



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 260 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE KIBIRECH ARAP KOGO - (DECEASED)

DINAH ROBBY SANGAPPLICANT/1ST PETITIONER

AND

DANIEL KIPSANG SABULE.....2ND PETITIONER /RESPONDENT

BENSON KIPTOOBIRECH.....3RD PETITIONER/RESPONDENT

RULING

1. The Applicant is one of the administrators of the deceased Estate herein. This court on **3rd April, 2019** delivered its considered judgment distributing the Estate among the beneficiaries pursuant to the rival affidavits and other supporting documents supplied by the parties.
2. The Applicant was dissatisfied with the said decision and has file the application dated **17th April, 2019** in which she has prayed that the said judgment be reviewed and set aside pursuant to the provisions of Section 49 and 73 of the Probate Rules as well as Section 47 of the Succession Act Cap 160 Laws of Kenya and Rule 45 (1) of the Civil Procedure Rules. The substance of her application is that this matter ought to have proceeded by way of oral evidence as there are new and important facts and evidence which were discovered later and were not within the knowledge of the Applicant as at the time this matter came up for determination.
3. She has supported the above averments in her affidavit sworn on 17th April 2019 together with the attached annexures.
4. The 3rd Petitioner in his replying affidavit dated **25th June, 2019** has opposed the application arguing inter alia that there is nothing new that the applicant has discovered and that all that she is seeking is to disturb the status quo and the agreed mode of distribution by the families who included the Applicant. That the Applicant was present all through the proceedings and she has even admitted that she was married in somewhere in Nandi and has conceded that **Rael Kogo** is the wife of **Taplelei Chebokong Kogo**.
5. The provisions of Order 45 of the Civil Procedure Rules are applicable pursuant to the provisions of Rule 63 of the Probate and Administration Rules. Rule 45(1) goes on to state that the court should disturb its decree if there is *...” discovery of new and important matter or evidence which after the exercise of due diligence, was not within the 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 ...”*.
6. The court has perused paragraph 4 of the applicants supporting affidavit which essentially indicates the reasons why she is seeking review of the judgment of the court. Clearly it is not entirely true that the applicant did not know that Taplelei Chebokong Kogo was not the first wife of the deceased and that she had two daughters, the applicant and her sister Hellen Mibei.
7. That Rael Kogo was the wife of Taplelei Chebokong Kogo and had 9 children. The said details of the children are well captured in the pleadings leading to the judgment.
8. This court does not belief that it is a new evidence discovered by the applicant that Taplelei Chebokong Kogo ran away from her matrimonial home and in fact stayed with the applicant in Nandi.
9. It is also not new that suit No. **Kitale CMCC 87 of 2018** was a new and important evidence discovered by the applicant. She was in fact a party in the matter and if it was relevant to the proceedings in this cause she ought to have brought it out.
10. This matter proceeded by way of affidavits evidence and there was no application by any party that the matter should be conducted by way of *viva voce* evidence. In fact, at some point this court ordered all the beneficiaries to attend court. Needless to state that all the parties

were well represented by counsels through the entire process and they would have notified the court of the desire of the parties on how the matter should have been heard.

11. Paul Kimurgor Kogo has been a party in this matter as well as **Mary Chepsat Kogo** her mother and that house was provided for. They have not complained at all and the Applicant cannot purport to complain on their behalf without any authority.

12. The minutes which she alleges were altered were not new and were supplied to the court and that was some of the reasons this court considered when distributing the estate. There was no such evidence that the same were altered as none of the parties including the Applicant raised the issue in the supporting or opposing affidavits. The said minutes must have been within the knowledge of the applicant and she cannot claim otherwise.

13. In a nutshell, I do not find any merit in the application. If the Applicant was not satisfied with the judgment of the court she should have appealed seeing that the issues she purports to be new are not at all. The Applicant did participate all along through her counsel and thus she cannot cry foul.

14. The application is hereby dismissed with costs to the Respondents.

Dated, signed and delivered in open court at Kitale this 18th day of December, 2019.

H. K. CHEMITEI

JUDGE

18/12/19

In the presence of:-

Parties Absent

Court Assistant – Silvia

Ruling read in open court.