



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 1101 OF 2011**

**IN THE MATTER OF THE ESTATE OF DUNCAN MUREITHI KIMONDO (DECEASED)**

**BETWEEN**

**LEAH NGIMA MURIITHI.....1<sup>ST</sup> PROTESTOR/APPLICANT**

**FAITH WANJIRU KIMONDO.....2<sup>ND</sup> PROTESTOR**

**AND**

**SUSAN WANJIRU MURIITHI..... RESPONDENT**

**RULING**

1. The application is premised under the provisions of Rules 49 and 73 of the of the Probate and Administration Rules; in essence the Applicant seeks an order to review the Order of this Honorable Court made on the 24/05/2016; the applicant for the following orders;

(i) That the court's Ruling made on 24<sup>th</sup> May, 2016 be reviewed as regards the sharing of land parcel number Thengenge/Karia/1276 to clearly establish the location of the shares of each house on the ground; and

(ii) Costs in the cause.

2. The application is supported by grounds on the face of the application and on the Supporting Affidavit made by Leah Ngima Muriithi dated the 28/03/2018;

3. Parties were directed to canvass the application by filing and exchanging written submissions; hereunder is a summary of the rival submissions;

**APPLICANTS CASE**

4. The applicant submits that the court should review its judgment and order the 1<sup>st</sup> house to take the parcel adjacent to Thengenge/Karia/3010 so that they can have unlimited access to the grave yard; the 1<sup>st</sup> house already has graveyard in Thengenge/Karia/1275 where they interred their mother and therefore do not need the land set aside for the graveyard in Thengenge/Karia/1276;

5. The applicant contends that if the land is shared as ordered by the court this will lead to a wastage of land as the grave yard will have to be provided with an access road and this is not economically viable;

6. The applicant urged the court to review its ruling for the just and equitable distribution of the estate.

**RESPONDENT'S SUBMISSIONS**

7. In response the respondent submits the ruling of 24/05/2016 was well reasoned and opposed the review of the same; that the respondent engaged the services of a surveyor who proposed a sketch plan that would create accessibility to all parcels of land without changing the acreage;

8. The respondent submitted that the applicant objected to the 1<sup>st</sup> wife being buried on the parcel which the court ordered be excised and set aside as a graveyard; this led to the 1<sup>st</sup> wife being buried elsewhere; and one of the four persons buried thereon is the deceased to whom the estate relates;

9. That the court had all this information prior to delivery of its Ruling and hence no new evidence has been discovered to warrant a review of the ruling;

10. The respondent contends that the court is '*functus officio*'; the application was misplaced and intended to defeat justice and was an abuse of the court process; the respondent urged the court to dismiss the application with costs.

### **ISSUES FOR DETERMINATION**

11. After taking into consideration the presentations of both parties this court finds only one issue for determination;

(i) Whether to review or set aside the order of 24/05/2016;

### **ANALYSIS**

12. The principles for review of an order or decree of the court are; that there must be discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the knowledge or could not be obtained and produced at the time the order was made; or that there must be a mistake or error apparent on the face of the record; or for any other sufficient reason;

13. In her Affidavit of Protest dated 1/04/2014 at paragraph 9 the applicant deposed as follows;

***'9. The property THENENGE/KARIA/1276 should be sub-divided into two between the 1<sup>st</sup> and 2<sup>nd</sup> house. One portion measuring 0.03 Ha to be registered in the name of Susan Wanjiru and Faith Wanjiru to hold the same on their own behalf and on behalf of the 1<sup>st</sup> house and take the portion that accommodate the graves of four members of their family. The other portion measuring 0.087Ha to be registered in the name of Leah Ngima to hold the same on her behalf and on behalf of the 2<sup>nd</sup> house.....'***

14. The Ruling delivered by this court on 24/05/2016 ordered that;

***'C. Thengenge/Karia 1276 the portion comprising of the graveyard be first excised and be utilized as a family graveyard for the first house; the resultant acreage shall be divided on a ratio of 6/13 for the first house and 7/13 for the 2<sup>nd</sup> house....'***

15. This court also directed the Deputy Registrar to conduct a site visit and a report was presented on the findings which are as follows;

***'7.The graves are in the middle of 1276 the approximate measurement taken roughly with a tape measure are shown on the body of the report. They are below 1274 the part worked by the respondents (2<sup>nd</sup> house) and the children buried there are from the 1<sup>st</sup> house.'***

16. The applicant when submitting on the division of the property stated that the 1<sup>st</sup> house be given the portion of land next to the graveyard and the 2<sup>nd</sup> house be given the adjacent part and this is exactly what this court ordered in its Ruling when the property was being distributed;

17. This court granted Thenenge/Karia/1275 to the 1<sup>st</sup> house and Thenenge/Karia/1274 to the 2<sup>nd</sup> house and the report indicates that there is a gap of three (3) metres between the properties which is a road; the property known as Thenenge/Karia/1276 is behind both Thenenge/Karia/1275 and a portion of Thenenge/Karia/1274 and this provides access to the properties without any conflict between the two families;

18. In her submissions the applicant alludes to wastage if the graveyard is excised as per the Ruling and that the graveyard will not be easily accessible; however, the respondent attached a surveyors map which shows that there is a small road that enables all the parties to access the graveyard from the portions they occupy and utilize;

19. If this court were to revise or make any changes this may result in an interruption in the manner in which each family will access the properties already apportioned to the two houses and this will create more acrimony and more issues between the family members;

20. In any event the access to the graveyard is not a daily event and can be done when the need arises and this court reiterates that there already exists a road thereto which all the family members can use to access the same.

21. The above analysis notwithstanding this court notes from the submissions of the applicant that there is no contention of discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced at the time the order was made; there is also no contention of any mistake or error apparent on the face of the record;

22. The only reason alluded to is the acrimony likely to arise from the 1<sup>st</sup> family accessing the graveyard and this court reiterates that visits thereto are not a daily activity and can be done when needed and in any event there is a road from which both houses can access the grave

yard; and this court finds that this does not qualify as a sufficient reason for the granting of the orders sought of review.

**FINDINGS AND DETERMINATION**

23. This court finds that the applicant has not satisfied the salient requirements for an order for review to enable this court to grant the application.

24. The application to review the order made on the 24/05/2016 is found to be lacking in merit and is hereby dismissed with costs to the respondent;

It is so Ordered.

**Dated, Signed and Delivered Electronically at Nyeri this 27<sup>th</sup> day of May, 2021.**

**HON.A. MSHILA**

**JUDGE**