REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE NO. 509 OF 2002

IN THE MATTER OF THE ESTATE OF JOEL MWAURA WAWERU (DECEASED)

VERONICA MUTAVE MWAURA.....1ST PETITIONER

DELOMON MWANGI MWAURA.....2ND PETITIONER

VERSUS

JOHN MAINA MWAURA.....1ST APPLICANT/RESPONDENT

ANN WAIRIMU MWAURA.....2ND APPLICANT/RESPONDENT

AND

SALOME MURUGI MWANGI.....INTENDED INTERESTED PARTY/APPLICANT

R U L I N G

A. Introduction

1. This ruling pertains to the application dated 7th May 2019 in which the applicant seeks to be enjoined as an interested party in these proceedings. She further seeks for review and setting aside of this court's orders issued on the 5th December 2018 that substituted the now deceased 2nd petitioner, who was one of the administrators of the deceased's estate with the 1st respondent.

2. It is the applicant's case that she was the only dependant of the deceased 2nd petitioner, who had a share in the estate of the deceased and as such the substitution of the 2nd petitioner with the 1st respondent without the applicant's knowledge, amounts to a denial of her rights to natural justice as well exposes her to great loss.

3. In rejoinder, the 1st respondent deposed that he was a brother to the deceased 2nd petitioner who was married to one Purity Muthoni. The 1st respondent further deposes that his late brother had an affair with the applicant who is now married to another man and not entitled to a share of the estate of Delmon Mwangi the 2nd petitioner. The 1st respondent further deposes that his substitution does not mean that he is entitled to the deceased's estate but it was an action decided by the family so as to enable the swift conclusion of the probate proceedings herein.

4. The 1st respondent's response was supported by one Purity Muthoni in her affidavit filed alongside that of the respondent. She refers to herself as the wife of the now deceased 2nd petitioner and deposes that she was married to the 2nd petitioner on or about the year 2000 after which they were blessed with one issue. She however does admit that the 2nd petitioner had an affair with the applicant on or about the year 2013 however they did not sire any child and further that the applicant is married to another man and as such not entitled to the 2nd petitioner's share.

B. Analysis & Determination

5. I have considered the pleadings herein and it is my considered opinion that the issues for determination are whether the application dated 7th May 2019 is merited to warrant the review and setting aside the orders of this court issued on the 5th December 2018 and subsequently lead to the enjoinment of the applicant in the instant suit.

6. Order 45 of the Civil Procedure Rules provides that:

"(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."

7. The Court of Appeal in **National Bank Ltd v Ndungu Njau NRB CA Civil Appeal No. 211 of 1996; [1997] eKLR** laid out the principles governing the exercise of the power of review by a court as follows:

"A review may be granted wherever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

8. I find useful guidance in the decision of Kwach, Lakha and O'kubasu JJA in the case of **Tokesi Mambili and others v Simion Litsanga Civil Appeal No. 90 of 2001 – Kisumu** where they held as follows: -

"i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. (Emphasis added).

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion."

9. The Court of Appeal (Omolo, O'kubasu & Githinji JJA) in **Francis Origo & Another v Jacob Kumali Mungala Civil Appeal No. 149 of 2001; {201} LLR 4720, {2005} 2 KLR 307** restated the position thus: -

"In an application for review an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason AND most importantly the applicant must make the application for review without unreasonable delay. (Emphasis added)."

10. I have anxiously considered the proceedings and find nothing in the material presented before me to show that there has been discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicant at the time the orders in question were made. It is alleged that the 2nd petitioner had an affair with the applicant and that the probate proceedings herein were within the applicant's knowledge.

11. Further to this it is trite law that he who alleges must prove otherwise such averments remain mere allegations. The applicant has not advanced any evidence to establish her marriage to the 2nd petitioner or dependence on him to warrant provision from his share. It is not lost that the applicant has not rebuffed the allegations that she was never married to the 2nd petitioner and that she is now married to another man.

12. I have considered the record and I find that there is nothing to show that there is an error on the face of the record of the court, which warrants the review of the ruling of this court. I have carefully perused the record and I am of the view that the applicant has not demonstrated any other sufficient reason to warrant the review of the court's ruling.

13. Turning to the issue of whether the applicant should be enjoined as an interested party, it is worth noting that an interested party is one who has a stake in the proceedings, though she was not party to the cause *ab initio*. She is one who will be affected by the decision of the Court when it is made, either way. The Court should not act in vain by enjoining a party that clearly would have no interest in the subsequent proceedings. The Courts have had instances to deal with the issue. In a persuasive decision in the case of **Skov Estate Limited & 5 Others V Agricultural Development Corporation & another [2015] eKLR** Justice Munayo Sila stated the following in dismissing an application for the applicants to be enjoined to the suit because they purchased the suit property from the plaintiffs' person;

"In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party. In other words, there needs to be a demonstration that the interest of the person goes further than "merely being affected" by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another.

14. The applicant seeks to be enjoined as an interested party on allegations that she was the wife of the now deceased 2nd petitioner. As I have already said, she has not annexed any evidence to support those allegations. In a succession cause, the applicant may join in to oppose any application where she has an interest without necessarily being enjoined as a party.

15. It is my considered view that the applicant has failed to satisfy the conditions for review of the orders made by this court on 5/12/2018.

16. I find this application dated 7th May 2019 is lacking merit and dismiss it accordingly.

17. Each party to meet its own costs.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

1st Applicant/Respondent

2nd Applicant/Respondent

1st Petitioner

Intended Interested Party/Applicant