



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 786 OF 2015

MARAGRET KANYUA GITUMA.....1ST PETITIONER

JOHN WYCLIFFE MUREITHI GITUMA.....2ND PETITIONER

VERSUS

GIDEON MWORIA.....1ST RESPONDENT

JOAN KANANA GITUMA.....2ND RESPONDENT

RULING

1. Before the Court is an application dated 19th October 2020 seeking for the Court to review its ruling of 8th October 2020 with respect to the distribution of L.R No. Ruiru/Rwarera/547.

Applicant's Case

2. The Applicant's application is supported by his supporting affidavit sworn on 19th October 2020 and written submissions dated 26th April 2021. The Applicant's case is that land parcel Ruiru/Rwarera/547 was held to form part of the deceased's estate and was allocated to the Respondents. He urges that the land has a dispute which was heard before the DLSO and they lost, but he subsequently appealed against the decision of the DLSA to the Minister and his appeal was successful. He urges that since he was the sole appellant, the Minister explicitly awarded him the said parcel of land. He urges that this is what led him to file the application for review of the ruling delivered on 8th October 2020. He urges that the Court has power of review pursuant to the provisions of Rule 63 (1) of the Probate and Administration Rules.

3. He urges that his application squarely falls under criteria (b) and (c) of Order 45 of the Civil Procedure Rules in that there is an error apparent on the face of the record that land parcel Ruiru/Rwarera 547 was awarded to himself through the land adjudication laws on behalf of the estate and the other error is that the deceased who was involved in the objection proceedings under the land adjudication laws yet the deceased died on 16th October 2014 and the objection proceedings were commenced in the year 2017 without mentioning the acreage being distributed is more than what is on the ground. He relies on the cases of *In re Estate of Livingstone M'mungania (Deceased) (2018) eKLR* and *In re Estate of Oliokampai Sarapae Sanguti (Deceased) (2019) eKLR*.

1st Respondent's Case

4. The 1st Respondent filed grounds of opposition dated 26th November 2020 and written submissions dated 30th June 2021. His case is that the application does not meet the requirements for grant of review and further, that the Applicant already filed a Notice of Appeal dated 14th October 2020 against the ruling that he seeks to review. He relies on the cases of *Stephen Nyasani Menge v Rispa Onsase (2018) eKLR* and *Malindi Civil Appeal No. 100 of 2016 Mary Wambui Njuguna vs William Ole Nabale & 9 Others (2018) eKLR* for the proposition that the options of review and appeal are not simultaneously available to an aggrieved party. He urges that the Appellant, having filed his notice of appeal dated 14th October 2020 exhausted his option to review and cannot be permitted to have a second bite of the cherry.

5. Relying on the case of *Veleo (K) Ltd vs Barclays Bank of Kenya Ltd (2008) eKLR* and *National Bank of Kenya Limited vs Ndungu Njau (1997) eKLR*, he urges that in cases for review, an error on the face of the record must be self-evident not requiring elaborate argument to be established. He urges that the order which is the subject of the present application does not suffer an error apparent on the face of the record and what the Applicant is raising requires examination and argument. He urges that the Court rightfully considered the evidence tendered by the protester regarding the land parcel in question and the response thereto by the Petitioners and made a determination that the said parcel formed part of the estate of the deceased.

2nd Respondent's Case

6. The 2nd Respondent filed a replying affidavit sworn on 29th October 2020 and written submissions dated 19th May 2021. Her case is that the application is an abuse of court process and is without any basis in fact or ground. She urges that the issue with respect to land parcel Ruiru/Rwaera/547 was raised during the hearing by the Respondent who indeed provided the decision of the Land Adjudication Officer and the appeal to the Minister and that the trial Court was alive to the existence of the said property and the litigation process as can be seen at paragraph 33 and 37 of the ruling of the trial Court. She urges that the Applicant was never the owner of the suit property and that the property was at all material times that of the deceased. She further urges that any fruits of any supposed litigation between the administrators and third parties cannot be for the benefit of the administrators to the exclusion of the beneficiaries.

7. She urges that the applicant's application does not fall within the purview of an application for review and the prayers sought amount to seeking the trial Judge to sit on appeal against his own ruling. She further urges that during trial, the Applicant never raised the issues he is now raising and that in any event, the Applicant has stated that he was only pursuing the objection on behalf of the estate of the deceased. She urges that the Court had ordered for valuation of the deceased's estate and as per the Court's distribution, the Applicant actually got properties with higher value than the others and that the Applicant's quest to get Ruiru/Rwaera/547 would deny the other beneficiaries their entitlement and unjustly enrich the Applicant. She finally urges that the Applicant had prior to the filing of the instant application filed a notice of appeal against the ruling and nothing prevents him from pursuing his claim in the Court of Appeal instead of asking the same Court to sit on appeal on its own well considered ruling.

Determination

8. The application invites this Court to consider whether the grounds for review have been met. However, before going into the merits of the application, the Respondents have raised a fundamental preliminary point of law which this Court must determine in priority to the application. Both the 1st and 2nd Respondents urge that the Applicant's application is bad in law for the reason that he had already filed a Notice of Appeal signifying his intention to appeal against the Ruling dated 8th October 2020 which is the subject of the instant application for review. The Applicant failed to respond to this issue in his submissions despite having notice of the same from the Respondent's responses.

9. The Respondents, as this Court understands it claim that the Applicant relinquished his right to file an application for review by reason of filing the Notice of Appeal. This Court has perused the record and has confirmed that a Notice of Appeal dated 14th October 2020 was filed by the Applicant against the whole ruling of 8th October 2020. There is also a receipt showing payment of monies for purposes of filing the Notice of Appeal. The record does not confirm any withdrawal of this Notice of Appeal. This Court finds that the filing of a Notice of Appeal is part of the appeal process and is as good as filing an appeal. Section 2 of the Court of Appeal Rules, 2010 define an appeal as follows: -

“appeal” in relation to appeals to the Court, includes an intended appeal and “appellant” includes an intended appellant.

10. As it stands therefore, there is a valid appeal pending in the Court of Appeal against the decision of this Court delivered on 8th October 2020. It may not matter much that a Record of Appeal is yet to be filed or that the appeal is yet to be heard. The determinant factor here as to the existence of an appeal is the fact of there being a filed Notice of Appeal pursuant to Rule 75 of the Court of Appeal Rules.

11. To this end, Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya which is replicated in Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides for the instances when an application for review may be made as follows: -

Any person who considers 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 allowed

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.

[emphasis added]

12. Accordingly, a litigant who has already preferred an appeal against a decision is barred from filing an application for review against the same decision. The question of whether a party who has filed a Notice of Appeal against a decision is precluded from filing an application for review against the said decision has been the subject of various authorities. This Court dealt with this issue in the case of ***Succession Cause No. 26 of 1998 In the Matter of the Estate of Thomas Mbui Njenge alias Thomas Nchenge (Deceased)*** where I held as follows: -

“In civil procedure practice in Kenya, once a party is dissatisfied with the outcome of a matter, there are only 2 recognized ways of challenging the same. The first is by appeal and the second is by review. These two options are mutually exclusive and cannot be exercised concurrently but there are rules as to when each applies.”

13. The Court of Appeal decision in ***Otieno, Ragot & Company Advocates Vs National Bank of Kenya Limited Civil Appeal No. 60 & 62 of 2017 (2020) eKLR*** where P. O. Kiage and Asikhe Makhandia JJA put the issue as follows: -

“...If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed...”

14. This was also the finding in the Court of Appeal case of *Karani & 47 Others Vs Kijana & 2 Others, Civil Appeals No. 43 and 153 of 1986 (Consolidated) (1987) KLR 557, 562* where Plat JA held as follows: -

“...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal. It would not be possible for example to pray for review because there was error on the face of the record, on the grounds that the court had no jurisdiction to pass the decree or the order complained of, and then by an appeal, complain of misdirections on the evidence. That would be an absurd use of the appeal process, because if the court had no jurisdiction, the misdirections on the evidence would, of course, be unimportant. The proper approach would be to put all the complaints into one appeal.”

See also *African Airlines International Limited Vs Eastern & Southern Africa Trade Bank Limited (2003) 1 EA 1(CAK)*.

15. Consequently, it is clear that the Applicants herein cannot seek review of a decision from which they had already preferred an appeal.

ORDERS

16. Accordingly, for the reasons set out above, this Court makes the following orders: -

i) The Applicant's application dated 20th August 2020 is dismissed.

ii) This being a succession and/or family matter, each party shall bear own costs.

Order accordingly.

DATED AND DELIVERED ON THIS 24TH DAY OF AUGUST, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Mwirigi Kaburu & Co. Advocates for the Applicant

M/S Wandabwa Advocates for the 1st Respondent

M/S Gikundi Anampiu & Co. Advocates for the 2nd Respondent