**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**SUCCESSION CAUSE NO. 397 OF 2013**

**IN THE MATTER OF THE ESTATE OF OLOKO MUNIKA ..... DECEASED**

**AND**

**GABRIEL SIMALI WESONGA ..... 1ST APPLICANT**

**THOMAS ODUODI SIMALI .....2ND APPLICANT**

**MATHEW ODUORI SIMALI ..... 3RD APPLICANT**

**MICHAEL SIMALI ..... 4TH APPLICANT**

**MARGARET AWINO OSINGO ..... 5TH APPLICANT**

**ROSE MAENDE SIMALI ..... 6TH APPLICANT**

**MARY SIMALI ..... 7TH APPLICANT**

**BONVENTURE CHESA ..... 8TH APPLICANT**

**VERSUS**

**GEORGE ODUOR OLOKO ..... RESPONDENT/ADMINISTRATOR**

**RULING**

**(Notice of Motion dated 23rd February, 2016)**

1. On 26th January, 2016 by brother F. Tuiyott, J delivered a ruling in respect to a chamber summons application dated 14th August, 2014 in which George Oduor Oloko the Applicant therein had, among other orders sought the revocation of the letters of administration granted to one Helena Otsieno Simali in Busia SPM Succession Cause No. 81 of 1987 in respect of the estate of Oloko Munika. The application was allowed.

2. Gabriel Simali Wesonga, Thomas Oduori Simali, Mathew Oduori Simali, Michael Simali, Margaret Awino Osingo, Rose Maende Simali, Mary Simali and Bonventure Chesa who were the 1st to 8th respondents in that application have now moved this court through the notice of motion application dated 23rd February, 2016 in which they seek orders as follows:

> **"1) The Honourable Court be pleased to review its orders dated 26/1/2016.**
>
> **2) That the Applicants be granted unconditional leave to oppose the Application dated 13/8/2014.**
>
> **3) Costs be in the cause."**

3. The application which is brought under Order 45 rules 1 and 5 of the Civil Procedure Rules, 2010(CPR) and Rule 63(1) of the Probate and Administration Rules (P&A Rules) is based on the grounds on its face and the supporting affidavit of Gabriel Simali Wesonga who now becomes the 1st Applicant in respect of this application. His co-respondents in the application whose ruling they now seek to review are the

2nd to 8th respondents respectively in this application. The Applicant in the application dated 13th August, 2014 is the Respondent in the instant application.

4. From the grounds on the face of the application and the 1st Applicant's affidavit, the applicants aver that during the pendency of the Respondent's application, they changed their advocate. According to them, their new advocate acted on the presumption that the application had been opposed and went ahead to file submissions in opposition to the Respondent's application.

5. The applicants contend that it is only after the ruling was delivered that they realized that their previous advocate had not filed any response to the Respondent's application. They posit that this is a discovery of a material fact that was not within their knowledge during the hearing of the application. Further, that the mistake of their advocate should not be visited on them.

6. The applicants wrapped up their arguments by stating that they had a strong defence against the application and they should be given an opportunity to argue their case.

7. The Respondent opposed the application through a replying affidavit sworn by himself on 14th July, 2016. His case is that Marachi customs and the succession laws of Kenya rank him, as the only surviving son of the deceased, in priority to anybody else. He asserts that the 1st Applicant's case is hopeless and seeks to postpone the inevitable fact that he cannot be an administrator of the estate of the deceased. The Respondent avers that the 1st Applicant is the grandchild of his step-sister Kelecencia and there is no way he can be appointed an administrator of the estate of the deceased.

8. The Respondent asserts that the applicants were given several opportunities to respond to his application but they did not do so.

9. The instant application is brought under Order 45 rules 1, 2 and 5 of the CPR. Rule 1(1) which provides the circumstances under which a decree or order can be reviewed states:

> **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 a review of judgment to the court which passed the decree or made the order without unreasonable delay."**

10. Only on three grounds can a decision be reviewed. Firstly, that there is 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 at the time the decision was made. Secondly, a review can be made on account of some mistake or error apparent on the face of the record. Thirdly, a review can be made for any other sufficient reason.

11. It is clear from a reading of the applicants' application that they do not seek a review of the ruling on the ground that it has a mistake or error apparent on its face. Mr. Ipapu for the applicants hammered home the point that they seek a review on the ground of discovery of new and important matter or evidence which was not within the knowledge of the applicants. He says that the applicants were not aware that their previous advocate had not filed a response to the Respondent's application.

12. It must be noted that for a review to be made on the ground that there was discovery of new and important matter or evidence, an applicant must demonstrate that the new and important matter or evidence was not within his knowledge and could not be discovered upon the exercise of due diligence.

13. Mr. Wanyama for the Respondent told the court that the matter was put off twice to enable the applicants file a response to the application. They were also given time to file submissions.

14. I have perused the court record. I do not see anywhere in which the applicants' counsel was given time to file a reply to the application. What I note is that on 10th December, 2014, the court directed the applicants to file and serve their submissions within 45 days. They subsequently filed submissions on 25th February, 2015.

15. On 9th February, 2015 the learned Judge took the file into his custody and indicated that he would deliver ruling on 10th March, 2015. On 10th March, 2015 the learned Judge delivered a ruling in which he indicated that there were two certificates of death in the matter indicating two different dates of the deceased's demise. He asked the parties to address him on the issue as to which certificate was to be used. On 18th May, 2015 the advocates entered a consent that the matter be decided on the basis that the deceased died on 29th July, 1985.

16. When the ruling of 10th March, 2015 was delivered, the record shows that Mr. Ipapu for the applicants was in attendance. In that ruling, the judge clearly indicated that the same was in respect to the summons for revocation of grant dated 14th August, 2014.

17. At paragraph 2 of the ruling the Judge stated:

> **"That application which is unopposed, is supported by the affidavit of George Oduori Oloko"**

In that one line the applicants had been alerted that they had not opposed the Respondent's application. They had time between 10th March, 2015 and 26th January, 2016 to ask for leave to file a response to the Applicant's application dated 14th August, 2014. They did not do so.

18. The information that they had not filed a response was all along available to them and they cannot now turn around and claim that this is a matter they discovered after the ruling of 26th January, 2016. Mistakes on the part of a party or counsel cannot be equated to discovery of new and important matter.

19. In this case it is clear that the applicants and their counsel were not keen enough on their application. They had been given sufficient time to respond to the application but they did not do so. In the circumstances of this case, I am not convinced that there is discovery of new and important matter to warrant a review of the ruling dated 26th January, 2016.

20. As I have already stated, no mistake or error has been identified in that ruling. The applicants have also not provided any other sufficient reason to warrant a review of the ruling. In the circumstances of this case, the answer to the instant application is that it lacks merit. The same is dismissed with costs to the Respondent.

**Dated, signed and delivered at Busia this 30thday of Nov., 2016.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**.