



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 195 OF 2013

CATHERINE WANGUI & FLORA WANJIRU.....PETITIONERS

VERSUS

DAVID NDUNGU KIMAMA.....RESPONDENT

RULING

The application is premised under **Section 45 of Law of Succession Act** and **Section 73** of the Probate & Administration Rules and under **Order 45** of the **Civil Procedure Code**.

The Applicant seeks review and or variation of the Order of this Honourable Court granted on the 30th May, 2014 by the Hon. Lady Justice Hellen Omondi.

The Application is supported by the affidavit made by Catherine Wangui and is dated the 28th day of January, 2013 in which she deposes to the fact that she is one of the Petitioners and is competent to make the affidavit.

The review and or variation sought relates to monies that were to be transferred from the Respondent's account to an account that belonged to the deceased but upon presentation of the Order to the bank the Petitioner's were informed that the account had been closed in November, 2013 at the Respondent's behest.

There is need to have the moneys which are still lying in the Respondent's account transferred and pursuant to this need the Petitioners have opened a joint account No. 0230163362045 at Equity Bank, Molo and therefore seek review/variation of the Order to facilitate this transfer.

ISSUES FOR DETERMINATION

- i) Whether there has been delay in bringing the application;
- ii) Whether to review or vary the order as prayed;

ANALYSIS

The first issue relates to the timeliness of bringing the application. The Order sought to be varied was granted on the 30th May, 2014. The instant application was filed in court on the 30th January, 2015, this translates to a period of seven (7) months. The decisions on inordinate delay are legion where a delay of

four (4) months has been held to be an inordinate delay.

Timeliness in this instant application was a crucial factor because had the application been filed without undue delay the Judge who had granted the Order would have been still in station and would have been able to review and or vary it.

The application for review ought to be heard by the same Judge who heard the matter and made the order. The order was made by Honorable Omondi, J who has since left the station. The judge who is in station has jurisdiction to review the Order.

Having perused the application, I note that a copy of the Order sought to be reviewed has been attached to the application.

This court opines that the application was not brought in a timely manner and no explanation has been offered by the Deponent as regards the delay.

It is my considered view that there is need for justice to be done and that the widows will be greatly prejudiced if the order sought is not granted. For that reason the issue of unreasonable delay will be overlooked.

The second issues relates to whether the orders sought are merited.

The principles for review of an order are; that there must be discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the knowledge or could not be produced at the time the order was made; that there must be a mistake or error apparent on the face of the record; or for any other sufficient reason.

The applicant has deposed that the closure of the deceased's bank account was a new discovery and an important factor, which even after exercising due diligence this information could not be produced at the time the order was made.

This court finds that the applicant has satisfied the salient requirements for an order for review to enable this court to grant the application.

DETERMINATION

The application is hereby allowed.

The Order dated 30th May, 2014 and issued on the 4th August, 2014 be and is hereby reviewed at prayer (1) to read as follows:

“That pending the hearing and determination of this cause, this Honorable Court hereby orders the transfer of all moneys not exceeding Kshs.3,332,878/- from the Respondent's account No. 02301999267925 Equity

Bank into the Petitioners' account No.0230163362045 Equity Bank Molo Branch for proper administration.”

The costs of this application shall be costs in the cause.

It is so Ordered.

Dated, Signed and Delivered at Nakuru this 17th day of July, 2015.

A. MSHILA

JUDGE