



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause No.127 Of 2001

In the matter of the Estate of Misheck Kibira Kogi (Deceased)

AND

JECINTA WANJIRU KIBIRA.....APPLICANT

VERSUS

SIMON MURAGURI KIBIRA.....1ST RESPONDENT

EPHRAIM WANJAU KIBIRA.....2ND RESPONDENT

ALICE GATHIGIA NYAGUTHII.....3RD RESPONDENT

R U L I N G

The applicant herein Jecinta Wanjiru Kibira is the mother to Misheck Kogi Kibira who is one of the administrators of the Estate of Misheck Kibira Kogi.

On 12th June 2014 he filed summons for confirmation of the grant of the Estate of Misheck Kibira Kogi where he listed the estate of the deceased as

- i) Magutu/Gatei/991 to be shared equally between him and Ephraim Wanjau Kibira.
- ii) Magutu/Gatei/995 to be shared to Jecinta Wanjiru Kibira, his mother.

Protests were filed by Jecinta Wanjiru's siblings; Ephraim Wanjau saying that he was to get 2.00 acres and Misheck 0.5 acres of Magutu/Gatei/991, Simon Muraguri Kibira saying that Misheck could only benefit from his mother Jecinta Wanjiru hence 991 should be shared equally between him, Simon and Ephraim, Elizabeth Thuguri Maina and Njoki John Mutu agreeing with Ephraim Kibira, Alice Gathigia Nyaguthii Kibira another daughter of the deceased.

In my judgment dated 17th January 2018 I resolved the issue by accepting the proposal that Jecinta get Magutu/Gatei/995 and a share of 0.25 acres, out of 991, and the balance shared equally among Simon, Ephraim and Alice Nyaguthii.

Now Jecinta has brought Summons General dated 8th February 2018 seeking orders: -

- 1) THAT the Judgment of 17th January 2018 be reviewed under rule 63 (1) of the P&A rules and order 45 of the CPR.
- 2) THAT the order of distribution made in parcel Magutu/Gatei/991 be substituted with an order distributing it equally among the four beneficiaries- Simon Muraguri, Ephraim Wanjau, Alice Gathigia and Jecinta Wanjiru.

The main ground for this application is that the court is giving Jecinta 0.25 acres out of Magutu/Gatei/991 took into consideration her 0.5 acres in Magutu/Gatei/995. That the respondents had not disclosed to the court that they had been given by the deceased other parcels of land Magutu/Gatei/992, 993 and 994 the same way the applicant had been given 995. That this was new evidence as the applicant had not participated in the proceedings and hence did not have the opportunity to produce the said evidence before court. That it was only the delivery of the judgment that the applicant discovered this new and important information and which was not within her reach at the material

time.

Parties decided to resolve the issue through written submissions. Mr. Kimunya for the applicant submitted that Order 45 rule 1 (1) and 2 was applicable to this case. Order 45 provides for application for review of decree or order: where any person considering himself aggrieved

- a) By a decree/order from which an appeal is allowed, but from which no appeal has been preferred, or
- b) By a decree from which no appeal is allowed

And who or the discovery of new and important matter or evidence which after exercise of due diligence, was not within his knowledge, or could not be produced by him at the time the decree was issued, or on account of some mistake or error apparent on the face of the record, or from any other sufficient reason desires to obtain a review of the decree/order, may apply the review of the judgment to the court which passed the decree/order.

For the respondent it is argued that the applicant is only acting as a proxy for her son; that when the son had shared the estate with his uncle, she had no issue but now that he lost, she is "aggrieved" on his behalf. That her son ought to have appealed the judgment; that her application does not meet the requirements of order 45, as she had all this information all the time the matter was before the court. That she kept aloof for as long as her son was winning but when he lost she was aggrieved.

I have carefully considered the application before me and the rival affidavits, and submissions by counsel.

The issue is whether the application by Jecinta has any merit to warrant review of the judgment of 17th January 2018.

It is not disputed by any of the parties that the deceased was the registered proprietor of Magutu/Gatei/342 which was closed on 4th September 1996 when it was subdivided into 991, 992, 993, 994, and 995. None of the parties disclosed this information to the court. From the documents filed in court it came out that;

- Alice Gathigia Nyaguthii was given no 994 approximately 0.16 Hectares -Ephraim Wanjau Kibira no. 993 approximately 0.67 Ha
- Simon Muraguri Kibira no. 992 approximately 0.67 Ha
- Jecinta Wanjiru no. 995 consent dated 2nd June 1995.
- The deceased left no. 991 to himself.

It is no. 991 that was the subject of my judgment. It is true that the applicant was aware that her siblings were given land by their father. However, I doubt that she was aware of the impact that information would have in the distribution of the remainder of the father's estate.

The deceased died on 10th March 1996. His title was closed on 4th September 1996. It appears that deceased had distributed his land before 2nd June 1995 which is when the consent for the transfer to Jecinta Wanjiru the applicant was given.

Clearly this information about each child having been given a share *inter vivos* was not placed before court when the judgment on 17th January 2018 was made. If that had been before me – it would have been clear that the distribution of no. 991 should not have been pegged on what the applicant already had as each of the beneficiaries already had their "unequal share" as submitted by counsel for the respondent. However, the deceased did not distribute his own share and there was no document to support its unequal distribution.

The deceased died intestate. He was survived by his 5 children and one grandchild who survived her mother. Each of them had received a certain share when he was alive.

Section 38 of the law of Succession Act provides that such estate should be shared equally subject to Section 42. This had only been applied to the applicant herein which creates the sufficient reason for review. If anything it should have been applied across the board.

However, the applicant is not being unreasonable she is only asking that the remainder of her father's estate made up of Magutu/Gatei/991 be shared equally among the 4 beneficiaries. I suppose the deceased had a reason for not distributing the balance to any member of the family, perhaps because it is the home stead where he was living himself hence each beneficiary should have a share of some kind.

In the circumstances of this case, I am persuaded that it was necessary to take into account the beneficiaries had been given a share of the estate by the deceased. His alleged wishes were not ascertainable from what was placed before me. I allow the application, review the judgment of 17th January 2018 and order that the title Magutu/Gatei/991 be shared equally among the following beneficiaries.

Simon Muraguri,

Ephraim Wanjau,

Alice Gathigia

and Jecinta Wanjiru.

No orders as to costs.

Dated, delivered and signed at Nyeri this 22nd day of February 2019.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Mr.Karweru holding brief for Karingithi for 2nd Respondent.

Kinuthia for Kimunya for Applicant.

Mr.Ogesse for Mwaura for Elizabeth Maina and Njoki Mutu.

Mumbua T. Matheka

Judge

22/2/19