



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 195 OF 2003

M'ÍTUNGA M'KIUNGA PETITIONER/APPLICANT

VERSUS

M'RIMBERE M'IKIUNGA RESPONDENT

RULING

1. Before me is a Motion on Notice dated 23rd March, 2017 expressed to be brought under Section 45 of the Civil Procedure Rules (sic). The same sought that pending the hearing and determination of the Motion, an order of inhibition be issued against LR NO. KIIRUA/RUIRI/RUIRI/6368-6372 (formerly land parcel no. KIIRUA/RUIRI/330). It further sought that the judgment made by this court, Mary Kasango J, on 29th September, 2011 and the subsequent orders be reviewed.

2. The Motion was opposed vide Grounds of Opposition dated 11th April, 2017. These were; that the Court was *functus officio* since the judgment has been executed and each beneficiary issued with title for his portion; that the Applicant was a vexatious litigant and that there was no substantive prayer in the Motion capable of being granted.

3. It was ordered that the parties file their submissions but the record shows that it is the Applicant only who complied with that order. It was submitted for the Applicant that the judgment of 24th Judgment was delivered to the effect that the estate of the deceased be distributed equally to his beneficiaries on the mistaken believe that they were in occupation thereof, yet those in occupation thereof were only two (2). The case of **Edward Kiarie Thiongó v. John Chege Ngethe & 2 Others Nbi Succ. Cause No. 2008** was cited in support of that submission.

4. It was further submitted for the Applicant that since the deceased died in 1968, the law applicable was the Meru Customary Law and not the **Law of Succession Act, Cap 160** Laws of Kenya which came into effect in 1981; that in the premises the evidence of the elders who held a meeting in 1982 to resolve the dispute should have been considered. **Sections 51 of the Evidence Act Cap 80, 52(2) of the Law of Succession Act and 3(2) of the Judicature Act** as well as **Rule 64 of the Probate and Administration Rules** were cited in support of the said submissions.

5. As regards the application of **Order 45 of the Civil Procedure Rules** to the application, Counsel for the Applicant submitted that, the impugned judgment was based on a false presumption that all the beneficiaries of the deceased were in occupation of the subject property yet only two were in occupation thereof. The case of **In the Matter of the Estate of M'Murungi M'Maitima (deceased) Meru Succ. Cause No. 274 of 2000** was cited in support of that submission. The Applicant concluded by submitting that the Court was not *functus officio* and the oxygen principles in **sections 1A and 3a of the Civil Procedure Act** and the case of **Jersey Evening Post Ltd v. Ai Thani (2002) JLR 542** were relied on in

support of that submission. It was therefore urged that the application be allowed.

6. This is an application for review under **Order 45 of the Civil Procedure Rules**. That Order provides:

“45.1. (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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

7. It is clear from the foregoing that the power of the Court to review its order or judgment/decreed under that order is discretionally. It will be exercised where there is an error apparent on the record or where there has been discovery of new evidence which was not in the possession of the applicant and could not have been obtained by him despite exercise of diligence by him and for sufficient cause. Such application should be made within a reasonable time.

8. The background to the present application is that in or about February, 2003, the Applicant petitioned for grant of letters of administration intestate for the estate of his father, the late M’Ikiunga M’Iriria. In Form No. P&A 5, he disclosed that the beneficiaries of the estate were himself and two sisters who were both deceased. The grant was issued and later confirmed in his favour. However, when the Respondent got wind of the Succession Cause, he applied for the revocation thereof. At the hearing of that application, in addition to Affidavits, oral evidence was called by both the Applicant and the Respondent upon which the Court (Emukule J) found that the Applicant had lied as to who were the real beneficiaries of the deceased. The Court also found that contrary to the Applicant’s assertions that his late father had given land to his brothers leaving him, the Applicant was not landless. The Court made firm factual findings based on the testimony of the witnesses which the parties had paraded before it.

9. Upon the grant being revoked, the Applicant and the Respondent were appointed joint administrators of the estate of the deceased. The Applicant did not challenge the findings which the Court had arrived at. The parties proceeded to file written submissions whereby Kasango J held, inter alia, that:-

“The evidence adduced before the court during that hearing was that all the deceased sons who included the petitioner had other land the court by its aforesaid ruling stated as follows:-

‘What clearly emerges is that the sons of M’Ikiunga M’Iriria were in 1965 and after, beneficiaries of government settlement in large tracks of land. Iriria himself was the beneficiary of Kiirua/Ruiru/300 which the petitioner seeks to appropriate to himself in this cause.’

That finding has not been challenged in an appeal. I am therefore bound by that finding. ... The written submissions were filed by the petitioner where he submitted that

that the deceased had in his lifetime had given the other beneficiaries his brothers land in his lifetime. He therefore sought that parcel No. 330 be wholly given to him. That argument had been rejected by this court in its ruling dated 19th December 2008 as quoted above. ... That mode of distribution, that is, dividing the parcel equally amongst the beneficiaries is the one which the court will adopt. The court will adopt it because it is bound by the findings of this court by its ruling of 19th December 2008 which found that none of the beneficiaries obtained any benefit from the deceased in his lifetime.

10. It is clear from the foregoing that the parties were allowed to and they actually called viva voce evidence at the hearing of the application for revocation. The issue as to whether the deceased had bequeathed any of his children any property arose and was conclusively decided upon on the basis of the evidence the respective parties tendered. Indeed, in its judgment, the court found that it was bound by the aforesaid findings. That is a natural cause of events as the court had already made a firm finding on the very same facts which had not been appealed against.

11. The Applicant has not disclosed who these elders who participated in the 1982 dispute resolution are; whether they testified during the hearing of the application for revocation, and if not, why they did not. It is not in dispute that the issue of whether or not the deceased had given property to some of his children arose and was decided upon at the stage of revocation. To my mind, that is the stage at which those elders should have testified. There are no reasons that have been advanced why they did not. If they testified and their evidence was ignored, the Applicant's remedy was to appeal against the finding against their evidence and not to review the judgment.

12. In this regard, this Court's finding is that there is no error on the face of the record to warrant the review of the judgment. Further, the Applicant has not established that the evidence of the alleged elders is a discovery of new evidence which the Applicant could not have availed at the time of distribution despite due diligence. To this Court's mind, the evidence of the alleged elders must have always been in the possession of the Applicant and he could have, if he so wished, tendered the same to the court at the hearing of the application for revocation for consideration by the court.

13. In this regard, whilst the cases referred to by the Applicants are correct as to the principles enunciated therein, they are not applicable in this case because of its peculiar circumstances.

14. Accordingly, I find the application to be without merit and the same is dismissed with costs.

It is so ordered.

DATED and **DELIVERED** Meru this 22nd day of June, 2017.

A. MABEYA

JUDGE

22/06/2017