



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 919 OF 1996

IN THE MATTER OF THE ESTATE OF GIKARU WANGIGI - (DECEASED)

JANE WANJIRU NG'ANG'A.....1ST APPLICANT

JANEPHER WANJIKU.....2ND APPLICANT

VERSUS

JAMES WAWERU GIKARU.....1ST RESPONDENT

LUCY NJERI BILLY.....2ND RESPONDENT

JOINT COMMERCIAL SUPPLIES LTD.....INTERESTED PARTY

RULING

1. The 1st applicant Jane Wanjiru Ng'ang'a swore in her supporting affidavit to the application dated 25th March 2021 seeking the review and/or setting aside of the ruling dated 29th September 2020 that:-

“3.THAT the said application raised fundamental issues that if heard would have changed the course of the petition and the mode of distribution of the deceased’s estate.

4.THAT the court determined the application solely on the ground of *res judicata* as raised by the respondents’ notice of preliminary objection however the applicants were not given the opportunity to be heard and rebut the allegations.

5.THAT I am advised by our advocates on record that our submissions were not considered since the matter was never mapped on e-portal.....

6.THAT I am advised by our advocates on record and which advice I heed that there were several issues of fact that the court could not have determined in the objection raised without hearing the evidence of the parties.

7.THAT as daughter in-law of the deceased I was never a party to the proceedings herein and my consent has never been sought since the proceedings were conducted discretely.

8.THAT I have seen the documents purporting that I signed a letter of authority and consent and which are not true.”

2. On the basis of these averments, the applicant stated that she was aggrieved by the court’s decision which determined that her application dated 7th September 2018 for the revocation of the grant that was issued on 29th January 1997 and confirmed on 29th May 2002 (and rectified on 13th September 2017) was *re judicata*. Her case was that, with this finding, the court had failed to deal with the substantive issues that her application had raised.

3. It is trite that where a party disagrees with, and is aggrieved by, a court’s determination on the facts and the law, what is open to him is to appeal the determination. In **Abasi Balinda –v- Fredrick Kangwamu and Another [1963]EA 557** it was held that –

“A point which may be a good ground of appeal may not be a good ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for review though it may be a good ground for an appeal.”

If this court was wrong in its finding that the applicants’ application dated 7th September 2018 was *res judicata*, then what was open to them was to appeal the decision. The applicants have not shown that they had made a discovery of new and important evidence, or that there was a mistake or error apparent on the face of the record, or that there were other sufficient grounds to enable the court to exercise its discretion under **Order 45 rule 1** of the **Civil Procedure Rules**.

4. I notice that the application was brought under **section 76** of the **Law of Succession Act, rules 44** and **73 of the Probate and Administration Rules** and **Articles 159** of the Constitution. These provisions do not at all relate to the power of the court to review its decision.

5. Regarding the facts of the case, the deceased Gikaru Wangigi died intestate on 24th November 1992. He left parcel Kabete/Kibichiku/964 and Plot No. 21 Wangige Market. He was survived by several children who included Francis Ng’ang’a Gikaru. When the estate of the deceased was being shared, Francis N’ganga Gikaru participated and got 0.56 acres of Kabete/Kibichiku/964. This is what he had asked for from the estate. The 1st applicant is the widow of the said Francis Ng’ang’a Gikaru. In the application dated 7th September 2018 the 1st applicant was saying that she had not been involved in the distribution of the estate of the deceased over Kabete/Kibichiku/964. The court observed that:-

“The 1st applicant is bound by what her late husband sought in these proceedings and was granted. Consequently, her claim over Kabete/Kibichiku/964 has been previously heard and determined. Her claim is *res judicata*.”

6. I have noted the preliminary objection dated 7th May 2021 by the 2nd respondent Lucy Njeri Billy and the interested party Joint Commercial Supplies Limited. I have considered the written submissions by Mr. Kirimi for the applicants and by Mr. Gitau for the 2nd respondent and interested party. For the reasons that I have given in the foregoing, I find that the applicants’ application dated 25th March 2021 is not merited and dismiss it with costs.

7. The grounds raised in the objection were largely factual in nature. They derived their foundation from factual information. They did not raise pure points of law as described in **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Ltd [1969]EA 696**. The preliminary objection is therefore not sustained, but I make no order as to costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 19TH JANUARY 2022

A.O. MUCHELULE

JUDGE