REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Probate & Administration 5 of 2008

IN THE MATTER OF THE ESTATE OF M.M ….....……..…(DECEASED)

R.C. M…….....……..…...…..1ST APPELLANT/RESPONDENT

R. A.M…….....……2ND APPELLANT/RESPONDENT

VERSUS

M.W.M.....…..……...RESPONDENT/APPLICANT

RULING

Pursuant to the provisions of *Order XLIV rule 1* of the Civil Procedure Rules, **M W M** took out a motion dated 6th April 2009, in which she prayed to this Court to review its judgment delivered on 5th March 2009. The motion is supported by the affidavit the Applicant swore on 6th April, 2009. **R C M**, the 1st Respondent to the Motion swore a Replying Affidavit to resist the Motion.

It is the submission of the Applicant that four of her daughters namely R.W.M, B.N.M, M.W.M, J.M.M and E.G from the second house were left out from inheriting the estate. It is also argued that 12 shares of [particulars withheld] Co. which was part of the Estate of the deceased was not included during the distribution of the Estate. Thirdly, it is further the submission of The Applicant the parcel of land known as [particulars withheld] was awarded to the children of the deceased yet she had lived on the land since 1983 whereupon she had build 5 roomed permanent dwelling which she may be forced to demolish. Consequently, the Applicant urged this court to review its judgment so as the omitted property and children be considered.

The Respondent on her part denied the Applicant's allegations. She stated that none of the children of the deceased were left out in the sharing of the Estate. She pointed out that R. W M, N M and J M M are the deceased's daughters who are currently married and living with their husbands, while E.G is said to be a minor whose interest was catered for as a beneficiary in the judgment of 5th March 2009. The Respondent further pointed out that M.W.M was not a daughter to the deceased but the Applicant's niece hence she is not a beneficiary to the Estate of M.M, deceased. The Applicant further argued that even her own married daughters were not given anything because the family had agreed that all married daughters should not be considered in the sharing of the Estate. The Respondent challenged the Applicant's assertion that she had put up a permanent house in [particulars withheld]. She alleged that the same was put up by the deceased in 1979.

I have considered the submissions of learned counsels from both sides. I have also considered the material before me. Under *rule 63 (1)* of the Probate and Administration Rules, the provision of *Order XLIV* of the Civil Procedure Rules were stated to apply to these proceedings. When dealing with applications for review under *Order XLIV* the principles are well settled. The court restated those principles in the case of **KITHOI =VS= KIOKO [1982] K.L.R. 177** as follows:

> ***"The Civil Procedure Rules Order XLIV demands interalia that an application for review must be based on the discovery of new and important evidence which was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made, or an account of some mistake or error apparent on the face of the record or for any other sufficient reason. The applicant for review must strictly prove the grounds for review except for review on the ground of mistake or error apparent on the record, failing which the application will not be granted."***

It is obvious from the rules that an application for review is limited. The court's discretion is not unfettered. The Applicant is saying that some of the beneficiaries have been left out of the distribution of the Estate. She is also saying that the land she is in occupation was irregularly allocated to the

beneficiaries yet there is a permanent building she had built standing thereon. She is also of the view that some shares with Ruriani Ranching co. were not included in the schedule of distribution. A careful perusal of the affidavit protest will show that the Applicant had deponed in paragraph 9 that she was in occupation of the parcel of land known as [particulars withheld]. There was therefore nothing new on this aspect. It was within the knowledge of the parties and the court. That submission cannot entitle this Court to invoke its jurisdiction of review. In paragraph 10 of the same affidavit the Applicant had averred that her daughters namely R.G, S.N and R.W should be given a share of the Estate. Again, it is apparent that the issues touching on the beneficiaries who were allegedly left out from the distribution was within the Applicant's knowledge. The same was drawn to the attention of the Court. That is not an issue which can be entertained by an application for review. The issue touching on the 12 shares in [particulars withheld] Company was also stated in paragraph 12 of the affidavit of protest. It was therefore drawn to the attention of the Court. The issue was within the knowledge of all the parties participating in this matter. The same issue cannot be raised on review. All the issues complained of were brought to the appellate court. In her judgment of 5th March 2009, Lady Justice Kasango to have considered all issues raised before her, she may not have taken into account certain issues. If any party is aggrieved, I shudder to state that the remedy does not lie by way of review. The Applicant if were advised, must know that her remedy lies elsewhere. It would appear the Applicant's grounds are more of grounds which should be argued on appeal. This Court cannot sit on appeal in it own cause.

In the end the Motion must fail. It is dismissed with costs to the Respondent.

Dated and delivered this 19th day of February 2010.

J. K. SERGON
JUDGE

In open court in the presence of Gacheru for Applicant. No appearance for Respondent.