



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO 984 OF 2014**

**IN THE MATTER OF THE ESTATE OF SAMUEL MUNGAI WANDUNG'U CHARAGU**

**(DECEASED)**

**VERONICAH WANJIRU.....APPLICANT/RESPONDENT**

**VERSUS**

**OBADIAH NDUNG'U MUNGAI.....RESPONDENT/APPLICANT**

**RULING**

This is a ruling in respect of the Application for Review, filed on 29<sup>th</sup> March 2016, of the Judgment of 25<sup>th</sup> September 2015 as far as the distribution of the estate of the deceased is concerned.

The Applicant/Respondent prays for orders that the distribution of the estate of the deceased be as per the schedule in Paragraph 26 of her affidavit.

The said Paragraph 26 provides a schedule of distribution in which the Applicant/Respondent proposes the manner in which she would like the orders of 25<sup>th</sup> September 2015 to be reviewed and the certificate of confirmation of Grant rectified. She seeks the whole of Land Title Number Ndumberi/Ndumberi/1394 and the whole of Gatatha Farmers Company Limited Share Certificate No. 766. She also states therein that Shares in Karagita (East Africa Limited) are to be awarded to the Respondent/Applicant wholly. The Applicant/Respondent also seeks that costs of this said Application be provided.

The Applicant/Respondent has based her Application for review on the grounds inter alia that:

- 1. The said Judgment and orders contain an error apparent on the face of the record as they gave the Applicant more than he asked for.**
- 2. The Applicant/Respondent's lawyer failed to file any opposing documents on behalf of the Applicant/Respondent at no fault on her part.**
- 3. The Application proceeded unopposed while the Applicant/Respondent all along believed that the application was opposed on her behalf.**
- 4. The Judgment and orders have disinherited the Applicant/Respondent.**

In her Affidavit in support of the said Application, the Applicant/Respondent averred that she did not know that her advocates failed to file affidavits or written opposition to the prayers in the Applicant/Respondent's summons dated 17<sup>th</sup> April 2014 until after judgment was given in his favour and she was served with the order of the court of 25<sup>th</sup> September 2015. She further averred that she was served with the said order on 27<sup>th</sup> November 2015 after which she approached the Advocate, C.Mwangi Gachichio to take appropriate action and seek justice for her.

The Applicant/Respondent was the sole administrator of the estate of the deceased after the Senior Principle Magistrate's Court at Kiambu, in Succession Cause no. 97 of 1998, granted her letters of Administration intestate on 23<sup>rd</sup> June 1998 as she was the surviving widow of the deceased and thereafter issuance of the Grant, his personal representative. The said Grant was confirmed on 16<sup>th</sup> August, 2000. She later had it rectified on 20<sup>th</sup> June, 2013 to include Gathatha Farmers Company Ltd share certificate No. 766 and she claimed that family members consented to her obtaining the shares absolutely.

The Respondent/Applicant stated that he and the Applicant/Respondent agreed to share 50%/50% the shares in Gathatha Farmers Ltd and as a result he received dividends up to 2013 when the same was stopped without notice to him. Upon enquiry, he was informed that the Applicant/Respondent obtained a grant that showed she was to benefit from the said share wholly. The Respondent/Applicant stated he had not given consent to the amendment of the grant in 2013. He thereafter sought a **Revocation** of the said Grant vide a **summons for revocation of Grant filed on 25<sup>th</sup> April 2014** with sufficient grounds. Kimandu Gichohi & Company Advocates entered appearance on 12<sup>th</sup> May 2014. Hearing notices were duly served on them by the court process server to attend the hearing however they never appeared. The Applicant/Respondent did not file a Replying affidavit nor did she attend Court. She later filed a Notice of change of Advocates on 13<sup>th</sup> May, 2015 and Kenya Human Rights Commission came on record as her representative. The Commission was duly served with the hearing notice as evidenced by affidavit of service filed on 28<sup>th</sup> July, 2015. The Commission did not appear in Court or present any reasons for the Court to consider. The hearing proceeded *ex-parte*.

Judgment was thereafter delivered in favour of the Respondent/Applicant revoking the Grant issued on 16<sup>th</sup> August 2000 and rectified on 20<sup>th</sup> June 2013 including all consequential transactions if any.

The court further ordered that Gathatha Farmers Company Limited Certificate No. 766 be distributed wholly and absolutely to Obadiah Ndungu Mungai son to the 1<sup>st</sup> wife of the deceased **LILIAN WANJIKU MUNGAI** (deceased) and that the share certificate No. 766 in the name of **VERONICAH WANJIRU MUNGAI** be revoked forthwith and be registered in the Respondent/Applicant's name and he shall receive the dividends. Each party was ordered to bear their own costs of the suit.

It is on this premise that the Applicant/Respondent has approached the court by way of the Application for Review, filed on 29<sup>th</sup> March 2016 seeking a review of the above distribution.

The Respondent/Applicant, through his Advocates opposed the Application for review and relied on the following Authority;

**Pancras T. Swai vs Kenya Brweries Limited (2014) eKLR** which was an appeal arising out of a Ruling from the High Court of Kenya by Lesiit, J. the three judge bench stated that;

***“...basing a review application on the failure by the court to apply the law correctly faulted on the decision on a point of law. That was a good ground for appeal but not for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because the Judge has failed to apply the law correctly or at all a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus officio and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts...”***

## THE LAW

The judgment of this court against which review has been brought by Applicant/Respondent is a judgment in default of Appearance. The grounds set forth for review are grounds for Appeal.

A review simply means to look again. **Section 80 of the Civil Procedure Act Cap 21 Laws of Kenya** grants the substantive right of review while **Section 45 of the Civil Procedure Rules,2010** sets out the grounds thereof.

According to **Order 45 Rule 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.*

Review is an exemption to the general rule that once a court pronounces itself on a decision it becomes *functus officio* in that it allows the same judge who delivered the judgment to go over it again and make corrections thereto. However the court can only review a judgment on the grounds set out under **Order 45 (1) of the Civil Procedure Rules,2010** as above stated on;

- **The discovery of new and important matter or evidence.**
- **A mistake aparent on the face of the record.**
- **Any other sufficient reason (however such a reason must be within the confines of the first two grounds.)**

This court has discretion in making provisions for dependants. **Section 27 of the Law of Succession Act, 1984** states as follows;

*In making provision for a dependant the court shall have **complete discretion to order a specific share of the estate** to be given to the dependant, or to make such other provision for him **by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.***

Applying for review challenging an order of the court on the ground that the Applicant was awarded more than he asked for amounts to challenging the law and this can only be done via Appeal.

The Applicant Respondent was previously awarded property in Land Title Ndumber/Ndumberi/1394 and thus cannot claim to have been disinherited. That notwithstanding, this would also be a ground for appeal and not for review since the Applicant/Respondent is challenging the decision of this court based on the law.

This court is convinced by the Authority adduced by the Respondent/Applicant; **Pancras T. Swai vs Kenya Breweries Limited (2014) eKLR**. On the premise that parties should not be allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because the Judge has failed to apply the law correctly or at all.

**Order 45, Rule3 (1) provides that “Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application”.**

This Application is therefore dismissed as per Order 45 Rule 3 of the Civil Procedure Rules, 2010 as this court finds no sufficient grounds for review in the Application. Any aggrieved party may apply.

**DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 28<sup>TH</sup> DAY OF JUNE, 2017.**

**M. MUIGAI**

**JUDGE**

*In the presence of:*