REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO.1940 OF 1996

CONSOLIDATED WITH SUCCESSION CAUSE NO.1860 OF 1996

IN THE MATTER OF THE ESTATE OF FREDRICK POLWARTH KUBAI – (DECEASED)

ANDREW KAMAU KUBAI.....1ST APPLICANT

MOSES MEDZA KUBAI……...……2ND APPLICANT

STEPHEN KIBUTHU KUBAI……3RD APPLICANT

VERSUS

CHRISTINA GAKUHI KUBAI.....RESPONDENT

R U L I N G

The dispute between the Applicants and the Respondent was in respect to whether the deceased, Fredrick Polwarth Kubai had left a valid Will. The Applicants challenged the Will which was presented to court for proving by the Respondent. The Will is dated 19th January 1991. After hearing the parties in a full hearing, Musyoka J found as a fact that indeed the deceased had left a valid Will. He further held that the Respondent was a wife of the deceased and therefore entitled to be considered as a beneficiary of the estate of the deceased. He issued a grant of probate of the said Will to the Respondent. The learned Judge went further and revoked a grant which had been issued to the Applicants. The judgment was delivered on 19th December 2013.

It was apparent that the Applicants were aggrieved by the said decision. The Applicants lodged a complaint against the learned Judge with the Chief Justice, alleging *inter alia*, that the decision rendered by the Judge had been compromised. The learned Judge disqualified himself from hearing the case. The matter was therefore referred to this court for hearing of the application that had then been lodged by the 1st Applicant, Andrew Kamau Kubai. The 1st Applicant, who is acting in person, filed an application seeking to have the said judgment reviewed and set aside. The 1st Applicant being a layman, titled his application **"Notice of Application".** The gist of his application was that the trial court had relied on forged documents to arrive at the decision finding in favour of the Respondent. In particular, the 1st Applicant urged the court to take into consideration the fact that after the conclusion of the case, the Deputy Registrar of this court had on 18th February, 2014 sent certain documents to the Directorate of Criminal Investigations to establish their authenticity. These documents included a Death Certificate and an Identity Card in the name of the Respondent. According to the a Report dated 18th March 2014 written

on behalf of the County Criminal Investigations Officer by one P.M. Kanina, it was stated that the death certificate relied on by the Respondent to lodge the petition for grant of probate was not genuine. The Report further stated that the identity card relied on by the Respondent contained a serial number which could not be traced or verified at the National Registration Bureau. It was on the basis of this report that the 1st Applicant wants the court to review the judgment of Musyoka J and proceed to find that the Applicants are the persons who are entitled to administer the estate of the deceased.

The application is opposed. The Respondent filed grounds in opposition to the application. The Respondent further filed a preliminary objection to the application. In the preliminary objection, the Respondent challenged the *locus standi* of the 1st Applicant to present the application before court. The Respondent stated that the 1st Applicant, being a grandchild of the deceased, had no *locus standi* to lodge a claim as a beneficiary of the estate of the deceased. The 1st Applicant could only claim benefit from the estate of the deceased through his father who was a son of the deceased. The Respondent further stated that the issues which the 1st Applicant was seeking to canvass in the present application had been ventilated during the hearing of the case and therefore those issues could not be raised again in an application such as the present one. The Respondent took issue with the manner in which the purported report of the Directorate of Criminal Investigation was procured. It was her case that the report had not been procured at the instance of the court. The Respondent was of the view that the issues raised in the application were issues which ought to have been canvassed by the aggrieved parties on appeal and not in an application such as the present one.

During the hearing of the application, this court heard oral rival submission made by the 1st Applicant who was in person, by Dr. Khaminwa who was acting for the rest of the Applicants and by Mr. Gacheru who was acting for the Respondent. This court has carefully considered the said submission. The issue for determination by this court is whether the 1st Applicant laid sufficient basis for this court to review the judgment that is the subject of this application. As stated earlier in this Ruling, the 1st Applicant acts in person. The application that he has filed is not drafted in accordance with provisions of the **Civil Procedure Act**. However, this court took cognizance of the fact that the 1st Applicant was acting in person and the fact that this court is required to deliver substantive justice to the parties without undue regard to procedural technicalities as provided under **Article 159(2)(d)** of the **Constitution**.

It was clear from the 1st Applicant's application that he is seeking to review and set aside the judgment of Musyoka J. **Rule 63(1)** of the **Probate** and **Administration Rules** grants this court jurisdiction to review its own decision in a similar manner that a court hearing an ordinary civil case may review its judgment under the provisions of **Order 45 Rule 1** of the **Civil Procedure Rules**. In the present application, it was evident that the 1st Applicant sought to review the judgment on the basis that he had obtained new and important evidence that was not within his knowledge at the time the court heard the case. This new evidence is the Report prepared by the Directorate of Criminal Investigations which impugned the Death Certificate that was relied on by the Respondent to lodge the petition for grant of probate and the Identity Card of the Respondent. It is the 1st Applicant's case that the two documents were forgeries and the court ought not to have relied on them. In response to the application, the Respondent stated that the issues that the 1st Applicant was seeking to raise in the present application had been considered by the court during the full hearing of the case.

Order 45 Rule 1(1) of the **Civil Procedure Rules** provides thus:

> ***"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 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 have been produced by him at the time when the decree***

was passed or made, or on account of some mistake or error apparent on the face of the record, or for any sufficient reason, desires to obtain a review of the decree or order, may apply for a review to the court which passed the decree or made the order without unreasonable delay."

This court has read the judgment of Musyoka J. It is clear that the issue as to whether the Respondent relied on forged documents to petition the court for a grant of probate was an issue in dispute. In fact, the Respondent was extensively cross examined on the very same issue. After considering the evidence that was placed before him, the learned Judge found no favour with the allegation of forgery put forward by the Applicants.

This court agrees with the Respondent that the 1st Applicant is attempting to re-argue his case before a court of concurrent jurisdiction over a matter which has been exhaustively considered by the court. As observed by Mwongo J in **Justus Chania Lyunga –Vs- Standard Chartered Bank Ltd [2013] eKLR** at paragraph 12:

"In the case of D.J. Lowe & Company vs Banque Indosuez, the Court of Appeal noted as follows:

"where such a review application is based on fact of discovery of fresh evidence, the court must exercise greatest care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and give a different complexion. In such event, to succeed, the party must show that there is no remissness on his part in adducing on possible evidence at the hearing.""

In **Waweru Kamau vs Joseph Mucheru Gichuki [2006] eKLR**, Koome J (as she then was) cited with approval the decision in **Yat Tung Investments Co Ltd –Vs- Dao Henry Bank Ltd [1975] AC 581** where it was held:

"Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not [except under special circumstances] permit the same parties to open the same litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res-judicata applies, except in special cases, not only to a point upon which the court was actually required by the parties to form an opinion and pronounce judgement but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable dispense might have brought forward."

In **James M. Kingaru & 17 Others vs J.M. Kangari & Muhu Holdings Ltd & 2 Others [2005] eKLR**, Visram J (as he then was) held as follows:

"***Applications on this ground [review] must be treated with caution. Review cannot be sought to supplement the evidence or to introduce new evidence. The applicant must show that he could not have produced the evidence inspite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial."***

In the present application, it was clear that the 1st Applicant sought to obtain the opinion of the Directorate of Criminal Investigations in respect of the two contentious documents after the court had already rendered its judgment. The 1st Applicant was aware that the issue as to whether the two documents were valid documents or not was the subject of the trial. It was apparent that, in bringing the present application, the 1st Applicant was attempting to introduce new evidence which he ought to have produced at the time of trial. A litigant is required to produce all the evidence that he intends to rely on during trial. It will not do for such litigant to seek to adduce such evidence after the court has delivered its

judgment. This court is of the view that the evidence that the 1st Applicant seeks to rely on in his application for review ought to have been presented to the court during trial and not after the court has rendered its decision. In any event, the court did render its opinion in respect of the allegations of forgery that was made by the Applicants. If the Applicants were aggrieved, they ought to have appealed instead of seeking to review the said decision before a court of concurrent decision.

This court therefore finds no merit with the 1st Applicant's application. There is no new evidence that has been placed before this court which could not have been placed before the trial court that can convince this court to review the judgment of Musyoka J which was delivered on 19th December 2013. The application is dismissed with costs.

DATED AT NAIROBI THIS 4TH DAY OF JUNE 2014

L. KIMARU

JUDGE