REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO.2974 OF 2005

LEAH WAMBUI KURIA

ROBERT MUCHUNU KURIA

PETER NJOROGE KURIA...APPLICANTS

-VS-

JANE MUCHUNU ALIAS JANE WAHU KAMAU ALIAS

JANE MUCHUNU ADAMS……..RESPONDENT

KIAMBU DISTRICT LAND REGISTRAR…………INTERESTED PARTY

R U L I N G

1. The applicants brought the present application dated 17th October 2016 by way of certificate of urgency under **Rule 45** of the **Civil Procedure Rules**. It seeks this court's review of its ruling of 20th June 2016, to set it aside and reinstate the applicant's application dated 30th July, 2010 for a new or fresh hearing on merits. The applicants also prayed that this court do grant stay of execution pending appeal, in the event that this review application is not granted. The application was supported by the affidavits of Robert Muchunu Kuria dated 17th October 2016 and 26th March 2017 respectively.

2. It is the applicant's case that on 22nd February 2016 the matter came before this court for highlighting of submissions. Both parties said they were ready to highlight but at the actual time of highlighting, Mr. Nabutete learned counsel for the Applicant objected stating that he did not have a copy of the interested party's submissions. The advocate for the 1st respondent said he had been served and had a copy of what had been served. The court flipped through the court file and failing to locate the interested party's submission in the file placed the file aside to attend to the matter later.

3. Mr. Nabutete prayed to be excused stating that he had another court to go to. Later the court gave the parties a ruling date with all counsels in court. That at the time the ruling date was given there were only two sets of submissions on record, being his submissions and the respondent's submissions. That he left the court knowing that the ruling would be based only on those two submissions, but on 20th June 2016 the court rendered its ruling mentioning matters which were neither in the respondent's or applicants' submissions.

4. Mr. Nabutete avers that upon perusal of the court file he discovered that the court had extensively relied on the interested party's submissions filed on 22nd February 2016, the date the matter was before court for highlighting. He pointed out the interested party's submissions have two receiving signatures one stamped at 12.36 hours on 22nd February 2016. He asserted that the document was not served no them and that the court ought to have noted that this document does not bear their office stamp.

5. The respondent filed a replying affidavit on 13th January 2017 to oppose the application. Mr. Ogunda learned counsel for the respondent, relying on the said affidavit, confirmed that on 27th November 2015, he was served with the interested party's submissions although they did not bear the court stamp. He was subsequently served with a similar copy which bore the court stamp showing that it had been filed on 22nd February 2016. Mr. Ogunda pointed out that when the matter was before the court on 22nd February 2016, Mr. Nabutete left to appear in the criminal court and did not return.

6. However his clerk who was in court was served with a copy of the submissions. That the court placed the file aside to await the filing of the interested party's submissions before the parties could take a ruling date. The court gave the ruling date only after the submissions had been filed. It is the respondent's case that this application lacks merit under **Order 45 Civil Procedure Rules**, and that the issues raised are best addressed on appeal.

7. The application was further opposed by the interested party through their replying affidavit of 22nd November 2016 together with grounds of opposition. It is the interested party's case that on 22nd February 2016, Mr. Githuka was ready to proceed because his submissions had been ready since 2015. They had however only been served on the respondent without filing and had not been served on the applicants. Mr. Githuka informed the court that he was in the process of filing his submissions that morning and the court file was placed aside to enable him to do so.

8. Counsel submitted that Mr. Nabutete who was in court said he could not wait since he was going to another court, and that his clerk was in court, hence the other counsels could go ahead and take a ruling date later on. Mr. Githuka did receive the filed submissions while in court and also served the respondents in court. Counsel asserts that he also served Mr. Nabutete's court clerk in court because he is personally known to him and the court clerk signed on the submissions. He pointed out that Mr. Nabutete's clerk has not filed an affidavit to deny that he was served with the submissions.

9. Mr. Githuka argued that in any case their submissions only summarized what was in the pleadings and the law, and did not raise any new matters. Further that Mr. Nabutete did not point out to any new fact that was introduced in the submissions, neither did he point to any law that states that he has a right to reply to the uninterested or interested parties submissions. It was the interested party's submission that the application does not meet the three conditions for review as required by **Order 45** of the **Civil Procedure Rules**.

10. I have carefully considered the proceedings in this cause, the application before me, the supporting affidavits, those in reply and the submissions by the parties. The prayers in the application appear to be three-pronged:

> i. First the applicaiton seeks review of the ruling of this court given on 20th June 2016.
>
> ii. Secondly, it seeks the setting aside of the said ruling and an order for the fresh hearing of the application dated 30th July, 2010.
>
> iii. Thirdly it seeks stay of execution of the orders granted in the ruling adverted to above pending appeal.

11. Rule **63 (1)** of the **Probate and Administration Rules** provides that:-

> **"Save as 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, X1, XV, XV111, XXV, XL1V, and XL1X, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules."

12. As stated above, **Order 45** relating to review is one of the Civil Procedure Rules imported into succession practice by **rule 63** of the **Probate** and **Administration Rules**. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review as set out in **Order 45** of the **Civil Procedure Rules**.

13. Under Order **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."

14. The above rule restricts the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds:

a. 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;

b. on account of some mistake or error apparent on the face of the record, or

c. for any other sufficient reason,

d. whatever the ground however there is a requirement that the application has to be made without un reasonable delay.

15. I find useful guidance in the decision of Kwach, Lakha and O'kubasu JJA in the case of **Tokesi Mambili and others vs Simion Litsanga Civil Appeal No. 90 of 2001 – Kisumu** where they held as follows:-

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added).

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

16. The Court of Appeal (**Omolo, O'kubasu & Githinji JJA**) in **Francis Origo & Another vs Jacob Kumali Mungala Civil Appeal No. 149 of 2001; {201} LLR 4720, {2005} 2 KLR 307** restated the position thus:-

"In an application for review an applicant must show that there has been discovery of new

and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason AND most importantly the applicant must make the application for review without unreasonable delay (Emphasis added).”

17. Mr. Nabutete submitted for the applicant that in terms of **Order 45**, he has made a discovery of new and important matters being that the applicant did not know and had not seen the interested party’s submissions until the court rendered its ruling. Further that he did not get an opportunity to comment on the submissions to assist the court to arrive at a balanced ruling. He argued that this meant that the applicants were ambushed and denied a right to fair hearing. Mr. Githuka for the interested party on the other hand submitted that the allegation by the applicant that the court in its last paragraph of the ruling used the word “both” instead of “all” cannot be a new and important matter of evidence to warrant review of the ruling.

18. I have anxiously considered the proceedings before me and find nothing in the material presented before me to show that there has been discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicants at the time the orders in question were made. The fact that the court relied on the interested party’s submissions just as it relied on the applicants’ and the respondent’s submission does not amount to discovery of new evidence.

19. In any event, counsels for the interested party and the respondent both stated that the interested party’s submissions were filed in court and served on the clerk for the applicant’s counsel. I note that for a point which the applicants intend to strongly rely on in their application for review, Mr. Nabutete did not file an affidavit by his clerk denying service of the submissions. Without such proof, I find that the submissions relied upon in the ruling of 20th June 2016 which were filed before the ruling date was issued, were properly on record before the court retired to write its ruling.

20. On whether there was a mistake or error on record, Mr. Nabutete submitted that there was an error in the last paragraph of the ruling which stated that the court had considered “both” instead of “three” submissions. His conclusion was that there was a submission which was not considered and if considered the court would have reached a different finding.

21. Mr. Ogunda contended for the respondent that no error had been demonstrated by the applicants to merit review orders as required by **Order 45 Civil Procedure Rules**, and that the issues raised are best addressed on appeal. Mr. Githuka for the interested party submitted that the **Civil Procedure rules** require that the error be an “error apparent.” He argued that the error that is pleaded herein invites the court to investigate the record, hence does not fall under limb number 2 of **Order 45**.

22. I have considered the record and I find that there is nothing to show that there is an error on the face of the record of the court, which warrants the review of the ruling of this court. The use of the word “both” instead of “all” is a simple typographical error which does not warrant a review order. I have anxiously considered the record and I find that the applicants’ have not demonstrated to the court, any other sufficient reason to warrant the review of the court’s ruling.

23. On the second limb in which the applicant seeks the setting aside of the ruling of 20th June 2016 and an order for the fresh hearing of the application dated 30th July, 2010, there are no limits or restrictions on the Judge’s discretion to set aside or vary a judgment. This however applies to an ex-parte judgment. Even then the court may only do so on such terms as may be just.

24. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. See - **Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA75 at page 76 C and E.** The court is not persuaded in the instant case that justice will be served by the setting aside of a ruling arrived at upon consideration of the pleadings and submissions of all the parties.

25. On the prayer for stay of execution pending appeal, I note that the provisions of **Rule 63 (1)** of the **Probate and Administration Rules** as set out at Para 11 of this ruling do not include this prayer. The only provisions of the Civil Procedure Rules imported into the Law of Succession Act are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attendance of witnesses, affidavits, review and computation of time.

26. The court recognizes that it is not infallible and its inherent powers are intended to ensure that the ends of justice are met. The provisions of the law however, are clear and are couched in mandatory terms on when the court may grant stay orders pending appeal. **Sub rules (a)** and **(b)** of **Order 42(2) Civil Procedure Rules** provide that:

> **"No order for stay of execution shall be made under sub rule (1) unless – (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.**
>
> > **a. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."**

The Court shall not therefore issue any stay orders unless the two grounds set out above are satisfied.

27. The court finds that the Applicant did not file this application without unreasonable delay as required in **sub-rule (a)** of **Order 42 Rule 6(2)**. This application is dated 17th October, 2016 and cannot be said to have been made without undue delay since it seeks the review of a ruling which was given four months there before on 20th June, 2016.

28. On the question of substantial loss, I have had recourse to the decision found in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368** of **2001**, in which **Musinga, J** (as he then was) explained substantial loss in the following terms:

> **'...substantial loss" is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.'**

The applicant herein has not demonstrated what substantial loss he stands to suffer if this application is not granted, in view of the fact that he participated in the proceedings leading up to the impugned ruling.

29. This appears to be the applicant's attempt to have a second bite at the cherry instead of going on appeal, in a matter in which the court had benefit of the submissions of all parties on record in arriving at its determination. In the premise the court finds that the application lacks merit and it is therefore dismissed with costs to the applicants.

SIGNED DATED and **DELIVERED** in open court this **5th day** of **February 2018**

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L. A. ACHODE

JUDGE