**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 341 OF 2009**

**IN THE MATTER OF THE ESTATE OF THE LATE JOHN KINYANJUI NJUGUNA (DECEASED)**

**RACHEL NDUTA KINYANJUI.....1ST APPLICANT**

**MONICAH WAITHERA KINYANJUI.....2ND APPLICANT**

**VERSUS**

**JAMES KINYANJUI KIMANI.....RESPONDENT/OBJECTOR**

**RULING**

1. The summons before court is dated 8/2/2017. Rachael Nduta Kinyanjui and Monicah Waithera Kinyanjui have moved the court for orders;

a) Spent

b) That his honorable court be pleased to review its orders made on 2nd February, 2017 and instead and order the inclusion of the names of the dependents not included in the original grant, to reflect the following as the defendants:

· **Rachel Nduta Kinyanjui**

· **Mary Njeri Warui**

· **Monicah Waithira Kinyanjui**

· **James Kinyanjui Kimani**

c) That the honorable court be pleased to reissue the grant confirmed on 13/10/10 in the names of all the beneficiaries above as joint administrators.

d) That the honorable court be pleased to order that all properties belonging to the deceased be shared out equally among all the beneficiaries.

e) That the honourable court be pleased to order that all properties belonging to the deceased be shared out equally among all the beneficiaries.

f) That the honorable court be pleased to direct the respondent to cease from further interference with the properties of the deceased particularly all that piece of land known as NGENDA/WAMWANGI/298 pending the hearing and final determination of the suit.

g) That this honorable court be pleased to review the orders of 2nd February, 2017 and direct that each party bear their costs, the same being a family matter.

h) That the honorable court be pleased to issue any further directions and orders as may be and expedient to grant.

i) That costs of this application be in the cause

2. Seven (7) grounds are raised in support of the application namely;

> 1. That the court delivered it's ruling on 2nd February, 2017, and failed to give directions on the conduct of the suit in light of the Ruling.
>
> 2. That the proceedings were marred by an apparent error on the part of the Chief's letter which inadvertently failed to include all the beneficiaries.
>
> 3. That the honorable court in applying its mind to the matter and delivering its ruling only applied its mind to only one piece of land, yet the estate of the deceased involves other properties and it would have therefore been prudent to give directions on the matter.
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> 4. That the Respondent herein has been in a wanton spree of destruction by taking down the fence and threatening the applicant with imminent eviction, and the applicant being of the advanced age of 83 years would be rendered destitute.
>
> 5. That the orders sought herein are necessary to promote the ends of justice and to enable the court adjudicate upon and settle all questions involved in this case.
>
> 6. That this being a fairly old matter, and in the wider interest of justice and expediency that the prayers sought herein be granted.
>
> 7. That no prejudice will be occasioned to any party if the orders prayed are granted.

3. The application is further premised on the affidavit of Rachael Nduta Kinyanjui sworn with authority of the 2nd applicant.

4. The gist of the applicant's case is that a grant of letters of administration confirmed on 13/10/2010 was subsequently annulled by this court vide its ruling dated 2/2/2017. The applicants herein were joint administrators in respect of that grant.

5. The mainstay of the said ruling was that the administrators had not included all beneficiaries and it is explained that this arose from an omission by the chief to include some names.

6. The applicant seeks that the omitted names be included and that all the beneficiaries be administrators.

7. The respondent is accused of pulling down a fence in one of the properties of the deceased and has threatened to evict the applicant.

8. The application is opposed and six (6) grounds of objection are on record. The grounds are;

> 1. **THAT** the applicant is not entitled to the orders sought as the said summons amounts to abuse of the court process.
>
> 2. **THAT** this application is misconceived, bad in law and is a gross abuse of this Honourable's Court process.
>
> 3. **THAT** there is no new evidence or new facts to warrant review of the orders issued on 2/2/2017.
>
> 4. **THAT** there is no by the beneficiaries on the proposed mode of distribution.
>
> 5. **THAT** this honourable court has no jurisdiction to further entertain this cause.
>
> 6. **THAT** the summons is bad in law for want of material facts and non-disclosure that the deceased herein had sold parcel of land number Ruiru East/Juja East/Block 2/1255 to Uhuru Welfare Association.

9. Directions were given that the application be canvassed by way of written submissions. A perusal of the record shows that only the respondent's submissions are on record.

10. The issue for determination is whether the applicant has met the threshold set in law for the grant of orders of review.

11. The principles applicable in an application for review are well illuminated by this Court (***Visram J***, as he then was) in **JAMES M. KINGARU AND 17 OTHERS vs. J.M. KANGARI & MUHU HOLDINGS LIMITED & 2 OTHERS (2005) eKLR** where the judge held;

> **"Applications on this ground (review) must be treated with caution. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial."**

12. The position is further elucidated in the decision of the Court of Appeal in **NATIONAL BANK OF KENYA LIMITED vs. NDUNG'U NJAU Civil Appeal No. 211 of 1996** (unreported) where the Court of Appeal held;

**"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute of other provision of law cannot be round for review" ".. the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wring conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it."**

13. I agree with the respondents that the application before court is misconceived, bad in law and indeed an abuse of the court process.

14. The application is premised on **Rule 26** of the **Probate and Administration Rules**. The rule provides;

**"26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.**

**(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.**

**(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.**

15. That particular rule has nothing to do with the application for the review of the orders of court. Even ignoring the wrong provision relied on and going to the substance of the matter as would be required of this court by **Article 159(d)** of the **Constitution**, on the material before court there is no evidence whatsoever to show;

1. The discovery of new and important matter.

2. The existence of mistake or error apparent on the face of the record.

3. Any sufficient reason warrant review.

16. In view of the above, the application before court is without merit.

17. The application has however achieved one thing. It was brought to light the fact that the administration of the estate of John Kinyanjui Kimani went in limbo since the delivery of the ruling of court dated 2/2/2017. It would have been expected that the beneficiaries would have taken appropriate steps to move the cause forward.

18. In the circumstances I proceed to dismiss the summons dated 8/2/2017 and make the following orders;

**1. The summons dated 8/2/2017 is dismissed.**

**2. Each party to bear its own costs.**

**3. This cause be mentioned before court on a mutually agreed dated for further directions as to the administration of the estate of the deceased.**

**Dated** and **Signed** at **Nakuru** this **20th** day of **February, 2019.**

**A. K. NDUNG'U**

**JUDGE**