**In re Estate of Elias Njiru Chandi (Deceased) (Succession Cause 108 of 2008) [2024] KEHC 12433 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12433 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**SUCCESSION CAUSE 108 OF 2008**

**LM NJUGUNA, J**

**OCTOBER 16, 2024**

**IN THE MATTER OF THE ESTATE OF ELIAS NJIRU CHANDI (DECEASED)**

**BETWEEN**

**ESTHER NJIRO ..... 1ST APPLICANT**

**REBECCA NG'ANG'A ..... 2ND APPLICANT**

**FAITH NJERU ..... 3RD APPLICANT**

**AND**

**PETER NDEGWA CHANDI ..... 1ST RESPONDENT**

**POLYCARP KARIUKI CHANDI ..... 2ND RESPONDENT**

**DAVID MATU WAHOME ..... 3RD RESPONDENT**

**AND**

**MARGARET WANJIKU KAMAU ..... INTERESTED PARTY**

**RULING**

1. Before the court is an application dated 18th June 2024 through which the applicants seek the following orders:

    a. Spent;

    b. That the honourable court be pleased to review, vary and set aside the ruling and orders of this court delivered on 06th March 2024, which held that the respondents failed to file their submissions and that the Civil Procedure (Court-Annexed Mediation) Rules 2022 applied to the application dated 16th November 2021;

c. That this honourable court be pleased to consider the applicants' submissions and to accordingly make a just and fair determination of the application dated 16th November 2021 without considering the provisions of the Civil Procedure (Court-Annexed Mediation) Rules 2022, as they did not apply to the application dated 16th November 2021;

d. That costs of this application be in the cause.

The application is premised on grounds set out on its face and in the supporting affidavit to the application.

2. It is the applicants' case that the court erred in finding that only the respondents filed their written submissions yet the applicants filed their submissions on 18th February 2022. That the court erroneously applied the Civil Procedure (Court-Annexed Mediation) Rules 2022 in its ruling yet the mediation agreement was reached before these rules came into force. That the court also erred in finding that the estate of the deceased had already been distributed which is not the case.

3. The 1st and 2nd respondent's counsel filed a replying affidavit to the application, stating that the application is frivolous and vexatious and there was unreasonable and in ordinate delay in filing the same. That the application also fails to raise sufficient grounds for review as provided in law. That the mediation agreement was reached with the consent of the parties and the court need not review its findings. The 3rd respondent's (a beneficiary) advocate also filed a replying affidavit stating that the application is a ploy to keep him away from his portion of the estate. He urged the court to dismiss the application.

4. In their written submissions, the 1st and 2nd respondents stated that the Mediation rules applied by the court in its ruling were the rules applicable at the time and that the court did not fall into error. That the applicants have not made a case warranting setting aside of the ruling. On his part, the 3rd respondent submitted that the applicants' case will entail re-examination of evidence which is beyond the authority of the court sitting to review. He relied on the case of National Bank of Kenya Limited v. Ndungu Njau (2001) eKLR. He stated that no new matter was discovered after the order was made, neither have the applicants established sufficient reason to review the court's ruling.

5. The applicants submitted that the Civil Procedure (Court-Annexed Mediation) Rules 2022 came into effect 9 months after the application for setting aside was filed. They relied on section 80 of the *Civil Procedure Act*, Order 45 of the Civil Procedure Rules and the cases of Republic v. Advocates Disciplinary Tribunal Exparte Appollo Mboya (2019) eKLR and Republic v. Registrar of Companies & 2 others; Exparte Schindler Limited (2020) eKLR. They urged that courts are obligated to consider all the submissions by counsel as was stated in the cases of Paul Odhiambo Onyango & Another v. Kalu Works Limited (2020) eKLR and Jeremiah Chalanga (suing as the Guardian Ad Litem of Chelanga Chepkonga) v. Board of Management Kamatony Primary School & 3 Others (2021) eKLR. They argued that the application is brought without delay, and that the orders sought ought to be granted since they meet the threshold for review. They relied on the case of Morgan Air Cargo Limited v. Everest Enterprises Limited (2015) eKLR.

6. The issue for determination is whether the application has merit.

7. Review is provided for under Section 80 of the *Civil Procedure Act* as follows:

> " Any person who considers himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

Similarly, Order 45 Rule 1 of the Civil Procedure Rules provides:

(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.

8. From the foregoing, there are only 3 factors for the court to consider before reviewing its findings, these are:

a. That there has been 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

b. That there has been some mistake or error apparent on the face of the record; or

c. Any other sufficient reason.

9. In the case of Republic v. Public Procurement Administrative Review Board & 2 others (2018) e KLR it was held: -

"Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) 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 by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

10. It is necessary to assess the time taken by the applicants before lodging the review application. The court's ruling was delivered on 06th March 2024 and the application for review is dated 18th June 2024. This is a 3-month delay that has not been explained, making the application seem like an afterthought. However, this court will overlook this delay as a technicality in the spirit of Article 159 of *the Constitution*. The next issue for consideration is whether the issues raised in the application meet the scope envisioned in law for a review. In the case of Ajit Kumar Rath v. State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608 the court stated:

"the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

11. A review cannot be based on issues that would trigger arguments or re-examination of facts. It is based on discovery of new evidence which could not have been adduced at the time the order was made, or an error on the face of the court's record; an error that is so easily spotted and does not require delving into the substance of the decision itself. It is the applicants' case herein that the court reached its decision without considering their submissions that were filed and on record. I have perused the court's record and do find that indeed the applicants filed their submissions dated 13th January 2022. The court slipped in stating that the applicants failed to file their written submissions which was an oversight on the part of the Court. But be that as it may, the Court cannot re-open the case on that ground as it is not a ground for review and it will amount to re-evaluation of the evidence.

12. The applicants also stated that the court erred in referring to the Civil Procedure (Court-Annexed Mediation) Rules 2022 which were enacted after the mediation agreement had been reached. The jurisdiction of this court in review is limited to errors apparent on the face of the record or the discretion of the court where it finds sufficient reason. This second limb of the applicants' argument opens the floor for the court to sit on appeal in its own decision.

13. It is my view that the applicants should appeal against the ruling in a bid to bring their wholesome arguments before the court. Therefore, I find that the application has no merits and it is hereby dismissed.

14. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2024.**

**L. NJUGUNA**

**JUDGE**

..... 1st Applicant

..... 2nd Applicant

..... 3rd Applicant

..... 1st Respondent

..... 2nd Respondent

..... 3rd Respondent/Beneficiary

..... Interested Party