



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 240 OF 2009**

**In the Matter of the Estate of M'barutua Kithia Kingili Alias Barutua Kithia (Deceased)**

**JOHN MEME MBARUTU.....APPLICANT**

**-VS-**

**STANLEY KARURU M'BARUTUA.....1<sup>ST</sup> RESPONDENT**

**JACOB MITHIKA M'BARUTUA.....2<sup>ND</sup> RESPONDENT**

**RULING**

[1] Before me is a Motion dated 3<sup>rd</sup> May 2019 in which the applicant/petitioner seeking the following orders:

**1. SPENT**

**2. SPENT**

**3. THAT the honorable court be pleased to review its judgment delivered on 4<sup>th</sup> April 2019 as follows**

***a) That the amount of Kshs. 1,160,000/- deposited in the account operated by the three administrators jointly be released and distributed to the applicant herein only***

***b) That Plot No. 434 Kangeta Adjudication section be distributed to***

***i. John Meeme***

***ii. Peter Murungi***

***iii. Jacob Mithika***

***iv. Charles Kubai***

***v. Isaac Kiili***

***c) That the Plot No. 13B Kiegoi deceased share be distributed to Peter Murungi***

***d) That Plot No. Njia /Kiegoi 1135 be shared equally to***

***i. John Meeme***

***ii. Peter Murungi***

***iii. Jacob Mithika***

*iv. Charles Kubai*

*v. Isaac Kiili*

*vi. Janet M'barutua*

*vii. Pauline M'barutua*

*viii. Nkatha M'barutua*

*e) Plot No. 434 Kangeta Adjudication Sections be shared equally to*

*i. John Meeme*

*ii. Peter Murungi*

*iii. Jacob Mithika*

*iv. Charles Kubai*

*v. Isaac Kiili*

*f) Shares Account No. 0010815 Barclays Bank to John Meeme*

#### **4. THAT cost be in the cause**

[2] The grounds upon which the application is grounded are set out in the application and the supporting affidavit of John Meme Mbarutu sworn on 3<sup>rd</sup> May 2019. It is argued that there was material evidence that was not presented to the court during the hearing which was material and substantial. That when the applicant filed the cause he got the amount Kshs. 1,160,000/- which he distributed equitably amongst all the beneficiaries of the deceased. Being asked to deposit the money again will occasion loss on the applicant. What's more, prior to the deceased death he had shared and distributed part of his properties to children of the two elder wives and all that was left belonged to only the children of the 3<sup>rd</sup> wife. Thus, the distribution was made to wrong beneficiaries hence the review is merited.

[3] This was opposed vide the affidavit of Jason Kabilu M'barutua sworn on 30/9/2019. He deposed that it is not true that there was material evidence which was missing when the court made the judgment delivered on 4/4/2019. It is not true that the deceased had prior to his death shared and distributed part of his estate to the two elder wives and that all that was left belonged to the children of the 3<sup>rd</sup> wife. Moreover, the allegations that the amount of Kshs. 1,160,462/- was distributed amongst the beneficiaries is not true. The issues with regard to this amount were tackled by the ruling dated 13/3/2017. It was stated that Njuri Ncheke Council has no jurisdiction to deal with matter that was pending and had been determined by the court.

[4] This matter was canvassed by way of written submissions. The applicant submitted by reiterating what he had stated. The respondent submitted recapping what he had stated. He added that the applicant has failed to prove that there is discovery of new evidence which was not within this knowledge or could not be adduced at the hearing as provided for under **Order 45 Rule 3 (2) of the Civil Procedure Rules**. He relied on the case of **Leonard Mutua Munyao & another v Attorney general & another [2018] Eklr**

#### **ANALYSIS AND DETERMINATION**

[5] The issue for determination is **whether the review is merited?**

[6] According to **Rule 63 of the Probate and Administration Rules, Order 45 of the Civil Procedure Rules** is one of the Orders that is applicable to probate and administration proceedings. **Order 45** spells out the instances a court may review an order or decree: one or more of the following grounds; **(a) 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) on account of some mistake or error apparent on the face of the record, or** **(c) for any other sufficient reason. But the application has to be made without un reasonable delay.**

[7] The applicant alleges that there is discovery of new and important evidence which is material and substantial to the cause to wit; (a) is that the amount of Kshs. 1,160,000/- that he was required to deposit was already distributed to the beneficiaries. Thus requiring him to do so would occasion him harm. (b) That while the matter was pending in court the beneficiaries appeared before Njuri Ncheke council of elders and agreed in writing that the applicant shared with them the amount that had been withdrawn. The applicant produced proceedings dated 16/1/2019, 23/1/2019, 13/2/2019, 11/3/2019 and 3/4/2019 to evidence this.

[8] On 8/9/2017 this court made its ruling on this matter. It directed the applicant to deposit the amount in issue in a bank account in the joint names of the administrators. However, it seems that the applicant tabled the issue before the Njuri Ncheke about two years later where allegedly the beneficiaries acknowledged receipt of the money. This was denied by the respondent who stated that he was not present at the meeting. Of greater concern is that the Applicant tabled this issue before Njuri Ncheke Council of Elders knowing too well that the court had decided on it. Needless to state that the said Council has no jurisdiction to deal with the matter that had already been determined by the court. By tabling the matter before the Council the Applicant acted in violation and defiance of the court order on the issue. The "decision" by the

Council was therefore a nullity *ab initio* and of no legal significance; it cannot constitute discovery of new and important matter that was not within the knowledge of the applicant and could not be produced by him at the time of the decision by the court.

[9] The other argument was that the deceased had already distributed his estate to the families of the two elder wives and that the remaining belonged to the children of the third wife whom the applicant is part of. In the judgment delivered by this court on 4/4/2019 it considered this matter in great length after hearing evidence and made its determination. Hence making it *functus officio* as it determined this issue with finality and cannot then again re-open and hear it again. This was appropriately summarized in the case of *Jersey Evening Post Ltd vs. Al Thani [2002] JLR 542 at 550* which was cited and applied by the Supreme Court in *Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others [2013] eKLR* that:

**“A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”**

[10] *It is worth noting that there is nothing that places this case within the exception to the doctrine of finality, that is, where the court itself has made such an egregious mistake that grave injustice to one or more of the parties concerned would result if the court’s erroneous decision were to form the basis of an estoppel against the aggrieved party. In such a case, the tension between the justice principle and the finality principle is resolved in favour of the former.*

[11] In any event, if the applicant is dissatisfied with the judgment he should file and appeal rather than apply for review on grounds that are not potent. Notably, in the judgment the court distributed the remaining part of the estate amongst the daughters and wife of the deceased for they were the only beneficiaries who had not been catered for. The applicant’s proposal is one that is filled with greed for he does not take into consideration the other beneficiaries in spite of the law promoting equality and the court having determined this. The arguments that John Meme, Peter Murungi, Jacob Mithika, Charles Kubai & Isaac Kiili have homesteads on Plot No. 1135/Njia/Kiegoi but not on the entire land would profit an appeal.

[12] Accordingly, I find no merit in the application and I dismiss it with costs to the Respondents.

**Dated, signed and delivered at Meru in open court the 17<sup>th</sup> day of December, 2019**

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**F. GIKONYO**

**JUDGE**

**IN PRESENCE OF**

**Otieno C for Mutembei for petitioner**

**Murango for objector – absent**

**All parties are present**

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**F. GIKONYO**

**JUDGE**