



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 695 OF 2010**

**IN THE MATTER OF THE ESTATE OF KWASILA LUHARO (DECEASED)**

**ADELAIDE WILEKA MUTERWA.....PETITIONER/ APPLICANT**

**VERSUS**

**FREDRICK LIGARE OTUNGA.....OBJECTOR/ RESPONDENT**

**RULING**

1. The applicant has filed an application dated 28<sup>th</sup> June, 2017 through the firm of Anziya & Company Advocates seeking that the court reviews, varies or sets aside its orders issued on 24<sup>th</sup> May, 2017 on the ground that there is an error apparent on the face of the record that has occasioned a miscarriage of justice. Further that there is discovery of new material which was not within the knowledge of the applicant.
2. The application was opposed by the respondent vide his replying affidavit sworn on 12<sup>th</sup> November, 2018.
3. The background to the application is that the applicant filed this succession cause on allegations that she was a granddaughter to the deceased in these succession proceedings, Kwasila Luharo. She alleged that she was a daughter to the deceased's son (deceased) called John Muterwa. On the 12<sup>th</sup> May, 2017 this court delivered a judgment in which it ruled that there was no evidence that the applicant was a daughter to the late John Muterwa and consequently that she had no entitlement in the estate of Kwasila Luharo. In its judgment the court remarked that the applicant had not filed a copy of the chief's letter among the documents that she had filed with the succession cause. The court also questioned why the applicant's brother had not been buried on the deceased's land. The court said that the evidence of the applicant's witness DW2 was not relevant to the case.
4. The applicant seeks for review of the judgment on the grounds that she had actually filed the chief's letter with the petition and that it must have been removed from the court file. That she has a copy of the same. That she had misplaced her baptism card when she testified in court but she has now retrieved it. That she has come to learn that her brother was buried at a public cemetery because he was suspected of having participated in the death of her grandfather and that custom could not allow him to be buried on her grandfather's land. That her uncle who testified for her in court was supposed to confirm that her mother was married to John Muterwa and that her father paid dowry but that the witness was confused due to lack of counsel. That she has now engaged counsel to avail all the evidence that they had.
5. In opposing the application the respondent states that the applicant has not annexed to the application the documents that she alleges were not available during the hearing. That the evidence about her brother's burial site and the evidence left out by her uncle are an afterthought with intent to abuse the due process of this court. That the subject matter of the application was adjudicated upon and determined by this court and is therefore res-judicata. That the application should be dismissed.
6. I have considered the application and the objection thereto. The application is made under Rule 73 of the Probate and Administration Rules that grants a succession court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
7. The first ground of the application is that there is an apparent error on the face of the record. Though the applicant stated in her application that she had annexed the chief's letter and the baptism card to the application there were no such documents annexed to her application. The fact that the applicant has upto now not annexed the chief's letter is a clear indication that there was none. There is thereby no error apparent on the face of the record as regards the chief's letter.
8. The second ground to the application is that there is discovery of new evidence. Though most of the provisions of the Civil Procedure Act are not applicable in succession matters, Order 45 of the Civil Procedure Act offers a guide on what to consider in an application based on grounds of discovery of new evidence. In the case of **Turbo Highway Eldoret Limited –Vs- Synergy Industrial Credit Limited (2016)**

eKLR Sewe J. cited the case of **Rose Kaiza –Vs- Angelo Mpanjuiza (2009) eKLR** where the Court of Appeal considered an application for review on the ground of new evidence and held that:-

*“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”*

9. It is then clear that the discovery ought to be new and important evidence which after due diligence was not within the knowledge of the party or could not have been produced when the decree was being made. The applicant did not mention the baptism card when she testified in court. It has not been shown that the evidence about the baptism card is new and important evidence.

10. The applicant’s uncle testified in court. He did not mention anything about payment of dowry. The said uncle has not sworn an affidavit as to the reason why he did not adduce the said evidence if it was in his knowledge. This cannot be new evidence.

11. The applicant was given an opportunity to explain why her brother was not buried in the deceased’s land. She did not give an explanation at the time. She has not disclosed the source of new evidence as to why her brother was buried in a public cemetery. She has not explained why she had not done due diligence to know why her brother was buried in a public cemetery instead of being buried on his grandfather’s land.

12. In an application for review based on discovery of new and important evidence, the court must exercise caution to prevent a party against whom a decision has been entered from procuring new evidence so as to strengthen or change the complexion of the case. In **D. J. Lowe & Company Ltd –Vs- Bonquo Indosuez, Nairobi Civil Application No. 217 of 1998** the Court of Appeal sounded a caution in such applications and stated that:-

*“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 clear that the applicant has gone out to fish for fresh evidence to strengthen her case in the pretext that it is new evidence. She has not demonstrated that she has new and important evidence to offer in the case which, after exercise of due diligence, was not in her possession when she testified in the case. She has not shown that there is any error apparent on the face of the record. The application has no merit. The same is dismissed with costs to the respondent.

**Delivered, dated and signed in open court at Kakamega this 6<sup>th</sup> day of February, 2020.**

**J. NJAGI**

**JUDGE**

In the presence of:

No appearance for the applicant

Mr. Mango for the respondent

Applicant - absent

Respondent - present

Court Assistant - Polycap

30 days right of appeal.