



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO.1787 OF 2001

IN THE MATTER OF THE ESTATE OF ALEXANDER OTIENO MUDHUNE (DECEASED)

SISILIA AWINO OTHIENO.....PETITIONER/APPLICANT

VERSUS

BENTA AUMA OTIENO.....1ST OBJECTOR

AUSTINE MUDHUNE.....2ND OBJECTOR

RULING.

1) The deceased, Alexander Otieno Mudhune died on 19th January 2001. Grant of letters of administration intestate was issued to his widow, Sisilia Awino Otieno on 2nd November 2001. The 1st objector filed notice of objection to the grant of representation on the grounds that the petitioner had not informed them of her petition for grant, had not obtained their consent to the same, and had left out members of her house, who were also beneficiaries of the estate of the deceased, from the proposed distribution. She stated that the deceased had two wives, the petitioner and herself; and that she had 9 children with the deceased including the 2nd objector. Her case was that as the 2nd wife to the deceased, having been married to him in the year 1957 under Luo customary law, she ought to have been enjoined as a co-administrator. The objectors died before the cause was heard and determined and the protest was taken over by the 1st objector's daughter, Beatrice Adhiambo Otieno.

2) In the judgment delivered on 29th September 2015, this court found that the 1st objector was a wife of the deceased under section 3(5) of the **Law of Succession Act (Cap.160)** and that she together with her children were beneficiaries of the estate of the deceased. The court went on to distribute the estate of the deceased comprising L.R No.Solai/Ndigiri 3/1317, L.R No. Siaya/South Ugenya/1429 and L.R Nakuru Municipality Block 3/425 among all the beneficiaries.

3) The petitioner was aggrieved by the judgment and filed notice of appeal dated 7th October 2015. She then filed a Chamber Summons dated 9th October 2015 seeking leave to appeal from the judgement and decree of this court dated 29th September 2015. It was the petitioner's case that since an appeal does not lie as of right from the said decision, it was necessary to obtain leave of this court to enable her lodge the appeal in the Court of Appeal. The application was supported by an affidavit of Paul Amuga advocate for the petitioner. A second application for review of the same judgment was made on 4th November 2015 in

which the applicant sought the review of the orders of this court made on 29/09/2015 on the grounds that there was an error on the face of the judgment with regard to the number of children and/or dependants in the 1st objector's house; and that the judgment was silent as concerns the dispute relating to income received from property L.R No.Nakuru Municipality/Block 3/425 from the date of death of the deceased until the date of judgment.

4) Both applications were served on the objector but were not responded to. The applicant filed written submissions which I have duly considered.

5) Under **rule 63(1)** of the **Probate and Administration Rules** the provisions of **Order 44** (now **45**) of the **Civil Procedure Rules** were imported into succession proceedings. Consequently, a person aggrieved by a decree or order 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 the review of the same.

6) The applicant's case was that the court made a mistake when it found that the 1st objector got 9 children with the deceased, when in fact they were only four, and went on to award her house 2/3 of the Nakuru property comprising L.R No. NakuruMunicipality/ Block 3/425. She was also offended by the fact that the court ignored the rental income received from the property by the 1st objector's household from the time of the deceased's death in the year 2001 to the date of the judgment. That omission, she stated, had denied her and her children a substantial interest and share of the estate of the deceased. As a general rule, no review can lie where the ground put forth is that an erroneous conclusion of fact was reached in the case or where the court misconstrued the law [**GODFREY AJUANG OKUMU-V-NOCHOLAS ODERA OPINYA, HCCC NO. 337 OF 1996 at KISUMU; and DAVID OMBEE OMBEE-V- ISAAC OLUOCH OPI (2000) LLR 7885**]. It follows that what the applicant is complaining about can only be subject of an appeal, not a review.

7) The applicant was aggrieved by the finding of this court contained in the judgment delivered on 29/9/15, and seeks to appeal. It is now trite that leave to appeal against the judgment was necessary [**MAKHANGU-V- KIBWANA (1995-1998) 1 EA 175**] cited in **IN THE MATTER OF THE ESTATE OF PETER NJENGA KINYARA H.C SUCCESSION CAUSE NO.1610 OF 2000 at Nairobi.**]

8) Consequently, I allow with costs the application for leave to appeal. The leave shall be for 30 days from today. The application seeking review is dismissed with costs.

DATED and SIGNED at NAIROBI this 12th day of AUGUST 2016.

A.O. MUCHELULE

JUDGE

DELIVERED and SIGNED this 16th day of AUGUST 2016

W.M. MUSYOKA

JUDGE