament and integrity of the judge were not supported by any evidence and must fall by the way side.

11. The Reasons for the review being sought includes but are not limited to

Mistake on the part of the court;

Prayer for a visit to the suit promises;

Calling of viva voce evidence

Belief that the judge ignored crucial evidence

The assertion that title Kiambaa/Ruaka/9 cannot be impeached or revoked.

Order 45 (2) (supra) requires a review such as the one being sought be heard by the very court that initially made the order or decree. There is great wisdom in the said provision which guards against not only forum shopping but mischief if any by the parties to a suit. It is expected that errors if any or other sufficient reasons leading to a request for review canvassed before the very court.

12. Therefore, based on the above reasons the court declines to recuse itself and directs that the remainder of the application dated 30th December 2019 be canvassed before it on the 27th of October 2020.

13. Costs to the respondents in any event.

DATED, SIGNED and DELIVERED at NAIROBI this 19th DAY OF OCTOBER 2020.

.....

ALI-ARONI

JUDGE