REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1045 OF 2013

IN THE MATTER OF THE ESTATE OF WILLIAM KIMUTAI MARTIN - (DECEASED)

DAVID COLIN KIPRUTO MARTIN.....1ST APPLICANT

KIM CHERUIYOT MARTIN.....2ND APPLICANT

VERSUS

JASMIN MARTIN.....RESPONDENT

IVANA CHEROTICH MATIN.....INTERESTED PARTY

RULING

1. Order 45 rule 1 of the **Civil Procedure Rules** provides that:-

> **"1. (1) Any person considering himself aggrieved—**
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> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
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> **(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. In the Court of Appeal decision in **Yani Haryanto –v- Ed and F. Man (Sugar) Ltd, Civil Appeal No. 122 of 1992** it was held that the facility of review is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review.

3. On 19th November 2018 this court delivered a ruling allowing the application by the respondent Jasmin Martin dated 26th June 2018 and ordered the disqualification of Mr. Francis Munyororo advocate, and the firm of John Mburu & Co. Advocates from acting for the applicants David Colin Kipruto Martin and Kim Cheruiyot Martin in this matter

4. The background of the case was that the deceased William Kimutai Martin died testate on 29th February 2012. He left a Will dated 20th July 2011 drawn by counsel Francis Munyororo from the firm of Joh Mburu & Co. Advocates. A grant of probate was made to the two applicants and Ian Kipkoech Martin, who were all the deceased's sons. Ian Kipkoech Martin died on 17th June 2015. The grant of probate was rectified on 20th June 2016 to remove his name leaving the two applicants. The respondent is the widow of the late Ian Kipkoech Martin and co-administrator of his estate. The firm of John Mburu & Co. Advocates had acted for all the beneficiaries of the estate of the deceased in relation to the property known as LR No. 209/2/292 (Wilma Court). The beneficiaries included the late Ian Kipkoech Martin. After Ian died the firm acted for his estate. Subsequently, the respondent instructed Ms Walker Kontos Associates. The Will of the deceased has become an issue. Certain aspects of it are challenged by the respondent. These are the reasons why the respondent brought the application

whose ruling is the subject of this ruling. The applicant's case was that because of the past dealings involving the deceased, the deceased's beneficiaries and the late Ian Kipkoech Martin, Francis Munyororo and the firm of John Mburu & Co. Advocates were in clear breach of confidentiality owed to all past and present clients, and, in order to avoid circumstances where there was real danger that a conflict of interest may arise, they should not act for the applicants in this matter.

5. On 18th December 2018 the applicants brought this application seeking the review of the ruling. The grounds were that the ruling, in effect, contravened the applicants' right to be represented by counsel of their choice, and that the respondent had misrepresented to the court that the Will of the deceased was in dispute when infact the estate had been distributed to the beneficiaries, including the late Ian Kipkoech Martin, by agreement. According to the applicants, there was an error on the face of the record which needed to be corrected by review.

6. The respondent filed a replying affidavit opposing the application. According to her, there was no error on the face of the record and neither was there a misrepresentation of facts. She stated that part to the reason why the estate of the deceased has not been distributed is because of the issues she has raised in the Will. She stated that the factual basis of the ruling subject of the review had not been challenged, no new matters or evidence had been raised and that the constitutional right to choose an advocate is subject to the advocate acting within the rules and ethical standards under the **Advocates Act** and the **Advocates (Practice) Rules 1996**.

7. Ivana Cherotich Martin (interested party) filed grounds of opposition seeking the dismissal of the application for being misconceived, mischievous, frivolous, scandalous, vexatious and without merit.

8. Counsel for the applicants and the respondent filed written submissions which I have considered.

9. There was no discovery of new and important matter or evidence that the applicants were relying on. Whether or not the Will was in dispute, or whether or not there was agreement on the distribution of the estate of the deceased, were not new matters or evidence.

10. The substance of the applicants' contention was that the court was wrong in disqualifying the advocate and the firm of advocates; that the court had not properly appreciated and applied the test in **Delphis Bank Ltd –v- Hannah Singh Chatthe & 6 Others [2005]eKLR; British American Investments Co. (K) Ltd –v- Njomaitha Investment Ltd & Another [2014]eKLR** and **National Bank of Kenya –v- Peter Kipkoech [2005]eKLR.** It was their case that had the court fully appreciated the principles in these decisions it would not have disqualified the advocate and the firm.

11. In response, it was submitted on behalf of the respondent that the applicants had not brought themselves within **Order 45 rule (1)** of the **Civil Procedure Rules** to merit review. They argued that there was no error on the face of the record that could be corrected.

12. I appreciate that it is a difficult decision to disqualify counsel from acting for a client on the basis of conflict of interest and on the ground of breach of confidentiality. This is because a party has a constitutional right to be represented by an advocate of his choice. However, it is also trite that all advocates have to submit to the ethical standards under the **Advocates Act** and **Rules** made the thereunder.

13. Regarding the issues raised by this application, it is trite that a point which may be a good ground of appeal may not be a good ground for an application to review, and an erroneous view of evidence or of law is not a good ground for review though it may be a good ground for appeal **(Abasi Belinda –v- Fredrick Kangwamu & Another [1963] EA 557).** In **National Bank of Kenya –v- Ndungu Njau [1997]eKLR,** the Court of Appeal observed that:-

> **"It will not be a 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 proceeded on the incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provisions of law cannot be a ground for review."**

14. In short, the applicants' case is that this court misapprehended the principles of law relating to when counsel can be disqualified from acting for his client. Quite unfortunately, erroneous conclusion of law or evidence is not a ground for review. It may be a good ground for appeal. I find no merit in the application which I dismiss with costs.

DATED and DELIVERED at NAIROBI this 22nd day of MAY 2019.

A.O. MUCHELULE

JUDGE