



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 857 OF 1998

IN THE ESTATE OF JOSEPH MWANIA KIKULUMI ALIAS JOSEPH MWANIA ALIAS KIKULUMI (DECEASED)

PETER NZIOKI MWANIA.....1ST ADMINISTRATOR/RESPONDENT

DAVID MUTISO MWANIA.....2ND ADMINISTRATOR/RESPONDENT

VERSUS

JOYCE MUMO MWANIA.....1ST INTERESTED PARTY/APPLICANT

ANASTACIA NDULU MWANIA.....2ND INTERESTED PARTY/APPLICANT

RULING

1. The substantive matter pending determination before this court is for revocation and or annulment of the grant that was confirmed on 26th September, 2007 and rectified on 4th November, 2008.
2. The same was filed by 2 daughters of the deceased namely Joyce Mumo Mwanja and Anastacia Ndulu Mwanja. The application by the two is based on grounds that they were disinherited by their brothers.
3. The matter proceeded by way of *viva voce* evidence with the Applicants side giving evidence on 15th of October 2018. Due to normal pressure of work the Respondent case was to be heard 11th of December 2018. The parties and counsel were present in court as the date was being fixed.
4. On the 11th of December 2018 neither the Respondents nor their counsel were present. Present was a counsel holding brief and who informed the court that the respondent's counsel sought for an adjournment as he had no witnesses. The application was declined. The Court directed the matter to proceed on the said date at 12 noon.
5. At 12 noon Mr. Mutua Mboya presented himself in court and informed the court that Mr. Peter Nzioki Mwanja's (the 1st Respondent's) wife had called him to inform him that Mr. Mwanja was unwell and on his way to hospital and for the reason he sought for an adjournment.
6. The application for an adjournment was opposed for the reason that there were two respondents, and further the estate continued to waste.
7. The court declined to adjourn the matter for the reason that; it has been pending for 20 years, nothing was said of a 2nd Administrator who ought to have been in court in the absence of the other, and there was no proof of the alleged sickness of the 1st Respondent.
8. At the point Mr. Mutua Mboya made 2 statements one seeking to have the court rely on statements placed on record by the Respondents and facts of the case based on affidavits in court. Secondly he sought leave to challenge the court's decision.
9. As relates to leave to appeal the court directed that a formal application be made.
10. Against the above background the Respondents filed an application dated 4th February, 2019 seeking for the court to review, vacate and/or discharge its orders issued 11th December, 2018, the applicants be allowed to tender evidence and costs of the application be provided for.

11. The application was grounded on the following; that the applicant was ill and hospitalised between 5th December, 2018 and 10th of January, 2019 which information was relayed to court but the court did not believe. It is only fair that the Respondents' evidence be obtained.

12. The application was opposed on grounds set in the affidavit of Anastacia Ndulu Mwanja, who propagates that the application is unmerited, full of lies and falsehood, lacks of sincerity, honesty. Further that the letter produced as evidence is highly suspicious, as it is not dated and the same raises question as to the intention of the 1st administrator.

13. I have considered the application, affidavit in opposition and lengthy submissions by counsel on record for the parties.

14. The law on when a court may review its orders is settled. **Order 45 Rule (1) (1) of the Civil Procedures Rules** states that:

“1. Application for review of decree or order.

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, or order, may apply for a review of judgment to the court which passed the decree or made the order without un reasonable delay” (emphasize added).

15. I have laid emphasize on key words in the rule set above.

-discovery of new and important matter which after exercise of due diligence has not shown knowledge or could not be produced

- some mistake or error

- any other sufficient reason

- without unreasonable delay

16. Firstly, it took the Applicant approximately two months to move this court, secondly on the date the matter was set for hearing as the court went through a mini call over neither the respondents and counsel were present. A counsel holding brief sought an adjournment for the reason that counsel for the respondents had no witnesses.

The court declined the adjournment and allocated time for hearing as 12 noon. At 12 noon counsel for the respondents sought for an adjournment as the first respondent was ill. Nothing was said of the second respondent. The court declined the adjournment for two reasons firstly there was no document in support of the assertion secondly the court was not told why the 2nd respondent was absent.

17. The court to date still holds the view that between 9 a.m. and 12 noon if at all one of the administrators was sick and in this error of technology a doctor's note would have been available. Nothing is said or has been said of the co-administrator absence and who ought to have been in court in any event.

18. A letter from a hospital has been introduced in support of the 1st respondent's illness. I agree with the applicant's that the said doctor's report is suspicious in content and lacks in authenticity militates against granting of the orders being sought.

Thirdly nothing new or important has been introduced to warrant a review of the previous orders nor has there been error or mistake pointed out.

19. Consequently, application is declined with costs.

20. On record are submissions of the applicants. The respondents are

further directed to file their submissions within 7 days of today's date failure of which the court will proceed to write its judgment.

DATED, SIGNED and DELIVERED at NAIROBI this 24TH DAY OF OCTOBER, 2019.

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ALI-ARONI

JUDGE