REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

PROBATE AND ADMINISRATION CAUSE NO. 6 OF 1997

IN THE MATTER OF THE ESTATE OF GEOFFREY ERASUS WAMBAYA

MARY WAMBAYA …..... PETITIONER/APPLICANT

VERSUS

ESPERANCE PERSIDE WAMBAYA …..... RESPONDENT

R U L I N G

1. The application dated ***25th February 2004*** is brought under the provisions of the old Order 44 Rule 1 of the Civil Procedure Rules and is for the review of the Judgment delivered herein on ***21st February 2003*** so that the subject estate may be redistributed.

The applicant is the petitioner, ***Mary Wambaya,*** while the respondent is ***Esperance Perside Wambaya.*** Both are the widows of the deceased ***Geoffrey Erastus Wambaya*** who died on the ***3rd December 1992*** and the grant of letters of administration interstate respecting his estate was issued to his two widows who failed to agree on the mode of distribution of the estate thereby resulting in protracted proceedings for the distribution of the estate by the court which eventually rendered its judgment on ***21st February 2003.*** It is that judgment which is the subject matter of this application on grounds that there are errors apparent, on the face of the record, that there are mistakes in the judgment which can be corrected by review, that there is discovery of new evidence and that there are sufficient grounds for review.

2. The application is supported by the averments contained in the supporting affidavit deponed by the applicant dated ***25th February 2004*** and further affidavit dated ***2nd October 2014***. A replying affidavit dated ***15th July 2014*** was filed in opposition to the application by ***Jacob Joseph Wambaya*** , son to the respondent who is now deceased. He basically contends that the application is an abuse of the court process and that the applicant is guilty of laches for having slept on her right for over ten (10) years since the filing of the application in court.

At the hearing of the application. ***Mr. Wafula***, learned counsel appeared for the applicant while ***Mr. Isiji***, Learned counsel appeared for the respondent.

3. ***Mr. Wafula***, in his submissions stated that their interest was in prayers (c) and (d) of the notice of motion dated ***25th February 2004.***

Prayer (c) is for review of the disputed judgment and redistribution of the estate while prayer (d) is for such other orders as the interest of justice may demand.

Learned Counsel, submitted that there are errors on the face of the record as the shares of the deceased in Nyawita Maternity Nursing home Co. Limited formed part of his estate but were not factored in by the court and that there was uncertainty in the ownership of four vehicles Reg.nos KUK 607, KRK 160, KMC.644 and KYV 601. That, it was discovered after judgment that the land at Olenguruoni and plot 11 at Kibomet did not exist and that there was no money in the alleged bank accounts.

Learned counsel, contended that this application was filed in 2004 but for one reason or another it could not be heard. It is therefore not belated as the delay in its prosecution cannot be blamed on the applicant.

4. On his part ***Mr. Isiji***, submitted that the application is brought in bad faith and an abuse of the court process since it does not fulfill the criteria for grant of a review order. That, during the hearing of the petition, it was the petitioner who stated that the property now said to be non existent actually existed and with regard to the company, the court indicated that it was an issue falling under the Companies Act which was not part of the estate as it was a limited liability company. That, the issue of delay and prosecution of the application was dealt with by this court and by virtue of being the first wife, the applicant was granted a bigger share of the estate and cannot therefore be in court forever. Learned counsel, contended that the applicant has not come to court with clean hands as she used a false grant to move the court.

5. From the averments in both the supporting and replying affidavits as well as the submissions by both parties, the issue for determination is whether the applicant has established sufficient grounds to warrant a review of the judgment delivered by the court on ***21st February 2003.*** It must however be first and foremost noted that this is a matter which has been in court for an unnecessary lengthy period of time due to the conduct of the parties of not letting go on the issue of distribution. Litigation must somehow come to an end and indeed the parties cannot remain in court forever on issues whose solutions lies in their very own hands. As for this application, it has been in court for over ten (10) years prior to its prosecution for reasons attributable to the indolence of both parties in taking necessary action at the right time. It is this court's hope that the determination of the application will finally bring the matter to an end in so far as the concluded distribution of the estate of the deceased is concerned.

6. Under the current Civil Procedure Rules, 2010, review is provided for in Order 45 Rule 1 to the effect that any person considered aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been referred or from which no appeal is 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.

7. Herein, the disputed judgment was delivered on ***24th February 2003***, but this application was filed one year later i.e ***26th February 2004***. The delay was unreasonable and no explanation for it was made by the applicant to the satisfaction of this court. Be that as it may, the application is grounded on the fact that there are errors and mistakes apparent on the face of the record and the judgment and the fact that new evidence has been discovered. The affidavits in support of the application are made of averments which in essence attack the judgment of the court in the manner it distributed the estate of the deceased without showing any errors or mistakes apparent on the face of the record and the judgment. Such averments are more suitable to an appeal against the judgment of the court rather than a review of the judgment.

A perusal of the judgement clearly indicates that what was distributed by the court was what was availed for distribution by the parties themselves including the land at Olenguruoni and plot or house at Kibomet as well as the shares in Nyawita Maternity and Nursing home. There is absolutely no discovery of new evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by her at the time when the judgment was delivered. The errors and / or mistakes alluded to by the applicant have not been established and are in fact none existent.

8. For all the foregoing reasons, it is apparent to this court that the present application is devoid of merit

to such an extent that it was clearly made in bad faith and a gross abuse of the court process. The application is therefore dismissed with costs to the Respondent.

It is so ordered.

J. R. KARANJA

JUDGE

Read on this 22nd of July 2015 in the presence of Mr. Wafula for Applicant and Mr. Isiji for Respondent