



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 121 OF 1996

IN THE MATTER OF THE ESTATE OF NGUTHARI MBOGORI(DECEASED)

CHARLES KITHINJI (Suing as the legal representative of the estate

of GERVASIO M'RUKUNGA.....OBJECTOR/APPLICANT

VERSUS

CHRISTINE KAJUJU MWENDA.....PETITIONER/RESPONDENT

RULING

1. By Summons under certificate of urgency dated 11/12/2019 brought pursuant to Rules 49 & 73 of the Probate and Administration Rules, Order 45 Rule 1 of the Civil Procedure Rules, Section 68 of the Land Registration Act and Article 159(2) of the Constitution, the applicant seeks in the main, orders of inhibition against any dealings with **LR NO.NYAKI/MULATHANKARI/551**; the review, setting aside and/or revocation of the grant issued on 22/1/2019 so that the land can revert back to the name of the deceased. The applicant further seeks an order that leave be granted to the applicant to file affidavits of evidence.

2. The application is premised on the grounds set out in the body of the application and the supporting affidavit of the applicant, sworn on 11/12/2019. The gist is that **L.R NO.NYAKI/MULATHANKARI/551 (hereinafter referred to as the suit land)** was a bequest from the deceased herein to his deceased father. All he craves is an opportunity to be heard when the matter is ordered to start afresh. He blames his former advocate for his failure to file affidavits evidence and submissions, despite clear instructions to do so. He contends that the application should be allowed in order to achieve a fair and equitable distribution of the suit land. He has exhibited court proceedings where the deceased only daughter, testified that the land was a bequest to the applicant's father. He has also exhibited an official search to show that the suit land is in real danger of being alienated, as it has already been transferred to a stranger called Joyce Karambu Mbui. He has further exhibited two affidavits he intends to file when the application succeeds to prove his assertion that the land was gifted to his father by the deceased

3. The respondent vehemently opposed the application by the replying affidavit sworn by her advocate on 16/1/2020 in which it is contended that the applicant having been presented at the trial ought to have appealed against the impugned decision to the court of appeal, and not seek review. It is further contended that no good reason has been availed to justify inhibit the suit land as it is already in the name of a 3rd party, an innocent buyer for value.

4. Submissions were filed by both parties on 4/6/2021 and 13/7/2021 respectively. The applicant asserts that his evidence could not be produced by him when the order was made, on account of a mistake on the part of his advocate. He urges the court not to visit that mistake of his previous counsel on him, especially now that he is about to lose his inheritance. He beseeches the court to hear him, to ensure the wheels of justice take their course. He relied on **Re Estate of Mercy Wanjiru Mbiti(deceased) (2019) eKLR, John Manda Juma & anor v Mary Amukowa Watako & anor (2016) eKLR and Mandeep Chauhan v Kenyatta National Hospital & 2 others (2013) eKLR** to support his submissions that negligence of an advocate should not be visited upon his client, when to grant orders of review and that nobody should be condemned unheard.

5. According to the respondent, the applicant has no direct relationship with the deceased and no need for the suit land being subdivided any further as it is slightly less than $\frac{1}{8}$ of an acre. She confirms that she took possession of the suit land even before this case was filed, and subsequently disposed it off to an innocent purchaser whose husband had bought the land way back in 1996 and continues to occupy the land to date. To her, there has not been demonstrated new evidence to warrant interference with the impugned decision and takes the position that the applicant's remedy lies in pursuing his advocate for negligence pursuant to the decisions in **Three Ways Shipping Services (Group) Ltd v Mitchell Cotts Freighters (K) Ltd (2005) eKLR, Charles Omwata Omwonyo v African Highlands & Produce Co Ltd (2002) eKLR and Alice Mumbi Nganga v Danson Chege Nganga & Anor (2006) eKLR.**

6. Being an application for review, the court is reminded that when to grant such order is statutorily circumscribed by law under section 80 and Order 45, Civil Procedure Act. An applicant must demonstrate, a new and important matter of evidence, not capable of being availed at the time the matter was determined, due diligence notwithstanding, an error or mistake apparent on the face of the record or other sufficient reason. However, an application for review is only available where there is no right of appeal or where a right of appeal exists but no appeal has been preferred.

7. In this matter, there was obvious right of appeal pursuant to which the applicant lodged a notice of appeal in this file on 13/2/2019. Under the rules, an appeal to the court of appeal is instituted the moment a notice of appeal is filed. It thus follows that the applicant chose to pursue and appeal in challenging the judgment of 22/01/2019 and he is now not at liberty to come seeking review orders. A litigant must elect either to seek review or to appeal, but not both. That is the law as recently reiterated by the court of appeal in **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR** where the court observed: -

“It is not permissible to pursue an appeal and an application for review concurrently. 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”.

8. It follows that the request for review became untenable the day the notice of appeal was filed. It cannot and does lie that the application for review be urged before this court.

9. However, even if I was to delve on the merits, the materials and facts the applicants seek to be allowed to present to court are not new fact or evidence. I have read the two affidavits annexed and exhibited in the Affidavit in support and I find that the same are not new but could have been availed to court with some due diligence being exercised. So that even if the application for review was not barred by the law under section 80 and order 45 of the Act, the prerequisites for review have not been met and the application is thus devoid of any merits.

10. The application however presents those instances when the law directs the litigant, if he feels let down by counsel, to pursue that counsel and not stand on the way of his adversary in litigation by undoing what has been done within the force and dictates of the law.

11. In the end I find no merit in the application dated 11/02/2019 seeking review. It is for that reason dismissed with an order that each party bears own costs.

DATED SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS THIS 28TH DAY OF SEPTEMBER, 2021

PATRICK J.O OTIENO

JUDGE