



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**SUCCESSION CAUSE NO. 398 OF 2012**  
**(ALSO KNOWN AS SUCCESSION CAUSE NO. 12 OF 1991)**

IN THE ESTATE OF:

MUTANDA WERE.....DECEASED

BETWEEN

CATHERINE NYAORO ALOO ...1<sup>ST</sup> APPLICANT/OBJECTOR

LUCY ANYANGO ONYANGO ....2<sup>ND</sup> APPLICANT/OBJECTOR

AND

OWINO MUSUMBA .....RESPONENT/PETITIONER

AND

GRACE NEKESA .....INTERESTED PARTY

AND

TERESA JOSEPHINE

ANYANGO.....2<sup>ND</sup> INTERESTED PARTY/APPLICANT

**RULING**

1. Teresa Josephine Anyango, the applicant herein, moved the court by way of Notice of Motion dated 16<sup>th</sup> July 2018 under section 93 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules and under Order 45 Rule 1 & Order 51 Rules 1 & 3 of the Civil Procedure Rules. She is seeking the following orders:

- a) That the application herein be and is hereby certified as urgent and service thereof be and is hereby dispensed with at the first instance. [Spent].
- b) That an order of inhibition be and is hereby granted inhibiting any dealings in L.R. Marach/Bumala/219 pending further orders of this court. [Spent].
- c) That the order of this court given on 31<sup>st</sup> January 2017 and issued on 14<sup>th</sup> September, 2017 be and is hereby reviewed and set aside and varied.
- d) That the order made on 18<sup>th</sup> September, 2014 cancelling L.R. Marach/Bumala/1357&1358 and restoring L.R. Marach/Bumala/219 be and is hereby set aside.
- e) That L.R. Marach/Bumala/1899 be restored back in the name of Teresa Josephine Anyango.

f) That costs of this application be provided for.

2. The application was premised on the following grounds:

a) That on or about 5<sup>th</sup> April, 2014 the interested party/applicant herein purchased L.R. Marach/Bumala/1899 measuring 2.07 hectares from one Mildred Kweyu Otsieno at an agreed consideration of Kshs.875,000/= which amount was paid in full and receipt thereof duly acknowledged.

b) That the interested party/applicant was subsequently registered as proprietor of L.R. Marach/Bumala/1899 on 18<sup>th</sup> April 2014 and took possession thereof and planted trees thereon.

c) That Mildred Kweyu Otsieno had bought the whole of the said L.R. Marach/Bumala/1899 from Galcanos Khasakhala who had in turn purchased the same from Owino Musumba, the petitioner herein.

d) That vide summons for revocation of grant dated 15<sup>th</sup> May 2011, the objectors herein sought for among others the following orders:

i) That the grant of letters of administration to Owino Musumba herein and confirmed on 12<sup>th</sup> May, 1993 be and is hereby revoked forthwith.

ii) That the registration of Owino Musumba Mutanda as an administrator on the 25<sup>th</sup> May 1993 and Owino Musumba Mutanda and Grace Nekesa on 25<sup>th</sup> May 1998 as owners and the subdivision on 24<sup>th</sup> May 1995 of land parcel L.R. Marach/Bumala/219 creating land parcels L.R. Marach/Bumala/1357&1358 is hereby cancelled.

iii) That all resultant parcels created from land parcel L.R. Marach/Bumala/219 including Nos. 1357&1358 or any other are hereby cancelled so as to restore L.R. Marach/Bumala/219 in the names of Owuor Aloo, Henry Onyango and Mutanda Were.

e) That on 18<sup>th</sup> September 2014 a consent was entered in the following terms among others:

a) The summons for revocation of 15<sup>th</sup> May, 2011 is partly compromised as follows:

i) The titles to L.R. Marach/Bumala/1357&1358 are hereby cancelled.

ii) Title to L.R. Marach/Bumala/219 is hereby restored to its pre-25<sup>th</sup> May 1993 position.

iii) Parties are at liberty to move the court in respect of prayer 4, 5 and 6 of the application of 15<sup>th</sup> May 2011.

f) That at the time of recording the said consent order, L.R. Marach/Bumala/1358 had long been closed and L.R. Marach/Bumala/1639&1640 created and that, L.R. Marach/Bumala/1639 had been subdivided and L.R. Marach/Bumala/1899 & 1900 created.

g) That L.R. Marach/Bumala/1899 had been sold to Galcanos Khasakhala who had in turn sold the same to Mildred Otsieno and who later sold the same to the interested party/applicant herein.

h) That the interested party/applicant was not served with any notice before her title deed was cancelled and was not party to consent cancelling her title deed.

i) That there is sufficient cause for both the order of this court given on 31<sup>st</sup> January 2017 and consent recorded on 18<sup>th</sup> September 2014 reviewed and or set aside.

3. The petitioner/respondent opposed the application on the following grounds:

a) That the application is premature for the estate of Mutanda Were is yet to be distributed fully.

b) That the application for review lacks merit.

c) That the applicant's title as sought to be protected does not emanate from the share of Mutanda Were.

4. After going through the application, the response thereof and the submissions filed by the parties, the following three issues emerge for determination:

a) Whether review under order 45 is applicable;

b) Whether L.R. Marach/Bumala/1899 formed part of the estate of Mutanda Were; and

c) Whether the interested/applicant has any claim against the estate of Mutanda Were.

5. Order 45 Rule 1 provides as follows:

1) **Any person considering 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 hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

(2) **A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.**

6. In order for an application for review under Order 45 to succeed, the applicant must show that there is discovery of a new and important matter or an error apparent in the face of record. The Court of Appeal in **Muyodi vs. Industrial & Commercial Development Corporation & Another (2006) 1 EA 243**, this Court stated:

**For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay.**

7. The applicant herein having failed to satisfy the requirements of a review, the prayer for review is therefore baseless.

8. This file is very untidy, but I will do the best I can to address the issues herein.

9. There is nothing in record in this case to show when Mutanda Were, the deceased herein, died. The available copies of death certificate relate to Owuori Aloo and Henry Onyango.

10. Succession cause No. 12 of 1991 went missing and by an application dated 8<sup>th</sup> September 2011 in Miscellaneous application No. 174 of 2011, an order for reconstruction was issued on 9<sup>th</sup> October 2012. Apparently, instead of reconstruction, the current file was created.

11. From the evidence on record, Mutanda Were, had one third share in L.R. Marach/Bumala/219.

12. Land parcel No. Marach/Bumala/219 was subdivided and the following parcels were created:

a) Marach/Bumala/1357; and

b) Marach/Bumala/1358.

13. It is worth noting that Mutanda Were was not assigned any share. Later own, Marach/Bumala/1358 was subdivided and resulted into Marach/Bumala/1639&1640. It was out of land parcel Marach/Bumala/1639 that land parcel number Marach/Bumala/1899 was created. The party/applicant was subsequently registered as proprietor of L.R. Marach/Bumala/1899 on 18<sup>th</sup> April 2014 after purchasing the land from Mildred Otsieno.

14. By a consent entered herein on 25<sup>th</sup> May 1993, parties herein agreed to have all the subdivisions revert to land parcel Marach/Bumala/219.

15. The applicant herein entered into a land sale agreement with Mildred Kweyu Otsieno on 5<sup>th</sup> April 2014. She cannot therefore lay any claim against the estate of the deceased Mutanda Were. She is a stranger. Her claim can only be directed to the seller.

16. Upon my perusal of the record, I have noted that the administrator has never rendered accounts as provided for under section 83 (g) of the Law of Succession Act. It provides as Follows:

**Personal representatives shall have the following duties—**

**g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;**

I am therefore giving the administrator herein 30 days of today's ruling to render accounts. Failure to do so, the grant will be automatically be revoked.

17. The application is therefore dismissed with costs.

**DELIVERED and SIGNED at BUSIA this 30<sup>th</sup> day of September, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**