



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

CONSTITUTIONAL APPLICATION NO. 5 OF 2014

CATHERINE WAMBUI MURIITHI.....APPLICANT

VERSUS

THE MANAGER MWEA IRRIGATION SCHEME.....1ST RESPONDENT

FLORA WANGUI Alias

FLORENCE WAMBUI MURIITHI.....2ND RESPONDENT

RULING

On 14th November 2014, I delivered my judgment in this Constitutional Petition dismissing it with no order as to costs.

The Petitioner/Applicant CATHERINE WAMBUI MURIITHI has moved this Court again under her Notice of Motion dated 1st April 2015 brought under the provisions of **Order 45 of the Civil Procedure Rules and Sections 1A & B and 3A of the Civil Procedure Act** seeking the following substantive orders:-

- 1. That the Honourable Court be pleased to review and set aside the orders made on 14th November 2014.***
- 2. That costs of this application be provided for.***

The same is premised on the grounds set out in the application and supported by the Applicant's affidavit.

From what I can glean in the supporting affidavit and grounds set out in the application, the basis for this application for review is that at the time the applicant was filing her Constitutional Petition that I dismissed on 14th November 2014, she had not been supplied with the proceedings and ruling in Wanguru Court Miscellaneous Succession Cause No. 4 of 1996. It is her case, therefore, that I should review and set aside the said judgment because, as deponed in paragraph 7 of her supporting affidavit, ***“... if the aforesaid proceedings and ruling were available at the time of hearing the Constitutional application, the Court could have come up with a different decision”.***

The application is resisted by both Respondents.

In her replying affidavit in opposition to the application, the 2nd Respondent FLORA WANGUI Alias FLORENCE WAMBUI MURIITHI has deponed, inter alia, that the application is grossly incompetent and should be struck out. She has also deponed to other matters that touch on the subject of the petition which are not really relevant for purposes of this application.

The 1st Respondent filed grounds of opposition in which it stated that there was no proof of discovery of any new evidence or sufficient ground for review and the fact that the applicant had not been supplied with proceedings and ruling does not mean she was not aware of the same. Besides, her decision to proceed with the Constitutional Petition in the absence of the alleged proceedings was deliberate on her part and cannot be regarded as new evidence at this stage.

Submissions have been filed by Ndata Mugo Advocate for the Applicant, Bwonwonga Advocate for the 1st Respondent and G.O. Obachi Advocate for the 2nd Respondent.

I have considered the application, the rival affidavits and supporting annexures and the submissions by counsels.

The application is founded under **Order 45(1) of the Civil Procedure Rules** which provides as follows:-

“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” (emphasis added)

It is clear from the applicant’s supporting affidavit that the ground for this application is because at the time she was canvassing her Constitutional Petition, she had not obtained the proceedings and ruling in Wanguru Miscellaneous Succession Cause No. 4 of 1996. She is therefore saying that this is ***“new and important matter or evidence which, after the exercise of due diligence, was not within her knowledge or could not be produced by her”*** at the time when this Court rendered its judgment subject of this application. But is that really the position?

Looking at the applicant’s Originating Motion filed herein on 21st July 2014 and which was the subject of my judgment sought to be reviewed or set aside, the applicant knew all along about the existence of Wanguru Miscellaneous Succession Cause No. 4 of 1996, she referred to it in paragraph 3 of her in her affidavit in support of that Originating Motion as follows:-

“That after his death, the custodian of rice holding being the Manager Mwea Irrigation Settlement the 1st Respondent herein applied at the District Magistrate Court at Wanguru in Misc Succession Cause No. 4 of 1996 for the sharing out of the deceased Estate comprising of the rice holding No. 2198”

Therefore, the existence of the Wanguru Miscellaneous Succession Cause No. 4 of 1996 was a matter well within her knowledge as far back as July 2014 when she filed her Petition. On the ground that the proceedings and ruling in that Succession Cause were not in her ***“possession”*** as pleaded in paragraph six (6) of her supporting affidavit, that is a matter that, ***“after the exercise of due diligence”*** she could easily have obtained from the Wanguru Court. No reasons have been advanced as to why she did not apply for those proceedings and Ruling which she knew about. In **FRANCIS ORIGU & ANOTHER VS JACOB**

KUMALI MUNGALA C.A CIVIL APPEAL NO. 149 OF 2001, a similar application was dismissed because the applicant did not show discovery of new and important matter or evidence since the witnesses they intended to call were all along known to them. That is the scenario obtaining in this case. The applicant herein did not exercise “***due diligence***” in trying to obtain the proceedings and ruling in the Wanguru Succession Cause which only needed a letter to the Court to obtain. That being the position, the provisions of **Order 45 Rule 1 of the Civil Procedure Rules** cannot come to her aid.

Even if this Court were to consider this application on the basis of “***any other sufficient reason***” I do not discern any such “***sufficient reason***” that would entitle me to exercise my discretion in the applicant’s favour realizing that such discretion must be exercised on sound reasons and not on caprice.

In the circumstances, therefore, I find that the applicant’s Notice of Motion dated 1st April 2015 is devoid of merit. The same is accordingly dismissed with costs to the Respondents.

B.N.

OLAO

JUDGE

26TH FEBRUARY, 2016

Ruling delivered in open Court this 26th day of February, 2016

Mr. Mwai for Mr. Ndata for Applicant present

Ms Magaro for 2nd Respondent present

No appearance for 1st Respondent.

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016