



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 768 OF 2012**

**IN THE MATTER OF THE ESTATE OF FRIDAH WAIRIMU WANGUHU (DECEASED)**

**RUTH MARY WANGUI.....BENEFICIARY/APPLICANT**

**VERSUS**

**PETER DAVID KAIME**

**WILFRED MANYARA WANGUHU**

**ALEX MWAURA WANGUHU.....RESPONDENTS**

**RULING**

1. The application before court is dated 5/10/2018. Ruth Mary Wangui (applicant) seeks orders;

**1. Spent**

**2. Spent**

**3. THAT this Honourable Court be pleased to review its judgment dated 23<sup>rd</sup> May, 2018 and to exclude the property known as LR NO. 6295/1 from the distributable assets of the estate.**

**4. THAT costs of this application be provided for.**

2. The application is premised on the affidavits of the applicant and John Kamunya Karanja and on grounds that;

1. **THAT** the matter herein relates to the estate of FRIDAH WAIRIMU WANGUHU who died on the 27<sup>th</sup> day of March, 2012.

2. **THAT** there was a partial confirmation of grant vide the judgment delivered on 23<sup>rd</sup> May, 2018 and more specifically that the property LR NO. 6295/1 situate East of Nakuru Municipality formed part of the estate herein.

3. **THAT** this was in spite of the objection raised by the Applicant herein that the property was still in the name of the deceased though the deceased had expressed her intention vide an indenture of conveyance to transfer the property to the objector/applicant

4. **THAT** the judgment read malice and ill motives into the existence of a power of attorney in favour of the objector/applicant as donated by the deceased.

5. **THAT** the indenture of conveyance other than being unregistered was disregarded on the belief that the owner was at the time senile and could not effect such a transaction.

6. **THAT** the deceased was at the time of execution of the indenture of conveyance of sound mind and appreciated the nature and effect of the transaction entered into.

7. **THAT** the deceased freely and voluntarily transferred the property LR NO. 6295/1 in favour of the objector/applicant.

8. **THAT** there is no evidence that the beneficiary/applicant unduly influenced or exercised any dominion over the deceased into bequeathing the property in her favour.

9. **THAT** the deceased was at the time of executing the indenture of conveyance in favour of the beneficiary/applicant was acting as a free agent.

10. **THAT** as per the averments by the advocate who prepared the indenture of conveyance, the deceased appreciated the nature of the transaction she was involved in at the time of execution of the indenture.

11. **THAT** the advocate was not available at the time of the hearing of the matter leading to the judgment of 23<sup>rd</sup> May, 2018 hence the court did not have all the material facts.

12. **THAT** the evidence of the advocate has a bearing on the matter herein therefore sufficient reason to warrant a review of the said judgment.

13. **THAT** the delay in filing the application for review is attributed to the need for legal representation by counsel of her choice as there was a change of counsel and is not meant to occasion any prejudice.

14. **THAT** it is therefore mete and just to have the judgment dated 23<sup>rd</sup> May, 2018 for partial confirmation of grant and declaration that the property LR NO. 6295/1 forms part of the estate herein be reviewed to take into account the intention of the deceased vide the indenture of conveyance of 4<sup>th</sup> November, 2011.

15. **THAT** there is need to preserve the ends of justice to warrant a review.

3. The gist of the application is that evidence about the state of mind of the deceased at the time she transferred the property to Ruth Mary Wangui was not availed to court as the attendance of the advocate involved in the preparation of the indenture of conveyance could not be secured as he was at large.

4. The delay in filing the application is explained in that there was a change of counsel as the applicant was desirous of securing another advocate to effectively handle the matter for and on the applicant's behalf.

5. The application is opposed and in a replying affidavit Alex Mwaura Wanguhu has stated that the conditions necessary for the court to review its orders have not been met. In particular that;

i) There is an error on the face of the record.

ii) There is no new evidence that the applicant did not have in her possession at the time of hearing.

iii) There is no sufficient reason given.

6. The applicant filed a supplementary affidavit in which she reiterates that at the time of hearing, the advocate present when deceased executed the indenture of conveyance was not available to testify. An affidavit by the said counsel is on record.

7. Both parties filed written submissions.

8. I have had regard to the application, the affidavit evidence and rival submission by counsel.

9. For determination is whether the applicant has met the threshold required to sufficiently move this court to review its orders.

10. This court has powers to review its own orders as per the provisions of **Rules 63(1)** of the **Probate and Administration Rules**. That rule provides;

**“S. 63. (1) 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 Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.**

11. The threshold to be achieved in an application for review under **Order 45** of the **Civil Procedure Act** requires a party to establish that;

a) There is 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 when the decree was passed or the order made.

b) There exists a mistake or error apparent on the face of the record.

c) There exists any other sufficient.

d) That the application is made without undue delay.

12. The mainstay of the current application is that the advocate who was present when conveyance of the property was made to the applicant by the deceased was not available to testify.

13. The said advocate is said to have sworn the affidavit now annexed to the applicant's supporting affidavit and marked "RMW3". Why such evidence through an affidavit was not presented directly and independently as ought to be is inexplicable. Nonetheless, a reading of the supporting and supplementary affidavit as well as the annexed affidavit shows that no evidence is availed to illuminate the circumstances under which the said advocate was not available to testify or could not be reached.

14. Notably, the record of proceedings of 1/3/2016 shows that no such advocate was expected to testify. Then counsel for the applicant addressed the court at the end of the day's proceedings as follows;

*"That is the close of our case but we wish to call the registrar. We apply for a summons to the registrar of companies to give evidence on the shareholding and directorship of Shah Plantation Limited."*

15. There was no whimper of any suggestion that an advocate was expected to testify. On the 25/4/2017, counsel for the applicant duly closed the objector's case

16. stating "I close our case" again no mention of any expected evidence of an advocate.

17. It must be borne in mind that the court will only allow a review based on the ground of new evidence **only where there is 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 when the decree was passed or order made.**

18. In our instant suit, stating that the advocate was at large without indicating why it was not possible to get him to testify and further not having raised the issue at all in the proceedings renders the applicant's application hopeless when placing reliance on ground for need to adduce more evidence.

19. The final blow to the applicant's application is the affidavit of John Kamunya Karanja advocate sworn on 5/6/2018. In that affidavit other than stating that deceased was in full control of her senses at the time he purportedly witnessed the signing of an indenture of conveyance, he makes no reference to any attempt to reach him to testify in this matter and neither does he give an account of any timeline within which he was unavailable to testify.

20. It follows therefore that the current application for review is an attempt to introduce new evidence but which evidence was (if at all it existed) within the knowledge and reach of the applicant when the judgment was made.

21. The Court of Appeal when addressing the issue of discovery of new evidence as ground for allowing a review application had the occasion to pronounce itself in **ROSA KAIZA vs. ANGELO MPANJU KAIZA [2009] eKLR** where the court quoting from a commentary by *Mulla* on similar provision of the **Indian Civil Procedure Code 15<sup>th</sup> Edition at page 2726** stated;

**"Application on this ground must be treated with great caution and as required by Rule 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 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."**

20 Secondly, the delay in the filing of the current application is not sufficiently explained. Judgment in this matter was delivered on 23/5/2018. It is not until 9/10/2018 when the application is filed. Change of counsel is not a sufficient reason for delay.

21 With the result that the application dated 5/10/2018 is without merit. The same is dismissed with costs to the respondents.

**Dated and Delivered at Nakuru this 4<sup>th</sup> day of April, 2019.**

**A. K. NDUNG'U**

**JUDGE**