



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1828 OF 2010

IN THE MATTER OF THE ESTATE OF MARY NJOKI ZAKARIA (DECEASED)

REGINA WAITHERA KIRUI.....APPLICANT

VERSUS

REHEMA WAIRIMU RAMADHAN.....RESPONDENT

RULING

1. This ruling relates to applications dated 28th October 2019 and 26th November 2019 by the applicant Regina Waithera Kirui against her sister Rehema Wairimu Ramadhan (the respondent). The application dated 28th October 2019 seeks the review of the certificate of confirmation issued on 13th November 2013 and the application dated 26th November 2019 seeks the review of this court's ruling dated 14th October 2019. Both applications were opposed by the respondent.

2. The background of this case is that the deceased Mary Njoki Zakaria died intestate on 15th October 2009. She left several children, but three of them (the applicant, the respondent and their brother Peter Kamau) petitioned the court for the grant of letters of administration intestate. Objections were filed by the deceased's grandchildren. Eventually the grant was issued to the three petitioners on 17th June 2011. The grandchildren applied to have the grant revoked. However, on 13th November 2013 all the beneficiaries appeared before Justice Kimaru. The record shows that there was agreement on who the beneficiaries were and the properties that contributed the estate of the deceased. A consent was recorded on how the properties were to be shared to the beneficiaries.

3. The gist of the applicant's application dated 28th October 2019 is to have reviewed that distribution as it relates to the properties allocated to the respondent. Her case was that the respondent was allocated Dagoretti/Riruta/3455 alone (in the name of Rehema Wairimu) and given Dagoretti/Riruta/5221 (under the name of Rahab Wairimu) to share with her sister Esther Nyokabi. The applicant sought that there be redistribution so that Dagoretti/Riruta/3455 be shared equally between her and the respondent. In the present application the applicant acknowledges that the names Rehema Wairimu, Rehab Wairimu Ramadhan and Rahab Wairimu all refer to the respondent. She has a problem with the respondent having been given Dagoretti/Riruta/3455 alone.

4. This application is easy to resolve. First, the distribution of the estate of the deceased that is contained in the order of the court dated 13th November 2013 was by the consent of all the beneficiaries of the estate of the deceased. The record shows the applicant was present. It is now trite that the court has the discretion to review any of its orders, and that does include consent orders (**Tropical Food Products –v The Eastern and Southern Africa Trade and Another, HC CC (Milimani) No. 1534 of 2001**). However, as was held in **Flora Wasike –v- Wamboko [1988]KLR 429**, the court cannot interfere with or review a consent order except in circumstances that would afford a good ground for varying or rescinding a contract between the parties. The grounds include fraud, mistake, misrepresentation, collusion, an agreement contrary to public policy, absence of sufficient material facts, and so on.

5. **Section 80** of the **Civil Procedure Act** and **Order 45 rule 1(b)** of the **Civil Procedure Rules** give the court power to review a decree or order where it is shown that there has been a discovery of new and important matter or evidence which after due diligence was not within the applicant's knowledge or could not be produced at the time, or that there is some error or mistake apparent on the face of the court, or that there was any other sufficient reason (**Francis Origo & Another –v- Jacob Kumali Mungala [2005]eKLR**). I have indicated that the applicant participated in the distribution of the estate of the deceased. She has not shown that there is any new or important matter or evidence that she has since discovered. She has not pointed to any error or mistake that is apparent on the face of the record. She has not pointed to any other sufficient reason.

6. The estate of the deceased was distributed following agreement of all the beneficiaries. The distribution can only be varied, reviewed or set

aside by the consent of all the parties, or if any of the grounds above is shown to exist. The beneficiaries have not agreed to review the distribution. One of the terms of the distribution was that Dagoretti/Riruta/3455 be given to the respondent. That distribution had a contractual and binding effect in favour of the respondent. (**Brooke Bond Liebig Ltd –v- Mallya [1975] EA 266**). The distribution was equally binding on all the beneficiaries, including the applicant. There is no demonstrated basis to review the distribution of the parcel that was given to the respondent.

7. Secondly, under **Order 45 rule 1(b)** of the **Civil Procedure Rules**, the application to review has to be made without unreasonable delay. What is reasonable time within which to apply for the review of a decree or order depends on the particular circumstances of each case. It is expected that where there has been delay, where the applicant did not bring the application soon after the order that has aggrieved her, she offers reasons for the delay. In this case, the application was brought 6 years later. There was no explanation for the delay. In **John Agina – v- Abdulswamad Sharif Alwi, Civil Appeal No. 83 of 1992**, the Court of Appeal held that such a long delay has to be explained. The delay in that case was 2 years. In the instant case the delay was 6 years. The applicant did not explain why she could not come to court earlier than that.

8. One needs to recall that following the distribution of the estate in 2013 the beneficiaries must have taken steps to comply with it. Any review would certainly materially affect the prevailing positions of the parties who have since 2013 acted on the basis of the distribution, and on the basis of the certificate of confirmation that followed.

9. The respondent raised the issue that the application was *res judicata* under **section 7** of the **Civil Procedure Act**. This is because, on 4th February 2019 the applicant filed an application to revoke the grant on the same grounds that she has sought to review the order of 13th November 2013. She was complaining about the allocation to the respondent. Infact, her claim was that the respondent had been allocated the property when she was not one of the beneficiaries of the deceased. On 14th October 2019 this court dismissed the application for want of merits. I accept that the present application is, to that extent, *res judicata*. The same dispute between the same parties was heard and determined by a competent court.

10. The applicant's application for review dated 26th November 2019 sought to review the decision of 14th October 2019. In her own words, the success of this second application was predicated on the success or otherwise of the application dated 28th October 2019. The applicant has a problem with the ruling of 14th October 2019 in so far as it states that the distribution of 13th November 2013 was by consent. According to her, the distribution was by the order of the court, and not by consent. I have noted in the foregoing that the distribution was by consent, and therefore there is nothing to review. Secondly, it is clear that Dagoretti/Riruta/5221 was to be inherited by the respondent and Esther Nyokabi.

11. In conclusion, I find no merit in both applications by the applicant which I dismiss with costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH JULY, 2020.

A.O. MUCHELULE

JUDGE