



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 57 OF 2000

IN THE MATTER OF THE ESTATE OF MARY NDUTA KIMANI

VERONICA WANGARI.....APPLICANT

VERSUS

NDIBA KIMANIADMINISTRATOR/RESPONDENT

JUDGMENT

1. Vide an application dated 16/10/2012, Veronica Wangari (hereinafter objector), sought orders;

1. Spent.

2. Spent.

3. THAT this Honourable Court be pleased to review, vary and/or set aside Certificate of Confirmation of Grant issued by this Court on 30th April, 2001.

2. The application is based on two (2) grounds namely;

a) THAT this Honourable Court was misled by the administrator/respondent herein in sharing family properties when there was a written agreement by the family.

b) THAT the aforesaid agreement dated 2nd January 1997 was written and witnessed by among others the respondent where land known as BAHATI/KABATINI BLOCK 12/2795 was allocated one acre to the applicant herein instead of half an acre as written in Certificate of Confirmation of Grant.

3. The objector has sworn a supporting affidavit.

4. The gist of the grounds and the supporting affidavit is simply that the court was misled by the administrator respondent herein in sharing out family properties when there was a written agreement by the family, the said agreement was written by among others the respondent where the applicant was to get one acre from land known as Bahati/Kabatini Block 1/2795 and not half an acre.

5. The said agreement is annexed.

6. The respondent raised a preliminary objection and swore a replying affidavit.

7. The respondent avers that the orders sought are ambiguous and are caught up by latches. The said is filed after an inordinate delay and after the while estate was fully distributed and finally wound up.

8. The respondent further avers that the applicant fully participated in the confirmation of the grant by signing the consent in agreement to the then proposed mode of distribution.

9. Both parties filed written submissions.

10. The court has had occasion to consider the application, the affidavit and oral evidence and submissions by counsel and the applicant.

11. The application is one for review. It is however fraught with anomalies relating to the law upon which it is predicated. I will, however, and by invoking **Article 159(d)** of the **Constitution** overlook the procedural nuances alive to the fact that the applicant appeared in person. I deem the application as properly before the court.

12. Two (2) issues emerge for determination;

1. Whether the court has jurisdiction to entertain the application.
2. Whether the applicant has met the threshold for review orders.

13. As regards the jurisdiction of the probate court in review matters **Rule 63** of the **Probate and Administration Rules** allows the application of **Order 45** of the **Civil Procedure Rules** in proceedings initiated under the **Probate and Administration Rules**.

14. In essence, applications for review can be made in succession causes the same way they are made in civil proceedings initiated under the **Civil Procedure Rules**.

15. When such jurisdiction is invoked, naturally, the threshold to be achieved by a party seeking such orders would be similar to the one required under **Order 45** of the **Civil Procedure Act** and the rules made thereunder.

16. **Order 45** of the **Civil Procedure Rules** provides;

“Order 45

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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

3. (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

4. (1) Where the application for a review is heard by more than one judge and the court is equally divided the application shall be dismissed.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

5. When an application for review is granted, a note thereof shall be made in the register, and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

6. No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.”

17. Broken down, the conditions or the grounds upon which an application for review may be made are;

- a) a discovery of a new and important matter of evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the material time; or
- b) there is a mistake or error apparent on the face of the record; or
- c) for any other sufficient reason.

18. So what obtains in our present application? The present application is based on a claim by the applicant that the court was misled in sharing out of the family properties as there was a written agreement by the family and secondly that, the applicant had been allocated, one (1) acre of land and not ½ an acre as written in the certificate of confirmation of grant.

19. That narrative is well summarized in the grounds listed in the application namely;

- a) THAT this Honourable Court was misled by the administrator/respondent herein in sharing family properties when there was a written agreement by the family.
- b) THAT the aforesaid agreement dated 2nd January 1997 was written and witnessed by among others the respondent where land known as BAHATI/KABATINI BLOCK 12/2795 was allocated one acre to the applicant herein instead of half an acre as written in Certificate of Confirmation of Grant.

20. I have painstakingly gone through the record herein. On the material before court there is no evidence of discovery of a new and important matter or evidence which, after exercise of due diligence, was not within the knowledge or could not be produced by the applicant at the time the grant was confirmed.

21. There is no iota of evidence of some mistake or error apparent on the face of the record and neither is there any other sufficient reason given why the orders herein should be reviewed.

22. The applicant predicates her case on an alleged agreement dated 2/1/1997 bequeathing the subject property to her. No evidence was led to the effect that the said agreement was not within the knowledge of the applicant or could not be produced by her when the grant was confirmed.

23. This cause was gazetted for purposes of public knowledge to enable all interested parties raise any objections that may be necessary. None was forthcoming from the applicant.

24. More fundamentally, on the 30/4/2001, this cause came up before this court (*S. Ondeyo J*) for confirmation of grant. Listed at number 4 in the list of beneficiaries present is the applicant. She raised no objections. If she had the evidence she now purports to introduce which contradicted the proposed distribution, there was no better time to produce and rely on it during the proceedings of 30/4/2001.

25. 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 15th 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.”

26. The above passage renders the applicant's case hopelessly below the threshold for review and renders the application one for failure.

27. It has not been lost on me that in her submissions the applicant addresses the issue of revocation of a grant under Section 76 of the Act.

28. The submission is in my view a clear misapprehension of her application which is specific to review orders.

29. Even assuming for a moment that I could invoke my jurisdiction on revocation of grant, on the material before me there is no demonstration that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case. The administrator cannot be accused of failing to reveal to the court the existence of a letter dated 2/1/1997, a letter which he doesn't recognize and it was upon the applicant to raise the issue of its existence before the court on 30/4/2001.

30. Finally, for a review application to see light of day, the same must be brought without delay. The grant herein was confirmed on 30/4/2001. The application herein was lodged in court on 17/10/2012. There is no attempt to explain this obvious inordinate delay. The delay is inexcusable.

31. For the reasons above stated I am satisfied that the applicant has failed to achieve the threshold for review of the courts orders of 30/4/2001 confirming the grant herein.

32. The application is dismissed. In view of the relationship between the parties, each party to bear its own costs.

Dated and Delivered at Nakuru this 11th day of December, 2018.

A. K. NDUNG'U

JUDGE