



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 364 OF 2006

IN THE MATTER OF THE ESTATE OF THE LATE SOLOMON ARACHI KIRIMANIA (DECEASED)

JENNIFFER WANZA KATIVANGA.....PETITIONER

-Versus-

ZIPPORAH GACEKE M'ARACHI PETITIONER

RULING

1. The Summons dated 1st February 2019 which is expressed to be brought pursuant to **Rule 49, 63 and 73 of the Probate and Administration Rules, Section 80 of the Civil Procedure Act, CAP 21 Laws of Kenya and Order 45 of the Civil Procedure Rules 2010** seeks:-

a. The court to review the ruling delivered on 30th October 2019; and

b. Order that the Applicant and the children of the late David Kirimania M'Arachi are entitled to 6 acres of the estate land.

2. The grounds for applying are set out in the application and supporting affidavit of Jenniffer Wanza Kativanga sworn on 1st February 2019. It is averred that the applicant and her children occupy a total 6 acres of the estate property and not 2 ½ acres as erroneously captured. The mistake arose due to the fact that part of the estate property is arable while another part is completely unproductive. They occupy 6 acres, 2 ½ is arable while the rest of the land is unproductive. The petitioner is in agreement as she stated that the children and she are in occupation of a total of 6 acres of the estate. It was stated that review sought shall not prejudice any party in any way as the portion of land they occupy is distinct and not disputed.

3. The review was opposed vide the replying affidavit of Zipporah Gaceke M'Arachi sworn on 6th April 2019. She deposed that the court's findings were based on the evidence presented by all and she believes that there was no error apparent on the face of the record. The contention by the applicant that part of the land that comprises of the estate is totally unproductive is unhelpful. That the applicant is out to delay this matter and review sought is uncalled for.

ANALYSIS AND DETERMINATION

4. In this case, is review merited?

5. Review is provided in **Order 45 of the Civil Procedure Rules 2010**. See also **Rule 63 of the Probate and Administration Rules**. **Order 45** provides:

“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 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.”

Accordingly, for review to be ordered, it must be shown:

- a. That there is discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- b. There is a mistake or error apparent on the face of the record, or
- c. Any other sufficient reason exists,
- d. And that the application was made without unreasonable delay.

6. In this case, the applicant is citing existence of some mistake and error apparent on the face of the record. Her argument is that she and her children are in occupation of 6 acres of the estate and not 2 ½ acres as was erroneously captured. According to her, the mistake arose due to the fact that part of the estate property is arable while another part is not. Also, that the respondent conceded through her affidavit that her grandchildren occupy 6 acres.

7. The ruling was delivered on 30th October 2018 and application for review made two months later. The delay has not been explained. Nonetheless, I will determine the application on merit.

8. In the ruling dated 30.10.2018, at 8, I noted that the petitioner deposed that, in distributing the estate, she will take into consideration the fact that her grandchildren occupy 6 acres of the estate property. The only problem was that the applicant had been left out completely from the estate and I cured that by making a specific provision for her and her children. This decision was based on the averments by the applicant that she and the children live and work on 2 ½ acres. I should state nonetheless, that, where an alleged error or mistake apparent on the face of the record requires copious explanations or need to interrogate evidence in order to prove, such is not an error or mistake apparent on the face of the record envisaged in the remedy of review. The error or mistake for which review should be granted is one which is readily discernible without probe of evidence. In this case, the applicant wants the court to interrogate evidence afresh and make major alteration in the mode of distribution of the estate confirmed by the court. If for any reason, the petitioner fails to take into account the grandchildren and their occupation of 6 acres as she undertook under oath, the parties concerned may appeal or take out other appropriate proceedings and have their rights vindicated. But I do not think review is the proper method to use in these proceedings.

9. Consequently, I find that there is no error or misstate apparent on the face of the record. Accordingly, the application is unmeritorious and is dismissed.

Dated signed and delivered in open court this 27th May 2019

F. GIKONYO

JUDGE

In presence of

Kariuki for applicant

Gatari for Petitioner

F. GIKONYO

JUDGE