



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 157 OF 2011

IN THE MATTER OF THE ESTATE OF PAUL ISAKA ODERA MBECHÉ ALIAS ISAKA ODERO MBECHÉ ALIAS PAUL ODERO ISAKA MBECHÉ ALIAS PAULO ISAKA (DECEASED)

BETWEEN

PEREZ AKECH ODERO.....APPLICANT

AND

ISAAC MBECHÉ ODERO.....1ST RESPONDENT

BENTA ODERO.....2ND RESPONDENT

RULING

Background

1. By a ruling dated 18th May, 2018, the court dismissed the applicant's claim that the deceased had given her **KISUMU MUNICIPALITY/BLOCK 8/211 (hereinafter referred to as the disputed property)** as a gift *inter vivos*.
2. The court further ruled that the disputed property is part of deceased's estate.

Application

3. The applicant seeks to review the court's order dated 18th May, 2018 referred to hereinabove. The Notice of Motion dated 10th September, 2018 is premised on Section 80 of the Civil Procedure Act Cap 21 Laws of Kenya, Order 45 Rule 1 and all enabling provisions of the law and seeks orders that:

1. This Honourable Court be pleased to set aside the orders issued vide Ruling dated 18th May, 2018 and any other consequential orders

2. This Honourable Court be pleased to review its ruling dated ruling dated 18th May, 2018 to allow the applicant keep her home situate in KISUMU MUNICIPALITY/BLOCK 8/211

3. The costs of this application be provided for

4. The application is based on grounds among others that the deceased had undertaken to transfer **the disputed property** to the applicant as a gift and that applicant has no other place to go or call home.

5. The application is also supported by an affidavit sworn by the Applicant on 10th September, 2018 in which she reiterates the grounds on the face of the application.

6. The application is opposed on the basis of a replying affidavit sworn by the 1st respondent on 6th November, 2018. In summary, the 1st respondent avers that the issues in this application were determined by the ruling dated 18th May, 2018 and that the applicant's remedy lies in an appeal.

Analysis and Determination

7. I have considered the application in the light of the supporting affidavit and the replying affidavit and annexures thereto.

8. The issue in question is whether the applicant has satisfied the threshold for grant of an order of review. Order 45 of the Civil Procedure Rules which as follows:

1. (1) Any person considering himself aggrieved-

(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.

9. In the case of *National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR*, the Court of Appeal stated with regard to review:-

“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 require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor 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 or other provision of law cannot be a ground for review.”

10. It is not disputed that the issues raised in this application were determined by way of a ruling dated 18th May, 2018 where Majanja J ruled that *the disputed property* is part of deceased's estate.

11. The Applicant has a right of appeal against the court's ruling dated 18th May, 2018 but she has not taken that path. Applicant has not demonstrated the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within her knowledge or could not be produced by her at the time when the impugned ruling was passed, or some self-evident error or omission on the face of the record, or any other sufficient reason that would entitle her to an order of review.

12. If the applicant is of the view that the court erred in making the impugned orders, then her remedy lies not in seeking a review of the orders but in filing an appeal.

Disposition

13. From the foregoing analysis, I have come to the conclusion that the notice of motion dated 10th September, 2018 is devoid of merit and it is dismissed with costs to the Respondents.

T. W. CHERERE

JUDGE

DELIVERED AND SIGNED IN KISUMU THIS 14th DAY OF March, 2019

F.A. OCHIENG

JUDGE

In the presence of:

Court Assistant - Felix

Applicant - Miss Kwamboka for Mwamu

Respondents - Yogo