REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 235 OF 2001

IN THE MATTER OF THE ESTATE OF SAMSON M'MURITHI

M'MUGAMBI Alias MURITHI S/O MUGAMBI (DECEASED)

JOHN KINOTI MURIUKI..PETITIONER

VERSUS

M'MBIJIWE M'MURITHI...OBJECTOR

JUDGMENT

1. By Summons under certificate of urgency dated 3/08/2020 and expressed to be brought pursuant to section 68 of the Land Registration Act, 2012, Rules 49 & 73 of the Law of Succession Act and Article 159(2) of the Constitution, the objector seeks in the main, the review, setting aside and/or revocation of the grant issued on 14/2/2019.

2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of the objector, M'Mbijiwe M'Murithi, sworn on 3/08/2020. He asserts that he as a son of the deceased herein, he was completely disinherited. He contends that he acquired his land in Kibirichia where he settled long time ago during the lifetime of the deceased. He disputes the allegations by his step brother Samson M'Murithi that, he was bequeathed the land in Kibirichia by the deceased herein. He seeks a share in the estate generally but paragraph 8 reveals the wants to be given a share of the money held in **Barclays Account No.5120006** amounting to **Kshs 1,795,237.**

3. On the date the matter was scheduled to be heard, 8/07/2021, only Mrs. Kaume, for the objector, attended and offered her submissions in the absence of the petitioner and his counsel. The court allowed the matter to proceed because there was evidence that service had been duly effected but not even a response had been filed and served. In her oral submissions, counsel underscored the fact that her client was wholly disregarded in the distribution of the estate yet one by the name Muthamia M'Muriithi was given both land but also two shares of the money in the bank. She contended that the issue was for review for there was nothing to take to the court of appeal.

4. While the application invokes the provisions of Section 68 of The Land Registration Act, providing for inhibitions, no prayer was made in that regard hence that provision is of no assistance to the court. I understand Rule 49, of the Probate and Administration Rules to be the omnibus provision for general application where no specific provision exists while Rule 73 in to reserve the inherent powers of the court to do justice and avoid abuse of its process.

5. In the context of this matter, I take the view that the applicant saw no specific provision to anchor the request for review and setting aside and equate same remedies to nullification and revocation of grant hence there was no invocation of section 76 of the Act.

6. That notwithstanding, however, the application makes a specific prayer and must be resolved by the court on the merits and based on the fact disclosed as applied to the law.

7. In executing the courts mandate I must now pose the question whether a grant can be revoked, set aside or reviewed principally because the objector did not get a penny from the money held in the Barclays Bank? The answer must depend on the relationship with the estate and also whether that allegation is indeed true. In order to determine the question, one must delve at some length on the evidence led during trial. **PW2, Muthamia Samson**, the objector's step brother, testified and said that: -

> **"My father had land at time of death. In 1960, he had 2 pieces of land. He gave Muriuki one land at Kibirichia in 1960. He remained with one at Githongo. Kibirichia land was 8 acres while that at Githongo was 9 acres."**

8. That evidence was not shaken even during cross examination and when the time for the objector to give evidence in rebuttal came, counsel addressed the court and said:

> **"It is only distribution that is in issue. I will now file submissions in 30 days. There is no need of oral evidence. I will one more Affidavit".**

9. The additional affidavit subsequently filed was by one Agnes Nkirote M'Muriithi whose gist was to deny the existence of the will and assert with no exhibit that the land in Kibirichia was bought by the Applicant/Objector.

10. In its reserved judgment, the court after detailed analysis of the evidence pointed out and held that that the deceased had, during his lifetime, bequeathed the objector land in Kibirichia measuring 8 acres. The court said: -

> **"From the evidence, the 2nd administrator got his share of the estate, being land in Kibirichia measuring 8 acres during the lifetime life time of the deceased. I will take the bequest into account.**

11. The court then proceeded to distribute the estate in which the objector 2nd defendant was not given any share over the land in Abothuguchi just like he received no share of the money then lying at the bank. I see in the judgment a clear finding that the court took into account the advancement made to the Objector as a gift *inter vivos* and considered it a sufficient provision to that Objector. Even though the court did not elaborate much on that decision, the law applicable is actually section 42 which provides:

> **42. previous benefits be brought into account where: -**
>
> **a) an interest has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**
>
> **b) property has been appointed or awarded to any child or grandchild under the provisions of section 36 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."**

12. On the basis of that provision I do find no error as a basis to interfere with the judgment of the court. I find that there is no error apparent on the face of the record to justify review nor any ground to set aside. It cannot be a true that he was omitted from the distribution because the court duly took into account the fact that he had obtained a benefit from the deceased. In my view, if the Objector was aggrieved by the decision of the court in the manner he applied the facts to the law, that amount to an error of law that never attract review but an appeal. The fact disclosed here wholly removes the matter from the ambit of review. In the decision in **National Bank of Kenya Limited Vs Ndugu Njau C.A No. 211 of 1996 (UR)** ***"… A review may be granted wherever 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 sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruction of a statute or other provisions of law cannot be a ground for review. In the instant case the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned judge would be sitting in appeal on his own judgment which is not permissible in law …".***

13. In addition, that the objector claims that he was not provided for after a determination on his objection, cannot be a basis to annul the grant. I consider that to be outrightly outside the parameters set by section 76 of the Act.

14. In sum, I find no merit in the application, I consider it wholly unmerited and is otherwise the kind of application that cannot escape the tag as bent of procrastinating the conclusion of the administration in this matter. I direct that it be dismissed with costs.

Dated signed and delivered in Meru this 26th day of July, 2021.

Patrick J.O Otieno

Judge

In presence of

No appearance for parties

Patrick J.O Otieno

Judge