



IN THE COURT OF APPEAL

AT NAIROBI

ICORAM: OUKO (P), MAKHANDIA & SICHALE, JJA

CIVIL APPEAL NO. 40 OF 2015

BETWEEN

KIRERU KAPOYA1ST APPELLANT

RAPHAEL SENTERO KAPOYA2ND APPELLANT

ELIJAH MOSIRO KAPOYA3RD APPELLANT

AND

SIMON MUTUNKEI KAPOYA.....1ST RESPONDENT

RUTH WANJIKU KAPOYA2ND RESPONDENT

(An appeal against the ruling of the High Court of Kenya at Nairobi (Dulu, J) dated and delivered on 27th February, 2007

In

High Court Succession Cause No. 1067 of 1991

JUDGMENT OF THE COURT

A dispute arose amongst the family members of **Moses Kapoya Ole Mosiro** (deceased) contesting the authenticity of a Will purported to have been drawn up by him through his Lawyer before he died on **15th May, 1999**. The deceased had three wives: **Grace Nasieku Kapoya** (hereinafter **Grace**), **Kireru Kapoya** (the 1st appellant) and **Ruth Wanjiru Kapoya** (the 2nd respondent), hereinafter **Ruth**.

Grace and **Ruth** were appointed executors of the Will. It would seem that the actual cause of the dispute is the fact that the deceased had not bequeathed to **Kireru** and her sons, **Raphael Sentero Kapoya** (the 2nd appellant) and **Elijah Mosiro Kapoya** (the 3rd appellant) as much of his estate as he had given to his other wives and their children, reasons for which he had set out in the contested Will dated **10th March, 1991**.

By an application dated **23rd December, 1991** and amended on **12th February, 1992**, **Kireru** sought revocation of the grant of probate issued to **Grace** and **Ruth** on **2nd December, 1991** on the grounds that the Will was a forgery. **Githinji, J** (as he then was) heard the application and considered all the reasons advanced by the appellants in support of the application. In his ruling rendered on **24th March, 1999**, the learned judge held that the deceased made and executed the contested Will and found no reason to revoke the grant. The application was therefore dismissed with costs.

There was no appeal lodged against this decision. Instead, the appellant filed, by way of summons dated **26th May, 2006**, an application seeking review of **Githinji, J's** ruling. The application was based on the grounds that: there was new evidence that was not available at the time of hearing; there was sufficient reason to warrant review of the ruling; and that it was in the interest of justice to review and set aside the ruling. From the supporting affidavit of the 3rd appellant and submissions by the appellants at the hearing, the reason an appeal against the impugned ruling was never filed was because the court file went missing and the appellants were unable to trace the file. According to the appellants, the file mysteriously resurfaced two years later, when the respondents sought eviction orders against the appellants. The appellants contended that with the existence of four (4) Wills, contradictory evidence before the learned judge, the doubt expressed by a

document examiner as to the authenticity of the Will and the denial of the witnesses that they did not attest the Will, all these constituted sufficient cause to warrant a review.

The respondents filed grounds of objection dated **18th July, 2006** opposing the application. In summary, the objection was premised on the grounds that: there was no new evidence exhibited to warrant review or setting aside of the ruling; that the appellants had failed to explain the delay in filing the review application and that the appellants had failed to demonstrate sufficient reason to warrant a review. **Dulu, J** heard the application and dismissed it with costs. In his ruling, the learned judge found that the delay in filing the review application was not only unexplained but that it was also inordinate. The learned judge held that the loss of the file was a flimsy excuse as the appellants had not provided the particulars of the loss or shown what steps they took to salvage the situation either in tracing the file or reconstructing a file. Further, that the appellants had failed to disclose the nature of the new evidence, its relevance and when it became available.

Aggrieved, the appellants have lodged an appeal to this Court on the grounds that the learned judge erred in failing to find that:

- (i) there was new evidence that was not available during the hearing;
- (ii) there was sufficient reason to warrant a review;
- (iii) a review of **Githinji, J's** ruling was in the interest of the parties;
- (iv) the loss of court files was a common occurrence at the time;
- (v) to appreciate the conflicts between the testimony at the hearing and the new evidence;
- (vi) the facts in the application were uncontroverted and the application therefore merited a review;
- (vii) that the grounds of opposition filed by the respondents was filed out of time and ought to have been expunged from the record;
- (viii) the appellant had explained the delay in bringing the application; and
- (ix) the appellant had expressly indicated by way of affidavit when the new evidence was discovered.

The appeal came before us for hearing on **4th April, 2019** and both parties were represented by learned counsel. **Mr. Ngugi** represented the appellants while **Mr. N. Gathaara** represented the respondents.

Firstly, **Mr. Ngugi** argued that the new evidence was sufficiently identified and explained and referred the court to the documents by the document examiner **Mr. Alex Ogutha** initially expressing his doubt as to the identity of the maker of the Will and a subsequent contrasting report confirming the deceased as the maker of the Will. Counsel submitted that this was sufficient reason(s) to warrant review of the impugned ruling. Secondly, counsel asserted that the delay in bringing the application was sufficiently explained in the 3rd appellant's affidavit that the court file went missing after the ruling of **Githinji, J**, only to resurface two years later.

Mr. Gathaara in opposing the appeal submitted that there was no express finding in the report by **Mr. Alex Ogutha** that the thumbprint on the Will did not belong to the deceased. Rather, the document examiner determined that the thumbprint exhibits were of poor quality and had insufficient ridge characteristics which prevented identification beyond reasonable doubt. Counsel reiterated and supported the findings of **Dulu, J** that the appellant had failed to explain the nature of the alleged new evidence and when that new evidence was discovered. Finally, counsel urged the court to find that the delay of about 7 years from the time the impugned ruling was delivered (**24th March, 1999**) and the date when the motion, the subject of this appeal was filed (**26th May, 2006**) was not explained. There was no evidence that the alleged missing court file had been reconstructed therefore the excuse could only be a flimsy one. Counsel urged the Court to consider the respondent's authorities setting out the principles governing review applications.

In a brief response, **Mr. Ngugi** maintained that the delay had been sufficiently explained. Secondly, he contended that new evidence had been brought to light to warrant reviewing of the ruling by **Githinji, J**.

We have considered the Memorandum of Appeal, the rival oral submissions, the record of appeal and the law.

For a start, the motion of **20th May, 2006** sought in the main an order to review the ruling of **Githinji, J** dated **24th March, 1999**. Suffice to state that the said motion was predicated on Section 80 of the Civil Procedure Act (CPA) which is the substantive law on review. It provides:

“80. Any person who considers himself aggrieved by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or order therein as it thinks fit.”

In the Civil Procedure Rules (CPR), Order 45 (1) provides as follows:

(1) “Any person considering himself aggrieved by a decree or order of which an appeal is allowed, but from which no appeal has been

preferred; or 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.

Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 set out the conditions precedent before a court can review its orders.

These are:

- (a) there must be a discovery of new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant, or
- (b) there was a mistake apparent on the face of the record, or
- (c) for any other sufficient reason(s), and
- (d) the application must have been made without undue delay.

We are now called upon to determine whether the applicant met the above threshold to justify review of the Court’s ruling of **Dulu, J.**

In expounding the provisions of the law as cited above, this Court in **Muyodi vrs. Industrial & Commercial Development Corporation & another [2006] IEA 243**, stated:

“ for an application for review under order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay.”

In the matter before us, we were not told of any new and important evidence which after due diligence was not within the appellant’s knowledge or could not be produced at the time the appellants urged the motion before **Dulu, J.** Again, no error apparent on the face of the record was pointed out. We also do not find any sufficient reason that would have made **Dulu, J** to review the decision of **Githinji, J.** The appellants may have been aggrieved as they did not get the same share of the deceased’s property, who seemed to have bequeathed more property to the children of **Grace & Ruth.** The reason(s) why the deceased gave the household of **Kireru** less than that of the other two (2) households is explained in paragraph 9 of the will. It states:

“ I declare that my wife KIRIRU KAPOYA and her children except

RAPHAEL KAPOYA shall not get any additional portion of my estate for the following reasons:-

- (i) She separated from me about 15 years ago and she has not looked after me since then.*
- (ii) I made sufficient provisions for her by way of 35 animals and Kshs 20,000/= at the time we were separated.*
- (iii) She refused to move from KISERIAN TO RANGAU where I offered her 50 acres.*
- (iv) She has generally not considered or treated me as her husband.”*

We are satisfied that the learned judge properly exercised his discretion when he dismissed the appellants’ application for review.

Apart from the threshold set out by Section 80 of the CPA and O.45 of the CPR, the appellant’s application to review **Githinji, J’s** orders made on **24th March, 1999** was filed on **20th May, 2006**, this was nearly seven (7) years later. It cannot be true that the file was missing and that it only resurfaced when the respondents sought to evict the appellants. No effort to reconstruct the file, (if indeed it had been missing for 7 years) was made by the appellants. Clearly, the delay was inordinate.

The upshot of the above is that we find this appeal to be bereft of merit. It is hereby dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 6th Day of August, 2019.

W. OUKO (P)

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JUDGE OF APPEAL

A. MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR