



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 376 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE MWM DCD

MARY WANGARI NJENGA.....APPLICANT

V E R S U S

JANE WANJIKU MBITI.....RESPONDENT

RULING

1. The applicant Mary Wangari Njenga vide a Summons under **Section 47 of the Law of Succession Act, Order 45 Rule 1 of the Civil Procedure Rules** seeks orders that this court be pleased to review its orders dated 19/5/2016 and allow the application dated 9/12/2013.
2. The applicant was also seeking an order that the respondent be restrained from selling, offering for sale disposing off or parting with possession of the deceased's shares in Mutiritha Wandu Co. Ltd, Plot No. 835 pending the hearing of the Summons interparties. The Interim Order was granted on 23/3/17.
3. The application is based on the ground that the applicant's application seeking to have the grant revoked was dismissed on 19/5/16. The applicant has in her new and important material which warrants a review of the order dismissing the application for revocation of grant. That the said evidence could not be produced at the time of making the order as the documents had been carried away by one Rose Wambui alongside the applicant's household items for none payment of a soft loan to the tune of Kshs 150,000/-. That she has brought the application without unreasonable delay. That it is only fair that the application be allowed and the estate be preserved.
4. The application is supported by the affidavit of the applicant Mary Wangari Njenga sworn on 23/3/2017.
5. The respondent Jane Wanjiku Mbiti opposed the application and filed a Replying Affidavit sworn on 31/3/17. Her contention is that the applicant is a stranger to the estate as her grandson had never informed her that she had a wife. That the issue of new and important materials not being produced at the time of hearing of the application for revocation of grant does not arise as the said documents could not have been used as security for loan and she could have been used as security for loan and she could have been availed the documents by the relevant authority. That the Chief's letter was obtained fraudulently. That the Eulogy of the late Benson can be easily manufactured. That there is nothing new to warrant a review of the orders.
6. The parties agreed to dispose of the application by way of written submissions. For the applicant it is submitted that the main ground is review and that three important grounds ought to be present, that is –
 - **Discovery of new and important matter of evidence.**
 - **Mistake or error apparent on the face of the record.**
 - **Any other sufficient reason.**
7. It is submitted that they are seeking review on the ground of discovery of new important evidence which after the exercise of due diligence could not be produced by the applicant at the time when the orders of 19/5/16 were made. It is also submitted that the application was brought without due delay.
8. For the respondent it is submitted that the application is an abuse of court process, is not merited and same ought to be dismissed.
9. I have considered the application and the submissions. The issue which arises is review. This is provided under **Section 80 and Order 45 rule -1- of the Civil Procedure Act**. For the court to order a review certain circumstances must be established. **Order 45 rule -1- of the Civil Procedure Rules** provides:-

“(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.”

10. A party seeking review must establish the following grounds:-

a. Discovery of new and important matter of evidence which after exercise due diligence, was not within his knowledge or could not be produced by him at time when the decree was passed or the order made.

b. Mistake on the face of the record.

c. Any other sufficient reason which may make the court to review its orders.

11. The applicant is basing her application on discovery of new and important matter of evidence. The discovery of new and important matter of evidence envisaged under **Order 45 rule -1- Civil Procedure Rules** relates to issues of fact which may emerge from evidence which a party could not produce at the time the order was made even after the exercise of due diligence and was not within his knowledge.

12. The exercise of due diligence refers to discovery of facts which are relevant and were not presented to the court when the order was made.

13. The facts relate to the birth certificate of the applicant's daughter who she says is the daughter of Benson Kibara Wanjiru who is the son of the deceased to whose estate these proceedings relate. The ruling of this court, Justice Limo – stated that the applicant did not establish that MW was a daughter to the late Benson Kibara Wanjiru, page 8 of the ruling. The applicant is not claiming as a dependant but is saying that her child MW is a dependant within the meaning of **Section 29(a) &(b) of the Law of Succession Act**. A fact which the applicant had to prove was that her daughter is a child of the deceased. The **Section 29(b) of the Law of Succession Act** provides:-

“such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;”

14. The respondent has admitted that the deceased had a son Benson Kibara Wanjiru. The son had survived the deceased. The applicant has availed a birth certificate showing that Kibara was a son of MWM the deceased herein and the birth certificate of MW who is the daughter of Benson Kibera Wanjiru. The child was born on 19/11/2009 and registered on 10/12/02. The eulogy of the deceased shows that she had a son by name Benson Kihara.

15. These evidence was not before the trial court. The applicant has therefore established one of the grounds for review. The evidence was not before court when the ruling was made. The respondent had not disclosed that the deceased had a son. In her affidavit she admits that Benson Kibara is her grandson who is the son of the deceased.

16. There is evidence before this court showing that the son of the deceased is survived by a child. There is no evidence to suggest that the documents are not authentic.

17. The applicant has explained why she could not have produced the documents in court. The explanation is plausible.

18. My view is that the applicant having established that Benson Kibara is the son of the deceased, who though deceased is survived by a child, they are dependents of the deceased as provided under **Section 29 of the Law of Succession Act**. MW who is a grandchild of the deceased is entitled to benefit from the estate.

19. The applicant was seeking review on the ground of discovery of new important matter of evidence. There is also sufficient ground to warrant review as the interests of the minor MW who was not catered for must be addressed.

20. I find that the application is meritorious. I allow it. I order that the ruling of this court dated 19/5/2016 is reviewed and set aside.

21. In the application for revocation of grant the applicant had stated that the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by making of a false statement or by concealment from court of something material to the cause. It has been established that material facts were concealed from the court. Though **Section 76 of the Act** gives situations where the grant may be set aside, it does not mean that all the grounds must be proved, prove of one or more of the grounds, will lead to revocation of grant. There is need to make provision for the grand child of the deceased.

22. I find that the application has merits and so I allow it. I order that the grant issued to the petitioner on 10/9/2013 is revoked. The applicant to file an application to be joined in as a co-administratrix.

23. I make no orders as to costs.

Dated at Kerugoya this 18th Day of June 2019.

L. W. GITARI

JUDGE