



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NUMBER 4 OF 2016**

VIVI MUTISYA.....1<sup>ST</sup> RESPONDENT

MUTHILE MUTISYA.....2<sup>ND</sup> RESPONDENT

MORRIS MUTISYA.....3<sup>RD</sup> RESPONDENT

WAMBUA MUTISYA.....4<sup>TH</sup> RESPONDENT

VERSUS

PETER MWANZIA MUSYOKA.....APPELLANT

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*(Being an appeal from the Ruling of PM's Court at Kitui dated 13th May, 2014 in Succession Cause No. 69 of 2008 by Hon. A.G. Kibiru-Ag. CM)*

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**RULING**

1. **Peter Musyoka Mwanzia**, the appellant herein, has moved this court through a **Notice of Motion** dated **4<sup>th</sup> February, 2020** seeking the following reliefs namely: -

- (i) Spent
- (ii) Spent
- (iii) That the judgement of this court be reviewed and set aside.
- (iv) Costs

2. The applicant has listed the following grounds as the basis of this application;

- (i) That the applicant was condemned unheard due to a default to comply with the directions given by the court.
- (ii) That there are sufficient reasons to review the judgement of this court dated **17<sup>th</sup> January, 2020**.
- (iii) That it will be in the interest of justice to review the said judgement.
- (iv) That there was an error on the face of the record which the applicant could not bring to the attention of the court at the time the judgement of the court was delivered.
- (v) That an appeal in his view, would not be appropriate and the better remedy is in a review of the judgement dated **17<sup>th</sup> January, 2020**.

3. The applicant has supported the grounds with his affidavit sworn on **4<sup>th</sup> February, 2020** where he has averred that the appeal herein, was to be canvassed through written submissions as per the directions of this court, given on 16<sup>th</sup> October, 2019.

4. He further states the appellants (the respondents in this application) were granted 21 days to file their submissions and that the period lapsed on **7<sup>th</sup> November, 2019**. According to the appellant, the Respondent/Appellants failed to file any submissions and that despite the default, he filed his submissions through counsel on **11<sup>th</sup> December, 2019**. He asserts that failure by the Respondent/Appellants to file their submissions should have meant that the appeal remained unprosecuted.

5. He submits that there was an oversight by this court because it noted that both parties had failed to file submissions in its judgement yet he had filed his submissions on 11<sup>th</sup> December, 2019. He submits that the date of judgement was given on 16<sup>th</sup> October, 2019 when the court gave directions and fixed the matter for judgement on 17<sup>th</sup> January, 2020.

6. The applicant further submits that he filed his submissions despite not being served with the appellants' submissions out of abundance of caution because he thought that perhaps the Respondent/Appellants might have filed their submissions but failed to serve him.

He states that he filed his submissions and took it all the way to Garissa High Court where the judge then was based and that on reaching Garissa High Court, he found that the Judge was on leave which left him with no option but to leave the submissions with the secretary of the Judge.

7. He contends that his submissions were not considered despite the fact that it had been filed and that there was some inadvertence on the part of the court.

8. He claims that he has come to this court for review and has brought his application without any delays. He further contends that the appeal should be heard afresh as no one would suffer any prejudice. He asserts that the error made by the court should not be visited on him submitting that the overriding factor is to do justice.

9. The Respondents opposed this application basing their opposition to the preliminary objection dated 1<sup>st</sup> February, 2020. The Respondents contend that the appellant had the option to appeal against the judgement or comply with the judgement passed. The Respondent further submit that a review can only be sought on discovery of a new matter and in their view, there is no new discovery as the court decided the appeal on merit after analysis of all the issues. They concede that they failed to file submissions but despite that, the court rendered itself after considering all the issues.

10. This court has considered this application and the response made. From the onset, this court finds that the application needed to have complied with **Rule 59 of Probate and Administration Rules in the Law of Succession Act (L.S.A)** as this is a probate matter and probate matters have its own special procedures specifically provided for by Probate and Administration Rules. The **Civil Procedure Rules and Civil Procedure Act**, do not apply save as provided for under **Rule 63 of Probate and Administration Rules. Rule 45 of Civil Procedure Rules** by construction, is one of those Civil Procedure Rules that also apply in Probate and Administration Rules. The rules committee should however do the needful by amending **Rule 63 of Probate and Administration Rules** accordingly after the old Civil Procedure Rules were amended. This court inclined to determine this application on substance rather than the form.

11. The main basis of this application is that the appeal herein was decided without his submissions being considered despite the fact that he had made efforts to file the same and taken all the way to Garissa High Court where the Hon. Judge handling the appeal was then based.

12. I have looked at the proceedings and chronology of events and it is apparent that the court handling the appeal, gave a date for judgement before the parties had filed their respective submissions. This was perhaps due to distance involved and the need to save on time and timely dispensation of justice.

Having said that, there is no denying the fact that the Applicant/Respondent filed his submissions, despite the fact that he had not been served as expected and directed. He says he did so out of abundance of caution and no one can fault for that because many a time, parties who have a right to begin file their submissions but fail to serve their counterparts putting them at risk of being locked out of a hearing. The applicant was therefore in order to file his submission even though strictly speaking the Appellants/Respondent had not prosecuted their appeal. When directions were given that the appeal was to be canvassed by way of written submissions, the Appellants were expected to file their submissions but they did not. But that notwithstanding, the Honorable Judge decided to write the judgement notwithstanding that none of the parties in the appeal had filed/placed submissions on record. There is likelihood that when the court proceeded on leave, it went with the file and so when the applicant took his submissions there, the file was not there hence the remark by the clerk that the submissions was brought when the court had proceeded on leave.

13. The fact that the Honorable Court determined the appeal on merit without submissions, is certainly an issue that can only be addressed on an appeal. This court is not well placed to entertain or determine the issue because the jurisdiction exercise is concurrent with that of the Honorable Judge who determined the matter.

14. Secondly, and more importantly is that, looking at the decision of the Honorable Judge, all the issues raised by the applicant in his submissions dated 22/11/2019, apparently were considered and the court duly rendered itself. The interests of the applicant on the estate of Mutisia Mbiti is purchaser's interests which is limited to the 12 acres that the lower court had ordered to be given to him. The Hon. Judge, in his Judgement determined that the issue of ownership of the 12 acres should be first be determined by a competent court which is Environment and Land Court and upon determination, the probate court would then proceed to confirm/rectify the grant and distribute the 12 acres accordingly. That in my considered view, was the only viable decision and even if this court was to find that there was basis for revision and re-hear this appeal, the direction or the substance of the decision would not have changed much given the facts and circumstances obtaining from the record from the court which I have had the occasion to peruse through. That in my view would be a futile

exercise that would not aid any of the parties herein.

In the premises, this court finds no merit in the application dated 4<sup>th</sup> February, 2020. The same is disallowed but I will make no order as to costs.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 19TH DAY OF APRIL, 2021.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**