



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1064 OF 1994**

**IN THE MATTER OF THE ESTATE OF ISAAC KIRERU NJUGUNA (DECEASED)**

**RULING**

1. The Application coming for consideration in this Ruling is dated 28<sup>th</sup> June, 2019 seeking the following orders.

**i. THAT this Court be pleased to review, vary and /or discharge its orders made and contained in the Judgment dated 11.4.2019.**

**ii. THAT the costs of the Application be in the Cause.**

2. The Application is supported by the Affidavit of EVANS KIMANI NJUGUNA of even date in which he has detailed the history of his relationship with the deceased herein who was his brother.

3. The 2<sup>nd</sup> Administrator/Respondent PATRICK NJUGUNA KIRERU filed a Replying Affidavit dated 20.9.2019 in opposition to the Application dated 28.6.2019.

4. The Parties filed written submissions in the Application dated 28.6.2019 which I have duly considered. I find that it is not in dispute that the Court heard the dispute between the parties and rendered its Judgment dated 11.4.2019 delivered on 3.5.2019.

5. The issues for determination in the Application dated 28.6.2019 are as follows:

**i. Whether the Court should review the Judgment dated 11.4.2019 delivered on 3.5.2019.**

**ii. Who pays the Costs of the Application?**

6. The Law provides for review of Judgment under **order 45** of the Civil Procedure Rules as follows:-

[Order 45, rule 1.] Application for review of decree or order.

(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.

(2)The aforesaid rule is based on **section 80** of the Civil Procedure Act, Cap. 21 Laws of Kenya which states 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.”

7. In the current case, I find that the Applicant has not established that there is an error apparent on the face of the record to warrant review of the Judgment of the Court which was delivered after the Court had heard both parties.

8. In Court of Appeal, **Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs NdunguNjau**, the Court of Appeal held that;

“A review may be granted whenever 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-evidence and should not require an elaborate argument to be established. It will not be 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 proceed on an incorrect expansion of the law”.

9. In **Abasi Belinda vs Fredrick Kangwamu and another** the Court held that:-

“A point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal”

10. I also find that there is also no new evidence which has come to the knowledge of the Applicant which was not within his knowledge or which the Applicant would not have obtained with due diligence at the time the hearing of this Case took place.

11. I find that the Applicant is attempting to have a second bite in a matter that has been heard and determined conclusively.

12. The Application dated 28.6.2019 is res judicata and the same has no merit. The only recourse for the Applicant is to appeal against the Judgment of the Court.

13. The Court stated in the Judgment dated 11.4.2019 that any party aggrieved by its Orders had a right to move the Court of Appeal on Appeal appropriately within 28 days of the date of the Judgment.

14. I find that the Application dated 28.6.2019 lacks in merit and the same is dismissed with costs to the Respondents.

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2020**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**