



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 160 OF 2000**

**In The Matter of the Estate of Mwiraria Munya (Deceased)**

**SARAH KINYA MWIRARIA ..... PETITIONER**

**VERSUS**

**ROSE KAMENWA M'MUNYUA ..... 1<sup>ST</sup> APPLICANT**

**CATHERINE KANAIRI M'MUNYUA ... 2<sup>ND</sup> APPLICANT**

**DELFINA KAREE MUGUNA ..... 3<sup>RD</sup> APPLICANT**

**ANASTACIA KAGETE GIKUNDI ..... 4<sup>TH</sup> APPLICANT**

**RULING**

[1] The Motion dated 13/06/2019 expressed to be brought pursuant to **Order 45, Order 51 Rule 1 of the Civil Procedure Rules and Sections 80 (b) 79C, 1A, 1B, 3 & 3A of the Civil Procedure Act, Sections 47 and 74 of the Law of Succession Act CAP 160 Laws of Kenya, Rules 43 and 73 of the Probate and Administration Rules** and any other enabling laws of Kenya, seeks amongst other orders: -

***a. Review and setting aside of the orders and decree or the judgment issued on 30/07/2018 herein; and***

***b. Reopening of the case so that the applicant may be heard.***

[2] The grounds upon which the application is premised have been set out in its body and the supporting affidavit of Rose Kamenwa M'Imunywa, Catherine Kanairi M'Munyua, Delfina Karee Muguna and Anastacia Kagete Gikundi each sworn on 13/06/2019 respectively. It was further supported by the supplementary affidavits of Rose Kamenwa M'Imunya sworn on 7/10/2019 and 29/11/2019 respectively.

[3] It is argued that the review sought is due to an error/mistake apparent on the fact of the proceedings of 14/06/2018 and the judgment of 30/07/2019. That on 19/12/2017 they requested that the parties call for *viva voce* evidence and the court ordered for hearing on 14/06/2018. On that day they came with their witnesses but they were not heard; instead they were given a date for 30/07/2018. The applicants were never heard prior to the determination of the case on merit; otherwise the court would have arrived at a different determination. It was decided that they have no share in their father's only land as they are not beneficiaries.

[4] Their claim is that the estate is family land which was held by the deceased for them and himself. Their brother, the deceased, inherited it from their father on their behalf. They are entitled to a share *vide* customary trust which they intended to establish save that they were not heard. Thus, they urge the court to re-open the case to hear them. Considering the respondents have threatened execution of the judgment, they will be occasioned irreparable damage and loss.

[5] This application was opposed *vide* the replying affidavit of Jerica Kaura M'Munyua and Sarah Kinya Mwiraria sworn on 26/09/2019 and 8/10/2019 respectively. They deposed that the court gave audience to the applicants and judgment was delivered. According to them, this is a probate court, yet, the applicants are claiming of trust and not as dependants or direct beneficiaries of the deceased. Hence, their claim ought to be the subject matter of a separate suit in a different forum. Thus, there is no evidence that the review sought is merited. Hence, the application ought to be dismissed with costs.

**Submissions**

[6] This matter was canvassed by way of written submissions. The applicants submitted that the error on the face of the record is that they were never heard prior to the determination of the case as opposed to what is stated on the face of the proceedings particularly those of 14/06/2018. When the matter was to proceed on the said date for hearing the parties were just given a judgment date for 30/07/2018. This forms a basis for review. Their case was dismissed on the basis of want of evidence to prove customary trust which could only happen through *viva voce* evidence as the court had directed of which this never happened. They relied on **Mutua Kaluku v Peter Njoroge [2017] eKLR** and **Re Estate of Muronga M’Kobia (deceased) [2018] eKLR** to support their submissions.

[7] The petitioner submitted by affirming that the applicants were given audience by the court before judgment was delivered considering they are not beneficiaries to the estate of the deceased. The applicants have not shown any error or mistake apparent on the face of the record or discovery of new evidence to warrant an order of review. Moreover, this court has no jurisdiction to determine the issue of existence of the alleged trust stated by the applicants. She relied on **Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & another [2018]eKLR** and **In the Matter of the Estate of Peter Igamba Njoroge Succession Cause No. 432 of 2009** to support her submissions.

#### **ANALYSIS AND DETERMINATION**

[8] The issue of determination is whether the review is merited.

[9] **Order 45 of the Civil Procedure Rules** is incorporated into the probate and administration proceedings by virtue of **Rule 63 of the Probate and Administration Rules**. **Order 45 Rule 1** is precise that a court can only review its orders if the following grounds exist:

- a. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or**
- b. There was a mistake or error apparent on the face of the record; or**
- c. There were other sufficient reasons; and**
- d. The application must have been made without undue delay.**

[10] The judgment that the applicants seek to review was delivered on 30/07/2018 and their application is dated 13/06/2019. This application was filed ten (10) months later. No explanation has been given as to why it took the applicants’ ten months to file the application taking into account the applicants’ were participants in the proceedings. Any litigant should know that they should be keen to prosecute their cases without unreasonable delay so as to avoid offending the now principle of justice that justice shall be delivered without delay. See article 159 of the Constitution. Here, yet another prohibition would catch-up with the applicants- sleeping on their rights. Courts will serve legitimate rights of diligent parties in prosecuting their cases; and not personal desires of a recalcitrant suitor who thinks that the judicial system will be readily available at their beck and call whenever they feel like. Execution or threat of execution of the judgment herein seems to be the reason that awoke the applicants from slumber. Ten (10) months’ delay without any or reasonable explanation is inordinate, and therefore inexcusable.

[11] Accordingly, I dismiss the application with no order as to costs. It is so ordered.

**Dated, signed and delivered at Narok through Teams Application this 23<sup>rd</sup> day of November, 2020**

**F. GIKONYO**

**JUDGE**