



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

P & A APPEAL NO 12 of 2013

(FORMERLY NYERI P & A APPEAL NO 2 OF 2010)

BENARD KIMANI MWIHURI.....APPELLANT

VERSUS

JULIUS MWANGI MUTHOGA.....RESPONDENT

R U L I N G

1. The Appellant herein, **Bernard Kimani Mwihuri**, appealed against a judgment of the lower court in **Murang'a SPM Succession Cause No 214 of 1984** by which a grant of letters of administration intestate were confirmed. In that judgement the lower court held that the Appellant and the Respondent, **Julius Mwangi Muthoga**, were relatives of the Deceased (who had died without spouse or child) in the nearest degree of consanguinity as defined in **section 39(1) (e)** of the **Law of succession Act, Cap 160**. That court therefore ordered that the three properties comprising the free estate of the Deceased be shared equally by the two parties.

2. In a judgment dated 26th November and delivered on 19th December 2014 this court (Ngaah, J) allowed the appeal; the judgment of the lower court was set aside and an order that the three properties comprising the free estate of the Deceased shall devolve upon Appellant absolutely.

3. The Respondent (in the appeal) then applied by **notice of motion dated 20/01/2015** seeking two main orders -

(i) That the court be pleased to review its aforesaid judgment dated 19/12/2014 and set it aside.

(ii) That a consequential order be made that the Deceased's free estate be shared equally by the Appellant and the Respondent (in other words, that the judgement of the lower court be restored).

This application, brought under **Order 45, Rule 1** of the **Civil Procedure Rules, 2010** and **Rules 63 and 73** of the **Probate and Administration Rules** is the subject of this ruling.

4. The ground for the application is stated to be that there is an error on the face of the record "which resulted into a complete change of lineage and the Respondent being awarded all parcels of land he was not wholly entitled". A reading of the supporting affidavit sworn by the Respondent/Applicant discloses his complaint to be that this court (Ngaah, J) completely misapprehended the evidence placed before the

lower court and thus erroneously reached the conclusion that the court did regarding who as between the Appellant and the Respondent was in the nearest degree of consanguinity to the Deceased as defined in law.

5. The Appellant opposed the application by his replying affidavit file on 06/03/2015.

6. The application was canvassed by way of written submissions. The Respondent/Applicant's submissions were filed on 27/03/2015 while those of the Appellant were filed on 27/05/2015. The court was informed of the filing of the submissions on 18/11/2015 and reserved ruling for 22/01/2016. However, I proceeded for my annual leave on 30/11/2015 to resume duty on 01/02/2016. Ruling was thus rescheduled for 12/02/2016.

7. I have considered the submissions as filed. No authorities were cited. An alleged misapprehension of facts on the part of a court resulting in an alleged erroneous conclusion regarding those facts cannot be an error on the face of the record amenable to the review jurisdiction. That would be an error of judgment on the facts amenable to correction only on appeal, where appeal is permitted by law.

8. Unfortunately for the Respondent/Appellant no appeal from the judgement herein of this court is permitted, and is in fact expressly forbidden by **section 50(1)** of the Law of Succession Act which states –

“50. (1) An appeal shall lie to the High Court in respect of any order or decree made by the Resident Magistrate in respect of any estate, and the decision of the High Court thereon shall be final.”

It is thus easy to understand why the Respondent/Applicant has sought to re-open the appeal again by the present application.

9. The application is misconceived. It is hereby dismissed with costs to the Appellant. It is so ordered.

DATE AT MURANG'A HIGH COURT THIS 11TH DAY OF FEBRUARY 2016

HPG WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 12TH DAY OF FEBRUARY 2016