



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE 506 OF 2010**

**IN THE MATTER OF ESTATE OF LIMBINE MUKIRI(DECEASED)**

**IN THE MATTER OF REVIEW OF ORDERS OF 18<sup>TH</sup> NOVEMBER, 2018**

**BETWEEN**

**MWAMATI MUTUMA .....BENEFICIARY/APPLICANT**

**AND**

**DANIEL KAINGA M'LIMBINE....2<sup>ND</sup> ADMINISTRATOR/RESPONDENT**

**RULING**

**Background**

1. The deceased's estate is comprised of the following assets:

**i. LR. NO. ANTUBETWE/NJOUNE/858**

**ii. LR. NO. ANTUBETWE/NJOUNE/1451**

**iii. LR. NO. ANTUBETWE/NJOUNE/1502**

2. By a ruling dated 08<sup>th</sup> November, 2018, the court directed that the estate be distributed as follows:

**i. LR. NO. ANTUBETWE/NJOUNE/858**

- ½ share to Mwamati Mutuma
- ½ share Rael Itura M'Nkanatha (widow to M'Nkanatha Limbine) to hold in trust for Zakayo Kaberia, Peter Michubu, Zabina Kenjira and Judy Kainga

**ii. LR. NO. ANTUBETWE/NJOUNE/1451**

- To be shared equally between Kaibi M'Limbine, Mbiti M'Limbine and Daniel Kainga

**iii. LR. NO. ANTUBETWE/NJOUNE/1502**

- To be shared equally between Kaibi M'Limbine, Mbiti M'Limbine and Daniel Kainga, Mwamati Mutuma and Rael Itura M'Nkanatha (widow to M'Nkanatha Limbine) to hold in trust for Zakayo Kaberia, Peter Michubu, Zabina Kenjira and Judy Kainga

3. By summons dated 10<sup>th</sup> July, 2020 and filed on 21<sup>st</sup> July, 2020, the Applicant prays for orders that:

1. The Court be pleased to issue an inhibition on land parcels LR. NO. ANTUBETWE/NJOUNE/858, 1451 and 1502
2. The Court be pleased to review, set aside and or revoke the grant/ruling issued on 08.11.2018 and hear the matter afresh
3. The court be pleased to grant the Applicant leave to file further affidavit evidence and or allow the Applicant to give oral evidence in his protest and call witnesses
4. That the newly registered numbers be cancelled and reverted to the name of the deceased pending the hearing and determination of this suit and redistribution
5. Costs be provided for

4. The application is based mainly on the ground that all the evidence was not presented and is supported by an affidavit sworn by the Applicant on 10<sup>th</sup> July, 2020 in which he reiterates that the ground on the face of the application and in addition contends that the deceased had distributed his estate long before he died and that some beneficiaries had already benefited from that distribution.

5. Daniel Kainga M'limbine (*2<sup>nd</sup> Administrator/Respondent*) by his replying affidavit sworn on 21<sup>st</sup> September, 2020 contends that Applicant was represented by counsel until he abandoned him towards the conclusion of the case and that he was given every opportunity to present his case. He denied that deceased had any other asset other than the ones distributed by the court order and faults the Applicant to attempting to revive this case long after the beneficiaries had settled on their portions of land as distributed to them.

6. I have considered the application in the light of the affidavits on record and the submission filed on behalf of the parties and I have deduced the following issues for determination.

**1. Whether a case has been made out for review of the ruling issued on 08.11.2018.**

**2. Whether a case has been made out for revocation of the certificate of confirmation of grant dated 08<sup>th</sup> November, 2018.**

**1. Whether a case has been made out for review of the ruling issued on 08.11.2018.**

7. Section 80 of the Civil Procedure Act and order 45 rule 1 of the Civil Procedure rules gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, as it has been constantly stated this discretion should be exercised judiciously and not capriciously. In **National Bank of Kenya Limited v Ndungu Njau (1997) eKLR** the Court of Appeal held that:

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter”.**

8. The applicable law for grant of review is Section 80 of the Civil Procedure Act which provides *inter alia*: -

**Any person who considers himself aggrieved—**

**a. 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 made the order, and the court may make such order thereon as it thinks fit.**

9. Order 45 rule 1 of the Civil Procure Rules on the other hand provides that: -

**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.**

10. The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.

11. The instant application was filed 20 months after the order sought to be reviewed was made. The 20 months' delay has not been explained to the satisfaction of the court or at all.

12. The Applicant submitted that there was new evidence without disclosing what the new evidence entailed. Whereas Section 42 of the Law of Succession Act mandates the court to take into account gifts made to beneficiaries by the Deceased during his life, the Applicant failed to disclose the gifts he alleged were made and to whom they were made.

13. The Applicant had a right of appeal against the court's ruling but he has chosen not to take that path. Applicant has not demonstrated 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 impugned ruling was passed, or some self-evident error or omission on the face of the record, or any other sufficient reason that would entitle him to an order of review.

## **2. Whether a case been made out for revocation of the grant**

14. Section 76 of the **Law of Succession Act** (hereinafter referred to as *the Act*) provides as follows:

**“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-**

**a. that the proceedings to obtain the grant were defective in substance;**

**b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**

**c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**

**d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either-**

**i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or**

**ii. to proceed diligently with the administration of the estate;**

**or**

**iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**

**e. that the grant has become useless and inoperative through subsequent circumstances.”**

15. I have considered the Application before me and I find that the Applicant has not established any of the grounds that would entitle him to an order for revocation of the grant.

16. From the foregoing analysis, the orders which commends to me and which I hereby issue are THAT:

**1. The summons dated 10<sup>th</sup> July, 2020 and filed on 21<sup>st</sup> July, 2020 is misconceived, bereft of legal basis and merit and it is dismissed**

**2. Applicant is condemned to pay costs of this application to the Respondent**

**Dated at Meru this 11<sup>th</sup> DAY OF February, 2021**

**T. W. CHERERE**

**JUDGE**

**Court Assistant For Applicant For Respondent**

**- Morris Kinoti**

**- N/A for M.G.Kaume & Co. Advocates**

**- N/A for Mutembei & Kimathi Advocates**