



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO.437 OF 2005**

**IN THE MATTER OF THE ESTATE OF NJERI KURIA (DECEASED)**

**FRANCIS KARIUKI KURIA.....APPLICANT/OBJECTOR**

**VERSUS**

**JACINTA NJERI KURIA.....1<sup>ST</sup> RESPONDENT/PETITIONER**

**RUTH WANJIRU KAMAU.....2<sup>ND</sup> RESPONDENT/PETITIONER**

**RULING**

By way of what is described as a summons for review and/or setting aside a judgment dated 20th July, 2015 and premised under **Section 26** of the **Law of Succession Act** and **Rules 44** and **76** of the **Probate and Administration rules**.

The orders sought are:

1. Spent
2. Spent
3. That the Honourable court be pleased to review and/or set aside the judgment delivered by this court on 10th June, 2009 with all the consequential orders thereof.
4. That the Respondents/Administrators herein be condemned to pay costs of the sums (sic) for revocation.

**THE APPLICANT'S CASE**

The application is founded on grounds as seen on the face of the application viz:

- a. That the grant was obtained fraudulently by making false statements and by concealment from the court of material facts.
- b. That the grant was obtained by means of untrue allegations
- c. That the purported Will the basis on which the grant was issued was forged and had questionable

signature and identity cards of people not known.

- d. That there is new and important matter discovered after the delivery of the said judgment.
- e. That the purported identity card of the Applicant has been confirmed not to belong to him and was forgery.
- f. That the purported Will was not properly attested to as required by law.
- g. That the annexed affidavit of Francis Kariuki Kuiria (sic).
- h. That such other grounds, reasons and or arguments as the court may allow to be heard and argued during the hearing.

The application is supported by an affidavit sworn by Francis Kariuki Kuria (hereinafter, the applicant) sworn on 22nd July, 2015.

The gist of the grounds and supporting affidavit is that the Will the basis upon which the grant was issued is questionable. The Will is alleged to have been forged. It is urged that the purported Identify Card of the applicant has been confirmed not to belong to him and was a forgery. The purported Will was not properly attested as required by law. It is the applicant's case that a request was made to the Director, National Registration Bureau to give details of thumb print as appears on their record of the deceased Mary Njeri Kuria ID. No.2959169. The Director wrote back seeking the original finger print as the one on a photo copy was not suitable for comparison. The applicant adds that he has information from the District Criminal Investigating Officer which information he believes to be true that they have asked for a copy of the Will given to court so that they can verify the fingerprint of the late Mary Njeri Kiarie.

It is urged that there are many errors on the alleged Will and the court should not have relied on it. The genuineness of the Will is seriously in dispute and the court ought to vary its judgment.

#### **THE RESPONDENT'S CASE:**

Ruth Wanjiru Kamau has sworn an affidavit to the effect that the application herein intends to have the court re-hear the matter all over again. It is stated that the applicant made the following applications which were disallowed:

- a. An application dated 24th June, 2009 dismissed on 28th April, 2010.
- b. An Application dated 29th April, 2010 dismissed on 27th January, 2011.
- c. An application dated 29th March, 2011 dismissed on 24th February, 2012.

It is deponed that the applicant filed a similar application dated 16th May, 2012 where stay orders were granted and remained in force until 25th June, 2015 when the same lapsed as the Judge declined to extend them.

A criminal case initiated against the Respondents relating to the Will was dismissed. The proceedings are annexed. The errors in the Will complained of are said to be obvious typing errors.

It is urged that the application be dismissed.

Both parties filed written submissions.

The issue for determination in this application is whether the threshold for a review of the court's judgment has been achieved.

## ANALYSIS

1. The application has been filed under **Sections 26 and 76** of the **Law of Succession Act** and **Rule 44** of the **Probate and Administration Rules** (the latter provisions provide for revocation or annulment of a grant). However the applicant's prayer was for review or setting aside of the judgment of Koome, J that was delivered on 10<sup>th</sup> June 2009 on the ground of discovery of new facts.

2. Therefore Order 45 of the Civil Procedure Rules is applicable by virtue of Rule 63 of the Probate and Administration Rules. This Order provides that a decree may be reviewed on the grounds that-

**a. the person seeking review has discovered new and important matter of 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 order made;**

**b. on account of some mistake or error apparent on the fact of the record; or**

**c. or for any other sufficient cause; and**

**d. this application must be made without unreasonable delay.**

3. The applicant alleged that there was new evidence to suggest that the will of the deceased was forged. He argued that the identity numbers on the will did not belong to the people they are alleged to belong to. He annexed to his supporting affidavit a letter from the Ministry of State for Immigration and Registration of Persons "**FKK 1**" which showed that the identity card numbers alleged to belong to the applicant, Muhika Nderebu, Jecinta Njeri and Joseph Ndome Ndonyo actually belonged to third parties.

4. The above errors caused him to doubt the authenticity of the thumb print on the will. He therefore asked the Ministry of State for Immigration and Registration of Persons to verify it but the print on the will that was submitted for verification was not suitable for comparison. (See "**FKK 3**"). However, he has information that the Ministry has asked for the copy of the will submitted in court to enable it verify the print. But at the time of the hearing of the application, he had no information regarding its authenticity.

5. The third fact which the applicant relied on was that the will was not properly witnessed. He relied on a statement that was made by Veronica Njeri Mwai to the police "**FKK 4**". Veronica Njeri was a witness to the will of the deceased. In her statement, she alleged that she did not see the deceased place her thumb print on the will.

6. The allegation of forgery had been raised earlier and was considered by the court in its judgment of 10<sup>th</sup> June, 2009 (see pages 2 and 4). The claim was dismissed on account of insufficient evidence. However, the applicant did not point out the errors on the will which have been admitted by the Respondents but alleged to be minor and inconsequential. He also did not challenge the validity of the will for not being properly witnessed.

7. Whereas these are purported new facts which are being raised after the judgment was delivered, the Court of Appeal in **Rose Kaiza v Angelo Mpanju Kaiza [2009] eKLR** held that not every new fact will justify interference with the judgment of court. According to the court, relying on the provisions of Order 45 and the Commentary by Mulla on similar provisions of the Indian Civil Procedure Code, 15<sup>th</sup> Edition at page 2726, the caveat is that the new fact was not within the knowledge of the party despite exercising due diligence. The excerpt provides:

**"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge;**

where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

8. The same court called for caution when exercising discretion to review and required of the party to show that he was not negligent or indifferent. It held in D.J. Lowe & Co Ltd v Banque Indosuez [1998] eKLR as follows-

**“Where such a review application is based on fact of fresh evidence, the court must exercise greatest care as it is easy for the party who has lost, to seek the weak part of his case and the temptation to lay and produce evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”**

9. Also, in James M. Kingaru & 17 Others V. J.M. Kangari & Muhu Holdings Ltd & 2 Others, [2005] eKLR, Visram J (as he then was) held as follows:

**“Applications on this ground [review] must be treated with caution. Review cannot be sought to supplement the evidence or to introduce new evidence. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial.”**

10. In the present case, it is clear that the applicant did not exercise due diligence to produce all evidence which would warrant the declaration of the Will as invalid at the time of the hearing. The errors on the Will could have been raised at the time as he did have in his possession the Will and all the relevant information, including that regarding the authenticity of the Will which could have been easily procured at the time and adduced at the hearing. Similarly there was no reason adduced as to why Veronica Mwai who alleges not to have witnessed the will was not called as a witness during the hearing.

11. The applicant herein is basing his case on fresh evidence. He is a party who has lost and he has sought the weak part of his case and has been tempted to lay and produce evidence which will strengthen that weak part and put a different complexion to it. He has not shown that he exercised utmost due diligence in collecting all possible evidence at the hearing.

12. The circumstances of this case show that the applicant is trying to clutch at straws and revive his claim as to the invalidity of the will. These efforts will not see the light of day as even in previous instances, the applicant has attempted to bring up the same issue without success.

13. This is exemplified by the fact that the same issue was raised in Chief Magistrate Criminal Case No. 3518 of 2013 where the Respondents were charged with forgery. The prosecution applied for withdrawal of the charges under Section 87 A of the Criminal Procedure Code. In making the said application the prosecutor delivered himself thus:

**“I got the instructions from the investigating officer Sgt. Sakong of Nakuru CID. The complainant was advised to appeal against the high court judgment in Succession Cause No. 437 of 2005.”**

This is a clear indication that the police have hitherto investigated this matter and found no cogent evidence

14. Further, in a Summons for Revocation or Annulment of grant dated 16<sup>th</sup> May, 2012, the applicant sought revocation of the grant on among other grounds, that the purported will the basis on which the grant was issued was forged and had questionable signatures and identity cards of people not known. That

application was not prosecuted and was eventually dismissed for non-appearance of the parties. Surely, the applicant is on a wild goose chase. His sole purpose appears to this court to be to delay the winding up of the estate.

15. In addition to the above grounds, I find that the applicant was indolent in filing this application. The judgment which he seeks to review was made in June, 2009 and the application for review was filed in July, 2015. A period of six years is a long period and constitutes unreasonable delay which renders the remedy of review unavailable to the applicant.

### **DETERMINATION**

16. The finding of this court is that the applicant did not exercise due diligence to procure all the evidence that was available to him and produce it during the hearing of the matter when the validity of the will was considered by the court. Secondly, the applicant is guilty of unreasonable delay in filing this application.

17. For the above stated reasons, application dated 20<sup>th</sup> July, 2015 is hereby dismissed with costs.

**Dated, Signed and Delivered at Nakuru this 22nd day of June, 2016**

**A. K. NDUNG'U**

**JUDGE**