**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION NO. 774 of 1999**

**IN THE MATTER OF THE ESTATE OF KIMANI KAHEHU**

**LUCY NDUTA KIMANI.....APPLICANT**

**VERSUS**

**ZACHARY GITAU KINUTHIA.....RESPONDENT**

**RULING**

1. Lucy Nduta Kimani, the Applicant herein seeks by her Summons dated 7.1.2020, stay of execution of the judgement delivered by Musyoka J on 20.4.18 and stay of distribution of the said estate of Kimani Kahihu, the subject of Thika Succession Cause No. 421 of 1997. She also seeks that the said judgment be reviewed. The applicant further seeks that the rental income from House No. 13/11 a Pumwani Redevelopment Account Number 31094 be deposited in an escrow account.

2. The Application is supported by the Applicant's affidavit sworn on even date. Zachary Gitau Kinuthia, the Respondent, opposed the Summons by his replying affidavit sworn on 15.5.2020.

3. Briefly, the background of the matter is that Kimani Kahehu, the deceased in respect of whom the proceedings herein relate died on 15.4.86. A grant of representation was issued to his son Joseph Kamau Kimani in Thika CM P& A No. 421 of 1997 and confirmed. By an application dated 25.10.13, the Applicant herein and 4 other applicants sought the revocation of the grant on grounds that the same was obtained fraudulently without involving them. The applicants further claimed that the will of the deceased was a forgery as it related to only one property of his estate, New Pumwani Estate B 3-11/A and disinherited all other beneficiaries of the estate.

4. In a judgment of 20.4.18, Musyoka, J found that the allegation of forgery of the will was not proved. The Judge noted that to establish forgery it is may be necessary to subject the impugned document to testing by a document or handwriting expert. The learned Judge therefore declined to revoke the grant. It is this judgment that the Applicant now seeks reviewed.

5. The Applicant claims that new and important matter has been recovered warranting a review of the orders of 20.4.18. The new and important matter is the document examiner's report by Global Forensic Security Services proving the forgery of the will, which report could not, with all due diligence, have been produced to Court at the time of the judgment.

6. The Respondent averred that the witnesses to the will of the deceased swore affidavits to prove the will on 14.12.07, which form part of the proceedings; that the application offends Order 9 Rule 9 of the Civil Procedure Act as the Applicant's advocate did not obtain leave of Court or consent of the Applicant's previous advocates to represent the Applicant. The Respondent further contended that the Application has not been brought within reasonable time, but after a period of 1 year after the judgment.

7. The law relating review of orders is set out in Order 45 of the Civil Procedure Rules as follows:

> ***(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. By dint of Rule 63 of the Probate and Administration Rules, Order 45 of the Civil Rules is applicable herein, being a succession matter. Rule 63(1) provides:

> ***Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.***

9. The law allows an aggrieved party to apply for review of an order on the basis of recovery of new and important matter or evidence which after due diligence, was not within his knowledge. Such application must be made without unreasonable delay.

10. To begin with, the Court notes that the judgment was delivered on 20.4.18 and the Application herein was filed on 30.1.2020, a period of about 1 year and 9 months. This is by no means a reasonable period, and there had been inordinate delay. No explanation for the delay has been proffered by the Applicant or indeed details of any steps taken by the Applicant to come to Court as soon as practicable. For this reason, the Court cannot exercise its discretion in favour of the Applicant. In this regard, I find guidance in the holding in Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR where the Court of Appeal the Court stated:

> ***For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable.***

11. I now turn to the forensic report which the Applicant says is new and discovered evidence. The record shows that the case was concluded on 25.7.17 and judgement reserved on 3.10.17 after the parties had filed submissions. The exhibited report of the document examiner indicates that he was instructed on 16.3.18, about 8 months *after* conclusion of the case. Can this forensic report be considered a new and important matter or evidence within the meaning of Order 45? I think not. Rule 1 clearly contemplates evidence which, after the exercise of due diligence, was not within an applicant's knowledge or could not be produced by the applicant at the time when the decree was passed or the order made. The Rule does not refer to evidence manufactured *after* the making of the order. The kind of evidence that would warrant the review of an order must be in existence before the making of the order. That is why the Rule talks of discovery of evidence. Something not in existence cannot be discovered no matter how much diligence is employed.

12. In the case of D. J. Lowe & Company Limited vs Banque Indosuez [1998] eKLR, the Court of Appeal urged the exercise of great caution in an application for review, based on discovery of new evidence and stated:

> ***Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.***

13. It is quite manifest that after conclusion of the hearing of the case, the Applicant no doubt seeing the weakness of her case proceeded to instruct a document examiner to analyse the will of the deceased and now seeks to introduce the forensic report as freshly discovered evidence, saying that the same just now been brought to her knowledge. The Applicant ought to have engaged the document examiner earlier and ensured that the forensic report was part of the evidence before the Court. This is not a case where the analysis of the will was done and the report could not be obtained even with due diligence. It is a situation where new evidence is created in a bid strengthen a weak case. It would appear that it is just such a scenario that the Court of Appeal had in mind, in the D. J. Lowe case (supra).

14. My view is that the Application does meet the threshold set out in Order 45 Rule 1 of the Civil Procedure Rules to warrant the grant of the orders sought. It follows that the prayer for stay of execution of the orders in the judgment and distribution of the said estate as well as the prayer relating to rent from House No. 13/11 A. Pumwani cannot be granted.

15. In view of the finding of the Court, it is not necessary to delve into the challenge to the Application by the Respondent on grounds that the same offends Order 9 Rule 9 of the Civil Procedure Rules. In any event, the said rule is not among the Civil Procedure Rules imported into the law of succession by dint of Rule 63 of the Probate and Administration Rules.

16. In the premises, and for the reasons stated, the Court finds that the Application dated 7.1.2020 lacks merit and the same is hereby dismissed. This being a family matter, each party shall bear own costs.

**DATED, SIGNED and DELIVERED in NAIROBI this 6th May 2021**

**M. THANDE**

**JUDGE**

**In the presence of: -**

**…… for the Applicant**

**…… for the Respondents**

**…….…….. Court Assistant**