



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISC. SUCCESSION NO. 1 OF 2015

(FORMERLY SPM SUCC. CAUSE NO. 125 OF 2012 AT CHUKA)

IN THE MATTER OF ESTATE OF THE LATE M'RUTHIOMI M'NDAGONE (DECEASED)

MERCY MBUTHU JAPHET.....APPLICANT

VERSUS

MATI M'RUTHIOMI.....RESPONDENT

R U L I N G

1. The application pending before me is the one dated 18th February 2020 brought pursuant to **Rule 73 of the Probate and Administration Rules** and **Order 45 of the Civil Procedure Rules**. The application seeks orders that the grant dated 3rd July 2018 be reviewed and the name Mercy Mbuthu Japhet be deleted from parcel No. Kiera/E.Magutuni/1811 on the grant and the same be shared equally amongst the children of the deceased. In the alternative the Land Parcel Kiera/E. Magutuni/1811 be shared equally between Mercy Mbuthu Japhet on the one hand and Michael Mutegi and Newton Mati (on behalf of the their late mother) on the other hand. That the name of most beneficiaries are wrongly spelt thus they be registered as per their identity cares.

2. The application is based on five grounds on the face of the application. These are:-

1. The deceased had two wives
2. The mother of the 1st petitioner predeceased the deceased herein
3. The 2nd petitioner i.e MERCY MBUTHU JAPHET had no right to be included in the distribution since the parcels were distributed to the children not mothers.
4. The 2nd petitioner i.e MERCY MBUTHU JAPHET'S children got shares in parcel No. KIERA/E.MAGUTUNI/206 thus MICHAEL MUTEGI and NEWTON MATI have a right to claim their share from parcel NO. KIERA/E.MATUTUNI/1811
5. MERCY MBUTHU JAPHET was divorced before the deceased died.

3. The application is supported by the affidavit of Mati M'Ruthiomi who is the 1st Petitioner. His contention is that the deceased had two wives, Alice Kimotho and Mercy Mbuthu. The 1st wife Alice Umotoh pre-deceased the deceased whose estate this proceedings relate. She had four children. The 2nd wife Mercy Mbuthu who is the 2nd Petitioner had four children. It is the applicant's contention that the 2nd petitioner had separated with the deceased and married elsewhere He contends that the deceased had recognized the children of the 2nd petitioner as his and had insisted that the 2nd petitioner should not get any share as she was divorced customarily. The applicant prays that the name of 2nd petitioner be removed from land parcel No. KIERA/E.MAGUTUNI/1811 and the same be shared equally amongst all the children of the deceased. The applicant contends that 2nd petitioner could not be registered alone on parcel No. KIERA/E.MAGUTUNI/1811 as there was their mother's share if she had been alive.

4. The 2nd Petitioner opposed the application and filed a replying affidavit sworn on 15/9/2020. Her contention is that the grant was issued to her on 3rd July 2018 and she has distributed the estate of the deceased equitably. She avers that Land Parcel No. KIERA/E. MAGUTUNI/1811 was her matrimonial home and is where she lived with her husband who is the deceased in this case. She contends that the application is without merits and should be dismissed. She avers that law of succession does not provide for review.

5. The application was canvassed by way of written submissions. For the applicant it is submitted that it is discriminatory for the 2nd respondent to get a whole share of Land Parcel No.1811. It is submitted the parcel was not matrimonial home and the issue does not arise. On the issue of review, it is submitted that **Order 45 Civil Procedure Rules** applies in succession matters. That a party who is not satisfied with an order can seek review or appeal.

6. The respondent filed submissions and has raised three issues for determination. These are:-

- 1) Whether the applicant is entitled to an order of review.
- 2) Whether the application meets the threshold for review.
- 3) Whether the respondent has proved dependency.

It is submitted the applicant has not demonstrated any material that was not within his knowledge or that there is an apparent error on the face of the record. That the application which seeks to change the mode of distribution which cannot be cured through an application for review. It is further submitted that the fact that she was a former wife of deceased does not bar her from benefitting from the estate as the Act recognizes former wives as dependants.

It is further submitted that the applicant could have filed summons for revocation of grant and seek redistribution of the estate.

7. I have considered the application. It is brought under **Rule 73 of the Probate and Administration Rules**. The rule provides that-

“ Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

The rules provides for the inherent powers of the court to exercise its discretion and make such orders as may in its opinion be necessary to meet the ends of justice or to prevent abuse of the court process. The rule does not provide for review but in view of the wording of the rule, the court may rely on it to review orders under the Act which may be necessary to meet the ends of justice or to prevent abuse. The rule gives court powers to make orders as the justice of the case may demand.

8. The applicant has relied on **Order 45 of the Civil Procedure Rules**.

There are certain orders which are imported to the **Law of Succession Act and Order 45** is one of them. This is as provided under **Rule 63 of the Probate and Administration Rules**. **Order 45 of the Civil Procedure Rules** provides for review. Order 45 rule 1 provides:-

“ (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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

9. Under this provision, for this court to exercise discretion and order review the party must prove that there is discovery of a new and important matter of evidence which was not within his knowledge or could not be produced at the time by the applicant or, on account of mistake or error apparent on the face of the record or for any sufficient reason. An application for review must be brought without unreasonable delay.

10. The question is whether the application meets the threshold for review. The grant was issue on 3rd July 2018. The application was filed on 18th February 2020. A period of one year and seven months. The application was not filed timeously. The delay was in-ordinate.

11. The applicant seeks review of the mode of distribution of the estate of the deceased. The contention is that the distribution was not fair and the 2nd petitioner was not entitled to the estate as she was divorced by the deceased and she married another man. These do not constitute errors or mistakes on the face of the record. The applicant has not alleged discovery of any new and important matter of evidence which he could not produce in court at the time the order was made. The applicant has not demonstrated any other sufficient reason to warrant a review. The applicant has not brought the application within the ambit of **Order 45 Rule (1) Civil Procedure Rules**. My view is that the matters raised by the applicant are not what is envisaged in an application for review.

12. **An analysis of the matters raised-**

1) That the 2nd petitioner was not supposed to get land parcel No. KIERA/E. MAGUTUNI/1811 and should have distributed it equally to all the children. The contention is that the mother of the applicant predeceased the deceased and had she lived she would have been entitled to a share. A beneficiary who predeceased the deceased is not entitled to a share of the estate as the estate is distributed to dependants who survive the deceased. **Section 29 of Law of Succession Act** gives the meaning of a dependant. It qualifies a dependant as a person who was maintained by the deceased immediately prior to his death. A person who died long before the deceased is not a dependant as defined and no provision can be made for him.

2) That the 2nd petitioner had been divorced and married another person. **Section 29(a) of the Law of Succession Act** on the meaning of dependant provides:-

“ For the purpose of this part, “dependant” means-

a) The wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”

The 2nd petitioner/Respondent proved that she was a dependent. The ruling by **Justice Mabeya** dated 7th April 2016 found as a fact that the respondent and deceased had constructed a house worth Kshs.300,000/- way back in 1984. The respondent proved dependency. The court ordered that she was entitled to Land Parcel No. KIERA/E.MAGUTUNI/1811 as it was her matrimonial home. The applicant did not prefer any appeal against that ruling. The respondent was entitled to the estate. **Section 40 of the Law of Succession Act** provides:

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

The law recognizes that the respondent is entitled to the estate of her deceased husband. No material evidence was tendered to prove that she was divorced or that she re-married.

12. 3) the applicant contends that the names have errors. This is a matter which cured by rectification and not by review. **Section 74 of the law of Succession Act** provides that errors in names and description may be rectified by the court.

I find that the matters which I have analysed above are not envisaged in an application for review. Although the court has discretion to review its Judgment, the grounds for review as set out under **Order 45 Rule 1 Civil Procedure Rules** must be demonstrated or for any other sufficient reason. A party challenging the mode of distribution after the grant has been confirmed and estate distributed can only move the court by way of an application to annul or revoke the grant.

Section 76 of the Law of Succession Act gives the Court power either on application by an Interested Party or of its own motion to at any time revoke the grant.

13. Review is dependant on situations where, known assets are omitted from the schedule of property to be distributed or where the name of a beneficiary has been omitted by mistake or error. The court may review its orders at the time of confirmation of grant or upon application by a party. The applicant has not demonstrated any of this matters to warrant this court to order a review of the grant.

In conclusion I find that the application lacks merits. I dismiss it. I make no orders as to costs.

Dated, signed and delivered at Chuka this 11th day of February, 2021.

L.W. GITARI

JUDGE

11/2/2021

Ruling has been read out in open court in presence of Ms Fuza for Applicant and Ms Kijaru for Respondent

L.W. GITARI

JUDGE

11/2/2021