



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Miscellaneous Application 19 of 1997

1. CHARLES KIRWEYA KAHWAI 1ST APPLICANT
2. JOHN MATHENGE KAHWAI 2ND APPLICANT
3. JAMES GAKURU KAHWAWI 3RD APPLICANT
4. GABRIEL WAMBUGU KAHWAI 4TH APPLICANT
5. NDUNGU KAHWAI 5TH APPLICANT
6. MARTIN WANJOHI KAHWAI 6TH APPLICANT

VERSUS

1. JOSEPH KIRWEYA KAHWAI 1ST RESPONDENT
2. GITHINJI KAHWAI 2ND RESPONDENT
3. JANE WANJIRU KAHWAI 3RD RESPONDENT
4. JOSEPH KINUTHIA KAHWAI 4TH RESPONDENT
5. PAUL GAKURU KAHWAI 5TH RESPONDENT
6. JACINTA WAGAKI KAHWAI 6TH RESPONDENT

R U L I N G

Pursuant to the provisions of section 80 of the Civil Procedure Act and Order XLIV rule 1 of the Civil Procedure Rules, the Respondents herein took out the motion dated 15th January 2010 in which they applied for the following orders:-

1. **THAT this Honourable Court be pleased to review/vary and or set aside the Order made on 24th November 2009.**
2. **THAT the Honourable Court be pleased to order that this matter be heard by way of viva voce evidence.**
3. **THAT the costs of this application be provided for.**

The motion is supported by the affidavit of **Githinji Kahwai** sworn on

15th January 2010. The respondents opposed the motion by filing the replying affidavit of **Charles Kirweya Kahwai** sworn on 28th June 2010.

The respondents are of the view that the court made a mistake when it overlooked the order made on 5th July 2005 which had directed the case to be determined by oral evidence. It is said that the order confirming distribution to be done in terms of the surveyor's report dated 11th June 2001 is oppressive and unfair to the respondents herein. It is further argued that the failure by the respondents to set aside the orders made on 15th May 2001 was not deliberate.

The applicants on the other hand are of the view that motion does not meet the requirements for an order for review. It is clearly argued that there is no discovery of new and important matter or evidence which was not within the respondents' knowledge at the time of the application.

I have taken into account the rival submissions made by both sides. The application before this court is that of review. The principles are well settled. They include:-

- (i) An applicant must show the discovery of new and important matter or evidence which was not within his knowledge at the time of the application.**
- (ii) An applicant must show a mistake or error apparent on the face of record.**
- (iii) Any other sufficient reason.**

I have considered the grounds presented to this court by the respondents on the face of the motion and the facts deponed in the supporting affidavit vis-à-vis the well settled principles of review. I find the motion to have fallen far below the threshold. The parties were aware of the existence of the orders issued on

5th July 2005 in which the dispute was directed to be determined by oral evidence. In fact the honourable **Mr. Justice Makhandia** clearly stated in his ruling of 24th November 2009 that there is nothing left to go for trial. The respondents herein have urged me to set aside the order. There is nothing new nor an error apparent on record. In my view, it would appear the respondents are indirectly challenging the order of **Justice Makhandia**. I cannot sit on appeal in his decision since we are of concurrent jurisdiction. If well advised the respondents' remedy lies elsewhere but not through the current motion. The motion is dismissed for lacking in merit with costs to the applicants.

Dated and delivered this 23rd day of July, 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Waruinge holding brief for A.K. Kariuki for Applicants.

Mr. Wahome for the Respondents