REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 76 OF 2005

IN THE MATTER OF THE ESTATE OF THE LATE KIBIRA MUTERO-DECEASED

Josiah Mwangi Mutero …….....…….....1st Applicant

Peterson Maina Mutero …….....….....…….....2nd Applicant

Versus

Rachael Wagithi Mutero ……...….…….....Respondent

RULING

Josiah Mwangi Mutero and **Peterson Maina Mutero** (herein after referred to as the applicants) by way of a notice of motion dated 5th May 2015 expressed under the provisions of Article **159 (2) (d)** of the Constitution of Kenya 2010, Order **45** Rule **1** of the Civil Procedure Rules, 2010 and Sections **1A** and **1B** of the Civil Procedure Act[1] moved this honourable court seeking orders to review the orders of this court rendered on 27th June 2014 with a view to setting aside the said orders and reinstate the application dated 28th November 2011 for hearing. The applicants also sought for costs of the application.

The grounds relied upon are that the applicants are gravely prejudiced by the said orders, that the respondent never sought nor obtained the consent of the applicants to have the grant confirmed nor did they consent to the mode of distribution of the deceased's estate, that the *applicant (sic)* has already sold title number **Iriani/ Gatundu/1462** without the knowledge or consent of the applicants, and that the applicants are genuinely apprehensive that the respondent will dispose of land parcel numbers **Iriani/ Gatundu/1459, Iriani/Gatiundu/1460, Iriani/Gatundu/1461, Iriani/Gatundu/1462, Iriani/Gatundu/1463** and **Iiani/Gatundu/1464** thereby disentitling the applicants their legal right to a share of the deceased's estate and that it is in the interests of justice that the orders sought herein be granted.

More reasons are provided in the supporting affidavit as follows:-

a. *that the grant was obtained on the basis of the Respondent herein misleading the court by stating that she was the widow of the deceased whereas she was the deceased's in law;*
b. *at the time of the confirmation of the grant, the Respondent misled the court that she was the sole beneficiary to the estate, thus the confirmation of the grant was defective in substance, that consent to mode of distribution or confirmation was never sought and obtained;*
c. *that the Respondent never informed the applicants about these proceedings and that the Respondent failed to inform the court that the second applicant had attained the age of majority at the time of confirming the grant;*
d. *that after the confirmation of the grant the Respondent caused the subdivision of the deceased's*

*property **Iriani/Gatundu/125** into the above parcels of land and transferred all the above titles except no. **1462** which she sold without the applicants knowledge or consent of the Land Control Board;*

e. *that they promptly registered cautions against the said parcel of land.*

In a Replying affidavit dated 22nd February 2016, the Respondent avers as follows:-

a. *that the applicants are her children and the estate relates to her husband's brother who was not married and was not survived by any issue and that she had no obligation to seek her children's consent since the estate did not belong to their father;*
b. *that in their summons for revocation they claimed that they were not given land and this prompted the learned judge to summon the area chief who confirmed that they were indeed given land and dismissed the said application for lack of merits and that the present application was filed after twenty months from date of the dismissal and no reasons have been offered for the delay or failure to appeal;*
c. *that she sold the portion in question to raise legal fees because the applicants have been engaging her in litigation and that she has no further intention of selling any other land.*

In their written submissions, counsel for the applicants also sought to bring the application under the purview of Rules **49** and **73** of the Probate and Administration Rules and Article **159 (2) (d)** of the Constitution of Kenya, 2010. Counsel also submitted that they had established *sufficient* grounds to warrant the court to allow the application, that the counsel then on record took no action after the impugned orders were made and that the present advocates came on record on 5th May 2015 and that the failure by their then advocate to act ought not be blamed on the advocates now on record.

Counsel for the Respondent submitted that the application is defective for being brought under the wrong provisions of the law, and that the only Rules imported into the succession practice are stipulated under Rule **63** of the Probate and Administration Rules, hence there is no application of Section **1A, 1B** and **3A** of the Civil Procedure Act.[2] In support of this contention, counsel quoted in *extenso* the decision of **Sitati J** *in the matter of the Estate of Francis Kamaliki Musembe*[3] where the learned judge held *inter alia*:-

> *" In my considered opinion the applicant sought refuge in Article 159 (2) basically because it may have dawned on her that there was no shelter for her under the provisions of the Civil Procedure Act**[4]** and Rules made there under upon which this application is anchored. I must however point out that Article **159** of the Constitution is not a panacea for all problems. It is not lost to this court that where there is a specified law under which certain actions are to be brought before the court, that law ought to apply unless there are cogent reasons put forward by the applicant justifying a departure from such law/rules. In the instant case, the applicant could have premised this application in Rule **73** of the Probate and Administration Rules, which rule clothes this court with inherent power to make orders as may be necessary for the ends of justice like sections **1A, 1B** and **3A** of the Civil Procedure Act**[5]** do for actions brought under the Civil Procure Act.**[6]** I therefore do not think that Article **159 (2)** of the constitution can provide any oxygen to the applicant to breathe through ....."*

Counsel further submitted that the application does not meet the threshold for granting the orders sought and cited the decisions *in the matter of the estate of James Waithaka Kinyanjui-deceased**[7]* and *in the matter of the estate of Philsilah Wambaki Kiguru-deceased*[8]and urged the court to dismiss the application.

On the issue whether Sections **1A, 1B** of the Civil Procedure Act[9] do apply in succession proceedings, guidance can be obtained in the book *Law of Succession* by **W. M. Musyoka**[10]where the author observes that *"the Law of Succession Act**[11]** inclusive of its support subsidiary legislation, is a comprehensive code of substantive and procedural law.**[12]*** **Nyamu J** in *Francis Kamau Mbugua & Another vs James Kinyanjui Mbugua*[13] observed that the Law of Succession Act[14]is a complete code except as regards third party rights or strangers, who should have recourse to provisions outside the Act.

In succession causes, the probate court exercises its jurisdiction under the Law of Succession Act[15] and its subsidiary legislation.[16] The provisions of the Civil Procedure Act[17] and the Civil Procedure Rules apply, and the probate court exercises jurisdiction under them, only to such extent as may be allowed by the Law of Succession Act[18] and the Probate and Administration Rules.[19]

Onyancha J was more explicit in *Shah vs Shah*[20] where he stated that where any proceedings are governed by special legislation, the provisions of the Civil Procedure Act[21] and rules do not apply unless expressly provided by such special legislation, and the position remains the same even if the special legislation is silent about it and does not exclude the Civil Procedure Act[22] and Rules.

Rule **63 (1)** of the Probate and Administration Rules provides that:-

> *"Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, X1, XV, XV111, XXV, **XL1V**, and XL1X, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules."*

From the above, it is clear that the only provisions of the Civil Procedure Rules imported to the Law of Succession Act[23] are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attendance of witnesses, affidavits, review and computation of time.[24]

The High Court has in numerous pronouncements severally stated that the other provisions of the Civil Procedure Act[25] and Civil Procedure Rules, that is those not mentioned in rule **63** cited above are of no application at all in proceedings under the Law of Succession Act.[26] For example, **Khamoni J** *in the matter of the estate of Joseph Mwinga Mwagana-deceased*[27]said in an application brought under Order **XL1** Rule **4** of the Civil Procedure Rules and Section 3A of the Civil Procedure Act,[28] that the said provisions did not apply as probate proceedings are governed by their own rules of procedure and added that the Civil Procedure Act[29] and Rules only apply where allowed by rule **63** of the Probate and Administration Rules. Thus, a party inviting the court to invoke its inherent powers should move under Section **47** of the Law of Succession Act[30] and Rule **73** of the Probate and Administration Rules **and not** Sections **1A, 1B** and **3A** of the Civil Procedure Act.[31]

Section **47** of the Law of Succession Act[32] enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act[33] and pronounce such decrees and make such orders therein as may be expedient. Further under Rule **73** of the Probate and Administration Rules it is provided:-

> *"73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

I acknowledge the fact that the Constitution is the supreme law. Under Article **159 (2) (d)** of the Constitution of Kenya 2010, the court is enjoined to administer justice without undue regard to procedural technicalities. However, I agree with **Sitati J** in the above cited case where she observed that "*I must however point out that Article **159** of the Constitution is not a panacea for all problems."*The facts and circumstances of this case do not reveal any technicalities of procedure to warrant the court to invoke article **159 (2) (d**) cited above.

Clearly, Order **45** relating to review is one of the Civil Procedure Rules imported into succession practice by Rule **63** of the Probate and Administration Rules.[34] To that extent, the application before me is premised on the correct provisions. However, the application must meet the substantive requirements of an application brought for review set out in Order **45** of the Civil Procedure Rules.[35] Thus, the crucial issue that falls for determination is whether or not the application meets the threshold to warrant this court to allow it.

This necessitates a close examination of Order **45** Rule **1** of the Civil Procedure Rules, 2010 which provides as follows:-

> ***45** Rule **1 (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 review of judgement to the court which passed the decree or made the order without unreasonable delay."*

The above rule in my view restricts the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds; **(a)** discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; **(b)** on account of some mistake or error apparent on the face of the record, or **(c)** for any other *sufficient reason* and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

The Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*[36] had this to say:-

> *"the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"(Emphasis added)*

I also find useful guidance in the decision of **Kwach, Lakha** and **O'kubasu JJA** in the case of *Tokesi Mambili and others vs Simion Litsanga*[37] where they held as follows:-

i. *In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)*

ii. *Where the application is based on sufficient reason it is for the Court to exercise its discretion.*

The court of appeal (**Omolo, O'kubasu & Githinji JJA**) in *Francis Origo & Another vs Jacob Kumali Mungala***[38]**succinctly stated:-

> *'In an application for review an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason AND most importantly the applicant must make the application for review without unreasonable delay'* ***(Emphasis added)***

I find nothing in the material presented before me to show that there has been discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicants at the time the orders in question were made. Further, there is nothing to show that there is an error on the face on the record of the court which warrants to be corrected by this court.

Counsel for the applicants strongly argued that the application before the court is premised on *"sufficient reason."* The reason offered for the delay is that the applicants previous advocates are to blame for failing to take the necessary steps until the present advocates came on record. The crucial question to resolve is whether indeed the alleged failure on the part of the advocates constitutes sufficient reason. Discussing what constitutes "*sufficient reason*" in an application for review, the Supreme Court of India in the above cited case of *Ajit Kumar Rath vs State of Orisa& Others*[39] stated *"any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"*

Shah, Owuor and **Waki JJA** in the case of *Zacharia Ogomba Omari and Another vs Otundo Mochache* held that "*An application for review based on any other sufficient reason which is not analogous to or ejusdem generis with the first two circumstances in Order 44 (Now O. 45) is not available where the reason given is that their advocate was not available at the hearing when his absence amounted to taking the Court for granted."*

A similar view was held in the case of *Sadar Mohamed vs Charan Signh and Another***[40]** where it was held that *"Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."*

Akiwumi & O'kubasu JJA in the case of *The official Receiver and Liquidator vs Freight Forwarders Kenya Limited***[41]** stated that *"these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice 'be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record."*

Mulla in the *Code of Civil Procedure**[42]*** (writing on Order **47** Rule **1** of the Civil Procedure Code of India), (the equivalent of our Order **45** Rule **1**), states that *'the expression sufficient reason' is wide enough to include misconception of fact or law by a Court or even by an advocate*." This definition only covers misconception of facts of law but not negligence or conduct of an advocate.

Mulla[43] also states that *'the expression' 'any other sufficient reason'* means *a reason sufficiently analogous to those specified in the rule*. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the order would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.[44] These words (*i.e. sufficient reason*) mean that the reason must be one sufficient to the court to which the application for review is made.[45]

The Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others*[46] discussing what constitutes sufficient cause had this to say:-

> *"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)*

In the present case, there is in action in that the blame is placed on the advocate then on record at the material time who is alleged to have failed to act and or the blame is placed upon the said advocate though no details have been given to demonstrate that the advocate failed to act as alleged.

In *Daphene Parry vs Murray Alexander Carson**[47]*** *the* court had the following to say:-

> *'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient*

> *cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, ..."(Emphasis added)*

I am not persuaded that the reason offered amounts to *'sufficient reason'* within the meaning of the rules cited above nor is it *analogous* or *ejusdem generis* to the other reasons stipulated in Order **45** Rule **1.** In *Savings and Loans Limited vs Susan Wanjiru Muritu*[48]**Kimaru J** expressed himself thus:-

> *'Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not her advocate. A litigant has a duty to pursue the prosecution of his or her case. ……..It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal.……She had been indolent and ……it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant'*

My above finding that the grounds offered by the applicant do not amount to sufficient reason is further fortified by the holding in the case of *Evan Bwire vs Andrew Nginda***[49]**where the court held that '*an application for review will only be allowed on very strong grounds' particularly if its effect will amount to re-opening the application or case a fresh.* To order that this case be re-opened where sufficient grounds have not been given would in my view amount to injustice.

This leads me to the next point. The application before me was filed after about 9 months after the order complained about was rendered. One thing is clear in this application. The delay of has not been explained. Other than blaming the lawyer, no convincing explanation has been offered to show why it took about 9 months to bring the present application to court or engage another advocate. Perhaps, it's important to recall the last words of Order **45** Rule **1 (1) (b**) which reads '…….*may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.'*

In the case of *Abdulraham Adam Hassan vs National Bank of Kenya Ltd,**[50]*an unexplained delay of **three months** was found to be unreasonable. Similarly, in the case of *Kenfreight (E.A.) Limited vs Star East Africa Company Limited*[51]**Onyango Otieno J** (as he then was) found a delay of **three months** to be unreasonable and disallowed an application for review.

A similar holding was made in the case of *Muyodi vs. Industrial and Commercial Dev. Corp and another**[52]* where the court emphasised the application must be brought to court without unreasonable delay. In *Mbogo Gatuiku vs A.G.**[53]*, **Mwera J** emphasising on the need to file applications for review without delay stated that *'even a delay of a day or two calls for an explanation'*.

Musinga JA in *Equity Bank vs West Link MBO Limited**[54]* put it correctly when he held that *'Courts of law exist to administer justice and in so doing they must balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met.' '*Thus, there is a need to balance the rights of both parties before the court.

In conclusion, I find that no new matter or evidence has been brought out which is completely new and was not within the knowledge of the applicants or could not have come to their knowledge even after exercising due diligence nor am I persuaded that sufficient cause has been shown to warrant this court to allow the application.

The upshot is that the application dated 5th May 2015 lacks merits and the same is hereby dismissed with costs to the Respondent.

Right of appeal **30** days

Signed, Delivered and dated at Nyeri this **24th** day of **May** 2016

John M. Mativo

Judge

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[1] Cap 21, Laws of Kenya

[2] Ibid

[3] High Court Succ Cause No. 186 of 2004

[4] Supra

[5] Supra

[6] Ibid

[7] High Court Succ Cause No. 3154 of 2003, {2007}eKLR

[8] High Court Succ Cause No. 989 of 1994, {2014}eKLR

[9] Supra

[10] LawAfrica Publishing (K) Ltd, Nairobi, 2006

[11] Cap 160, Laws of Kenya

[12] See in the matter of David Wahinya Mathenge-deceased, Nairobi High Court Succ Cause No. 1670 of 2004- Koome J

[13]High Court Civil Case No. 111 of 2004 (O.S)

[14] Supra

[15] Ibid

[16] See W. M. Musyoka, supra at page 151

[17] Supra

[18] Ibid

[19] Supra Note 12

[20] No. 2 {2002} 2KLR 607

[21] Supra

[22] Ibid

[23] Cap 160, Laws of Kenya

[24]See more at: http://www.kenyalawresourcecenter.org/2011/07/probate-

succession.html#sthash.4aLT92zr.dpuf

[25] Supra

[26] Supra

[27] High Court Succ Cause No. 1814 of 1996

[28] Supra

[29] Ibid

[30] Ibid

[31] Ibid

[32] Cap 160 Laws of Kenya

[33] Ibid

[34] See W. M. Musyoka, Law of Succession, law Africa, at page 191.

[35] Ibid, at page 191

[36] 9 Supreme Court Cases 596 at Page 608

[37]

[38] Civil Appeal No. 149 of 2001; {201} LLR 4720, {2005} 2 KLR 307

[39] 9 Supreme Court Cases 596 at Page 608

[40] {1963}EA 557

[41]Civil Appeal No. 235 of 1997; {1997} LLR 7356

[42] Sir DinshahFardunjiMulla, The Code of Civil Procedure, 18th Edition, Reprint 2012, at Page 1147, paragraph 10 Civil Appeal No. 90 of 2001; {2001} LLR 6937 (cak)

[43]Supra, paragraph 17, page 3672

[44]

[45] Supra note 9 above

[46] Civil Appeal No. 147 of 2006 (Munuo JA, Msoffe JA and Kileo JJA)

[47] {1963} E.A. 546

[48] HCCC No. 397 of 2002, Milimani

[49] Civil Appeal No. 103 of 2000, Kisumu ; {2000} LLR 8340

[50] Kisumu High Court Civil Case No. 446 of 2001

[51] {2002} 2 KLR 783

[52] {2006} 1EA 243 (CAK)

[53]HCCC 1983 of 1980, High Court, Nairobi.

[54] Civil App No. 78 of 2011