



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**SUCCESSION CAUSE NO.49 OF 2017**

**IN THE MATTER OF THE ESTATE OF THE LATE MAGETE TESOT (DECEASED)**

PAUL KIPKEMOI SITIENEL.....PETITIONER/APPLICANT

**- V E R S U S -**

SARAH CHELANGAT.....OBJECTOR/1<sup>ST</sup> RESPONDENT

**AND**

LOISE CHELANGAT TESOT.....2<sup>ND</sup> RESPONDENT

KIBUNGE TANGUS.....3<sup>RD</sup> RESPONDENT

NICHOLAS KIPKIRUI LANGAT.....4<sup>TH</sup> RESPONDENT

JOHN KORIR.....5<sup>TH</sup> RESPONDENT

THOMAS KOECH.....6<sup>TH</sup> RESPONDENT

JOSEPH CHERUIYOT.....7<sup>TH</sup> RESPONDENT

SAMUEL KIPNGENO KORIR.....8<sup>TH</sup> RESPONDENT

WESLEY LANGAT.....9<sup>TH</sup> RESPONDENT

SAMUEL KIMUTAI KIRUL.....10<sup>TH</sup> RESPONDENT

**R U L I N G**

1. The Application coming for consideration in this ruling is dated 17/8/2020 seeking to set aside the Judgment of this court delivered on 6/8/2020 for the following reasons.

- i. THAT there is an error apparent on the face of the record as the said Judgment is based on an application dated 24/4/2018 which was withdrawn on 11/6/2018.**
- ii. THAT the order dated 11/6/2018 withdrawing the Application dated 24/4/2018 has never been set aside or appealed against.**
- iii. THAT some of the Respondents against whom the orders dated 6/8/2020 were issued have never been served with the Application dated 24/4/2018 and they were condemned unheard.**
- iv. THAT there is an objection raised by the 1<sup>st</sup> Respondent/Applicant which has not yet been determined.**

**v. THAT the 1<sup>st</sup> Respondent/Applicant was appointed a Joint Administrator to the Estate of the Deceased herein vide a consent order dated 29/2/2016 but to date no grant has been issued in the Joint names of the Respondents/Applicants and the Petitioner and if the orders issued on 6/8/2020 are implemented they will have adverse effects on the Applicant herein.**

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Respondent/Applicant dated 17/8/2020 in which the above grounds are retaliated.
3. The Petitioner filed a Replying Affidavit dated 6/9/2020 opposing the Application dated 17/8/2020.
4. I find that it is not in dispute that the Judgment dated 6/8/2020 is based on the Application dated 24/4/2018 which was withdrawn on 11/6/2018.
5. I agree with the Applicant that there is an error apparent on the face of the record as the Judgment dated 6/8/2018 is based on a nonexistent Application which was withdrawn on 11/6/2018.
6. This court has power to review its own orders but such power must be exercised within the framework of Section 80 Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules which provide as follows: -

**80. 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

7. Order 45 Rule 1 of the Civil Procedure Rules 2010 provides as follows:-

**45 Rule 1 (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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”**

8. A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds-

(i) The 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;

(ii) on account of some mistake or error apparent on the face of the record, or

(iii) Any other sufficient reason and,

(iv) The application has to be made without unreasonable delay.

9. It is not in dispute that this court erroneously drafted a judgment based on an Application that had been withdrawn.

10. I also find that his Application has been made without undue delay.

11. I accordingly set aside the Judgment delivered on 6/8/2020 and I vacate all consequential orders arising from the said Judgment and I direct that the matter be mentioned before the High Court at Bomet for directions.

**Delivered, Dated and Signed at Kericho this 2<sup>nd</sup> day of October, 2020**

**A.N. ONGERI**

**JUDGE**