



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.1 OF 2018

ADAN ROBA..... 1ST APPELLANT

ABDIKADIR ROBA..... 2ND APPELLANT

MAKO ROBA.....3rd APPELLANT

VERSUS

ABIBA ROBA GUYO.....RESPONDENT

RULING

The Notice of motion dated 19th November, 2019 seeks the following orders:-

- 1. The Honourable Court be pleased to make an order for stay of the judgement granted on 24th September 2018 with regard to the distribution/share in Plot No.12255/28(IR.No.5325) at Moyale town in Marsabit County and decree issued on 30th October, 2018 pending the hearing and determination of the prayer 4 of this application.*
- 2. The Honourable Court do Review the order/Decree/Judgement of this Honourable Court delivered on 24th September, 2018.*
- 3. The Honourable Court be pleased to order the respondent to pay the appellants/applicants their share of rental income forthwith.*
- 4. That the costs of this application be provided for.*

The application is supported by the affidavit of Adan Roba, the first applicant. The respondent's response was by way of grounds of opposition. Mr. Lakicha appeared for the applicant. Counsel submit that the application seeks a review of the Court's decree. Two issues flow from the judgement of this Court. The first issue is that the judgement state that the applicants were paid their share of the rental income. No such payment has been made. A letter was sent to the respondent's Counsel seeking the payment. The response from the respondent's counsel sought the applicants' bank details but no payment was made.

Mr. Lakicha further submit that the dispute is about the deceased's estate. There is a valuation report that was produced before the Kadhi. The valuation report did not value the property standing on the plot. Parties were not aware of the exclusion of the property. The respondent is benefitting from a property that was not valued. Counsel relies on the case of **MOSES WACHIRA -V- NIELES BRUEL & 2 OTHERS [2013]eKLR**. Counsel further contends that the notice of appeal filed against this Court's judgement is not an appeal.

Mr. Owino for the respondent opposed the application. Counsel maintain that it is the respondent who is the judgement debtor. She is supposed to pay the applicants yet it is the applicants who are seeking stay orders. The applicants are trying to obtain an appeal through the back door. There is no error apparent on the face of the record. No one was disinherited. The shares of each beneficiary were determined. The valuation report is part of the record and has been in Court for over two (2) years. This is not new and important evidence. The applicants filed a notice of appeal and could seek review. Counsel rely on the case of **STEPHEN GATHUA KIMANI -V- NANCY WANJIRA WARUINGI T/A PROVIDENCE AUCTIONEERS Nyeri Civil Appeal No.142 of 2012 (2016)eKLR**

Order 45 rules 1,2(2) and 3 states as follows-

1.(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 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 misstate 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 judgement 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 judgement 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.

(2)(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

3(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same.

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

Similarly Section 80 of the Civil Procedure Act states as follows:-

Any person who considers himself aggrieved –

a. *By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or*

b. *By a decree or order from which no appeal is allowed by this Act. May apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it things fit.*

The application raises only two issues:-

- i. Payment of the applicants' share from the accrued rental proceeds.
- ii. The valuation of the property developed on the plot.

The respondent is not alleging that she has fully paid the applicants their share of the rental income. Counsel for the respondent sought the applicants' account details. I believe this is part of the process of complying with the orders of the Kadhi's court. In my judgment I stated as follows:

“I am satisfied that the deceased's estate has been properly stated and has been distributed.”

The Kadhi shared out the estate and stated the share of each beneficiary. There is no dispute that the applicants have not been paid their share of the rental proceeds. I do not find that there is any error on the face of the records. By indicating that the estate was distributed it does not mean that each beneficiary got his or her own specific share. The word “**distribute**” has several meanings: It also means “**to apportion**,” to “**divide**” or “**to give out**”. Since the respondent is in agreement that she has not paid the applicants their apportioned share of the rental income, I do find that the applicants' request on this issue must fail. Indeed the decree dated 30th October, 2018 only states as follows:-

“1.IT IS HEREBY ORDERED THAT The appeal lacks merit and is hereby dismissed with costs”.

The decree does not state that the applicants have been fully compensated. The payment is being processed and there is no need for further orders.

The next issue involves the valuation of the estate. There is a valuation report done by **PROBITY VALUERS LIMITED** dated 14th November, 2017.

Page two of the report states as follows:-

“THE UNIMPROVED SITE (LAND ONLY) OF LR No.12255/28(LRN.5325) MOYALE TOWN, MOYALE SUB COUNTY, MARSABIT COUNTY.”

Improvements

Erected on the plot are single story commercial and residential buildings. The improvements erected thereon have been ignored in this report since the subject of the valuation is the unimproved site (land component only). The mention of the improvements in this valuation report is for clarity and ease of reference. (emphasis added)

The report further states as follows:

VALUATION

In our opinion, the Unimproved Site Market Value (U.S.V) of the developed leasehold title interest in the property referenced L.R. No.12255/28 (LRN.5325). MOYALE TOWN, MOYALE SUB-COUTY, MARSABIT COUNTY free from all encumbrances and subject to our terms of reference, limiting conditions and general remarks is in the sum of Ksh.8,000,000/=.

Each page of the report indicates at the top that the valuation is only on the land. There is no dispute that the developments on the land form part of the deceased's estate. A succession cause involves the distribution of the estate of a deceased person. It is not clear why the valuers only valued the land and left out the developments thereon. If the court is to close its eyes on the developments, it will be passing over part of the estate to the respondent without having it shared amongst the deceased's beneficiaries. By seeking a review of the judgment of the court, I do find that the applicants are within their right to seek such orders. The respondent should not unfairly benefit from the deceased's estate. The respondent and her children are entitled to their respective shares. Those shares should be determined from a proper valuation of the entire estate. I do find that prayer four (4) of the application dated 19.11.2018 is merited and is hereby granted. The developments on the plot which form part of the estate were left out. This is an error apparent on the face of the record.

In my view when an application for review is made, it should not be taken as an affront to the court which delivered the ruling or Judgement which is the subject of review. It should be taken positively so as to find out if there is any problem with the court's decision. The application gives the court a second chance to see if there is an error or mistake on the face of the record. In short such applications, unless made with ulterior motives, should be viewed positively. The application herein has been made within reasonable time.

In the end, the application dated 19.11.2018 is granted in terms of prayer four (4). The respondent is also directed to pay the applicants their share of the accrued rental income. If no bank details are provided by the applicants, the respondent shall be at liberty to deposit the money in Court.

In order to satisfy the orders of this Court herein, I do order that the same valuer, Probity Valuers Limited, do value the developments on the suit property and file the report in Court. Upon such valuation, the Kadhi to allocate the share of each beneficiary on the valued property. The respondent thereafter to pay the applicants their share of the valued property. This payment is separate from that of the accrued rent. The parties shall share equally the cost of the 2nd valuation report.

In the end, the application dated 19.11.2018 is granted in the above terms. parties shall meet their respective costs of the application.

Dated, Signed and Delivered at Marsabit this 21st day of January, 2019

S. CHITEMBWE

JUDGE