REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 33 OF 2015

(FORMERLY MERU HCCA NO. 68 OF 2010)

SILAS NJERU M'THAARA.....APPELLANT

VERSUS

M'RITHAA THAARA.....RESPONDENT

(***An Appeal from the Ruling and orders of N.N. Murage- RM made on 23/6/2010 in Chuka Principal Magistrate's Court Succession Cause No. 68 of 2010)***

R U L I N G

1. This is a ruling on the Motion on Notice dated 8th September, 2016 by the Appellant brought under Order 45 of the Civil Procedure Rules and Sections 1A, 1, 3, 3A of the Civil Procedure Act and Article 159 of the Constitution. The Motion seeks a review of the Judgment delivered on 9th June, 2016 and the consequent transfer of 0.95 acres from the Respondent in Mwimbi/S.Magumango/139 *"the property"* and register the same in favour of the Appellant.

2. The grounds for the application were set out in the body of the Motion and the Supporting Affidavit of Silas Njeru M'Thaara sworn on 8th September, 2016. These were; that during adjudication prior to his death, the deceased had given the Respondent 1.90 Acres from the family land; that since the Judgment held that the estate of the deceased be divided equally, it was just and fair that the Respondent do give half of the property to the Appellant; that the Appellant was looking for this portion of evidence until after Judgment when he was able to procure it. He produced some documents from the Land Adjudication office Imenti North District to buttress his contention.

3. The application was opposed vide a Replying Affidavit sworn by M'Rithaa Thaara on 20th September, 2016. The Respondent contended that the application was an attempt by the Appellant to continue retaining the Respondent's share of the estate as the Appellant has been unwilling to have this matter determined; that the application was an abuse of the court process as the succession of the estate of the late Jadiel Thaara was determined by the Chuka Principal Magistrate's Court and not this court.

4. At the hearing of the application, Mr. Ogoti Learned Counsel for the Appellant reiterated the facts narrated in the Supporting Affidavit and submitted that since the judgment was to the effect that the estate be divided equally and the Appellant had produced evidence to show that the Respondent benefited from the deceased 1.90 Acres, the orders sought should be granted. He further submitted that the exhibit had been missing. Mrs Ntarangwi for the Respondent submitted that order 45 was not applicable as the matter

was on appeal; that leave to adduce additional evidence should have been sought before the appeal was heard; that admitting the exhibit at this juncture will be prejudicial to the Respondent as there will be no opportunity for him to challenge the same. She argued that Article 159 is not to be used to create rights that are non-existent and cited the Court of Appeal decision in **John Mwiga Macharia .v. Geoffrey Githagui Wachira [2016] eKLR** in support of that proposition.

5. This is an application for review of a judgment of this court delivered on 9th June, 2016. The principles applicable are well known that, the application must be made without unreasonable delay; there has been 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 at the time the decree was passed or that there is an error or mistake apparent on the face of the record or for any sufficient reason. The present application seems to have been brought on the basis of the discovery of important matter or evidence.

6. As regards the filing of the application, I note that, the application was made within three (3) months of the delivery of the judgment sought to be reviewed. To my mind, that was without unreasonable delay. Indeed the Respondent, quite correctly, did not object to the application on that ground. The application was objected to on three grounds; that Order 45 of the Civil Procedure Rules is not applicable the judgment having been made on appeal; secondly, that the application should have been made in the lower court or before the appeal was heard by seeking to adduce fresh evidence and finally that to admit fresh evidence at this stage will be prejudicial to the Respondent as he cannot effectively challenged the same.

7. On the first ground that Order 45 of the Civil Procedure Rules is not applicable, Mrs Ntarangwi did not cite any law that bars this court from entertaining such an application. A reading of Order 45 shows that the only restriction placed on a party who is aggrieved is where he prefers an appeal against the order or decree that he is aggrieved with. This is clear from the wording of Order 45 1(1) (a) and (b),viz:-

> ***"(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."***

It is not in dispute that what resulted on the judgment of this court of 9th June, 2016 is a decree from which no appeal lies by virtue of section 55 of the Law of Succession Act.That being the case, I reject the contention that the Appellant was not entitled to bring the application.

8. The second objection was that the application should have been made before the trial court or before the appeal was heard. I did not understand this objection properly. The appellant having preferred an appeal to this court, the route of review to the lower court was closed. As regards applying before the appeal was heard, there was no answer by the Appellant. Although it was not properly argued, when a party seeks to have a decree or order reviewed on the ground of discovery of new important matter or evidence, he must show that at the time of the hearing he did not know of its existence and if he knew, any effort and diligence on his part could and indeed did not bear any fruits.

9. In the present case, the deceased died in August 1983. The Appellant commenced this Succession Cause on 16th September, 2008. He has deponed that the events of the alleged evidence he is relying on what happened during adjudication before the deceased died. He does not state when he discovered it. He vaguely swore:-

> ***"10. That when the matter was proceeding the exhibit herein was not in our reach hence need to review the judgment herein and consider the same."***

10. In his response to the application, the Respondent had sworn in paragraph 14 of the Replying Affidavit as follows:-

> ***"14. That during the hearing of the protest and during the time of determination of the distribution of the estate, the appellant tendered evidence to the effect that I had been given land***

at Ntuumu which fact the lower court decided on and made a finding that no such land was given to me and since the applicant all along raised the issue of my having been given land, then he ought to have availed documents if at all the said documents existed."

The above averment was neither contradicted nor denied.

11. In his testimony before the trial court, the Appellant had stated on oath that:-

"My names are Silas Njeru M'Thaara, am from Ndugori Sub- location am a farmer. I filed this Succession over my father's land because the 1st Protestor was given land at Ntumu Location. Then I was left with the other land I was told to give 3rd protestor 1 acre and also give him title."

In cross-examination he stated:-

"You were given coffee at Ntumu not on the land I live. I don't know how much land my father bought you."

(Underlining supplied.)

12. From the foregoing, it is clear that the issue of the Respondent having been given land by the deceased was within the Appellant's knowledge. It was a live issue that was submitted to the trial court but that court found no evidence to support the allegation. The fact that the Appellant flippantly prosecuted his case by failing to collect, gather and produce all the relevant evidence in support thereof does not make such evidence new. That evidence must have been existing all these years. It was waiting to be collected from the adjudication office. That is why it was readily available in less than 2 months after the judgment was delivered because the appellant made effort to go and collect it. I do not think Order 45 Rule (1) was enacted for such scenarios. The Appellant did not show any previous effort he had made to obtain the evidence he seeks to introduce now. To allow a party who has been unable to prove his case to wonder, collect and gather additional evidence to return and buttress his case by way of review, it will be to encourage litigation by instalment. This will be disastrous to the cause of justice as there may never be an end to litigation.

13. In any event, I have looked at exhibit *"EOK 1"* which is said to be a copy of the adjudication record. There is nothing to show that there was any property recorded in the name of the deceased that was being transferred to the Respondent. Admitting the document as it is, will be highly prejudicial to the Respondent as its authenticity and efficacy would not have been tested.

14. In the premises, I find that the Applicant has not made a case for the review of the Judgment of 9th June, 2016. The application is therefore dismissed with costs.

DATED and Delivered at Chuka this 13th day of December,2016.

A. MABEYA

JUDGE

Judgment read and delivered on open court in the absence of the Appellant whose Counsel had notice of the ruling date.

A.MABEYA

JUDGE

13/12/2016