REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 362 OF 1998

IN THE MATTER OF THE ESTATE OF THE LATE ZKN (DECEASED)

MWW.....PETITIONER/RESPONDENT

VERSUS

EWK.....OBJECTOR/APPLICANT

RULING

1. By way of a notice of motion dated 8/3/2012 EWK (applicant) seeks orders;

a) Spent.

b) Spent.

c) THAT this Honourable Court be pleased to review and/or set aside its ruling delivered on 14th February, 2012 and its subsequent orders.

d) THAT costs of this application be provided for.

2. The application is premised on grounds;

1. THAT a ruling in this case was delivered on 14th February, 2012 in favour of the Respondent.

2. THAT in the said ruling the court ordered that the Respondent be at liberty to proceed to sub-divide the suit property in two equal shares and further ordered that the Deputy Registrar of this court be directed to release to the Respondent the title deed deposited in court.

3. THAT however new information has come to knowledge of the applicant herein that there was a material non disclosure of facts on the part of the Respondent.

4. THAT the court was not informed that the Respondent was all along married to one KKM and was not the wife of the deceased.

5. THAT non-disclosure and concealment of material facts amounts to an abuse of court process which render the ruling and order a nullity *ab initio* hence the court is entitled to review and set aside its ruling and order *exdebito justiciae.*

6. THAT the Respondent has no right to claim any part of the deceased's estate for the reason that they are not related in any manner.

3. The application finds support in the affidavit of the applicant sworn on 8/3/2012;

4. The gist of the application is that there was no material disclosure before the trial court in that the court was not informed that the respondent was all along married to KKM and was not the wife of the deceased. The applicant avers that it never occurred to her and she could not discover with all due diligence that actually the respondent herein was all along married to one KKM way back in 1961 that she had 13 children with the said M. The said marriage subsists to date.

5. An affidavit by Mr. M and his statement disclosing the said marriage are annexed.

6. In his statement and affidavit, KKM states that he married the respondent in 1962. They separated with respondent in 1961. They separated in 1993 when the respondent was caught in an adulterous union. He notes that the respondent was married to the deceased but they later divorced and in 1964. A council of elders order KKM to refund Kshs. 600/= paid by the deceased as dowry since the respondent was now married to him.

7. K insists that the respondent is still his lawful wife upto date since their marriage has not been dissolved and no dowry has been refunded.

8. The application is opposed and MWW (respondent) has filed a replying affidavit.

9. She urges that the application is a duplication of another filed by the applicant dated 8th June, 2011 filed by the applicant's previous counsel on record which has never been prosecuted.

10. The applicant is accused on being intent on delaying this matter and disobeying court orders. Her intention is said to be to frustrate the respondent and not to seek justice.

11. The respondent reiterates that she is the wife of the deceased and prior to his death the deceased entrusted her with the title deed of the estate property. She denies marriage to KKM.

12. Directions were given that the application be canvassed by way of written submissions.

13. I have considered the application the affidavit evidence and submissions on record.

14. Of determination is whether the applicant has achieved the threshold set in law enabling a court to review its judgment or orders in respect of orders of ***Ouko J*** of 14/2/2018.

15. This court has powers of review as provided for under **Rule 63(1)** of the **Probate and Administration Rules**.

> **Rule 63 (1)** provides;
>
> **"Rule 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."**

16. 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 sufficient.
>
> d) That the application is made without undue delay.

17. The orders sought are not available to the applicant. The impugned orders emanated from the successful prosecution of the application dated 18/3/2010. That application sought orders;

> **1. THAT the applicant be allowed to proceed with the subdivision of parcel No. NYANDARUA/NGORIKA/xxx as per the certificate of confirmation of grant dated 5th December, 2003.**
>
> **2. THAT the title deed deposited in court pursuant to the orders of October 2009 be released to the applicant to facilitate such subdivision.**
>
> **3. THAT costs be provided for.**

18. The orders given are consequential orders derived from the judgment of this court, ***Rimita J*** dated 9/3/2001.

19. The grounds now raised to review the impugned orders can only be directed to review of the judgment.

20. The court could not possibly have had the jurisdiction to entertain the new evidence now alluded to in what was purely an execution application seeking to enforce the orders of court.

21. There is no discovery of a new and important matter of evidence which after due diligence was not within the applicant's knowledge or

could not be produced by her at the hearing of the application dated 18/3/2010. Neither is there mistake or error apparent on the face of the record and no sufficient reason is given to warrant review of the orders emanating from the ruling of ***Ouko J*** dated 14/2/2012.

22. The mainstay of the current application is that there is discovery of new and important evidence which, after exercise of due diligence, was not within the knowledge of the applicant or could not be produced by her at the time this cause was heard.

23. The applicant makes some important revelations through submissions by her counsel at **paragraph 13** and **14** of the **submissions dated 22/10/2018.** I will paraphrase the 2 paragraphs for their full import and effect.

> **Paragraph 13**
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> **"In fact your Lordship, the fact that the Respondent has been married to, and in deed continues to be married to one KM is the singular fact that has never been addressed by the honourable court, despite the same coming up in each of the applicant's myriad applications to the honourable court. In fact, the same was not even granted a cursory glance in the judgment of 9th March 2009, despite the same having been hinted at by the objector's witnesses and not rebutted by the petitioner.**
>
> **Paragraph 14**
>
> **"It is our humble submission that a court is *functus officio* when it has performed all its duties in a particular case. The doctrine does not however preclude the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected."**

24. These 2 paragraphs reveal that the evidence relating to the alleged marriage of the respondent to KM is not a new discovery. That matter was alive during trial and the court made specific findings.

25. Indeed paragraph 14 of the applicant's submissions alludes to a court's powers to have *"a judicial change of mind even when a decision has been communicated to the parties."*

26. In essence therefore, there is no discovery of new evidence but the court is accused of disregarding that evidence at trial.

27. When such a position arises, the open avenue for an aggrieved party is an appeal and not a review.

28. The Court of Appeal in **ROSA KAIZA vs ANGELO MPANJU KAIZA [2009] eKLR** while quoting from a commentary by ***Mulla*** on similar provision of the **Indian Civil Procedure Code 15th Edition at page 2726** laid bare the parameters to be met in an application for review on ground of discovery of new evidence. The court stated;

> **"Applications 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."**

Certainly these conditions are not met in our instant application.

29. From the record, there is no error apparent on the face of the record nor is there any other sufficient reason adduced to merit review.

30. The application dated 8/3/2012 seeks review of consequential orders whose genesis is a judgment delivered by ***Rimita J*** ten (10) years before. One condition for the grant of a review order is that the application must be made without unreasonable delay. The delay herein is unexplained, unreasonable and cannot be countenanced.

31. With the result that I find no merit in the application dated 8/3/2012. The same is dismissed. In the circumstances of this case, each party to bear its own costs.

Dated and Signed at Nakuru this 3rd day of April, 2019.

A. K. NDUNG'U

JUDGE