



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.8 OF 1995

IN THE MATTER OF THE ESTATE OF WALTER ALELA ONDUSO (DECEASED)

1. EDWARD OKOLI(DECEASED)

2. PETER ALELA.....PETITIONERS

AGGREY ALELA.....OBJECTOR

RULING

1. The application for determination is the Notice of Motion dated 6/11/2012 brought pursuant to Section 3 and 3A of the Civil Procedure Act, Order 45 Rule 1 & 2 of the Civil Procedure Rules and all other enabling provisions of the Law. The applicant seeks for ORDERS THAT:-

- a. This Honourable Court be pleased to review and/or vary the judgment herein delivered on 24/09/2012.
- b. Costs of this application
- c. be provided.

2. The application is based on the grounds set out on the face of it and supported by the annexed affidavit of PETER ALELA ONDUSO of the same date. He deposes that judgment in this cause was delivered on 24/9/2012 wherein the Court awarded the parcel of land known as L.R.No.KISA/KHUSHIKU/326 to DANIEL ANDABWA ONDUSO and MARY MUCHELULE OKOLI to share equally.

3. He explains that the said parcel of land measures approximately 2 acres but not 3 acres as erroneously stated in the judgment. See annexure marked "PAO" being copy of the Certificate of the official search. He claims that this Honourable Court misdirected itself and was moved with the affidavit on mode of distribution by ARTHUR E. BAKHUYA, GIVAN MBAYI and HENRY ELIAKIMU SHIRANDA the other beneficiaries. He further claims that the Court failed to consider his proposed mode of distribution and that of the Petitioner contained in their respective affidavits sworn on 5/5/2012. He argues that the contention in this matter having been on distribution over parcel No.KISA/KHUSHIKU/326 it would be in the interests of justice to have the judgment herein reviewed and/or varied to reflect the mode of distribution set out in the affidavits above mentioned.

4. The application is opposed. ARTHUR E. BAKHUYA one of the beneficiaries of the estate of the deceased herein swore a replying affidavit dated 12/05/2013 on behalf of Henry Eshiranda and Givan Mbayi. He denies that the deceased EDWARD OKOLI had established his home on land parcel KISA/KHUSHIKU/72 and alleged that the true position is that he had established his home on land parcel Kisa/Khushiku/326 as shown in the search (annexture "PAO").

5. He maintains that this Court was right in reaching the conclusion in its judgment that land parcel

No.Kisa/Khushiku/326 be shared equally between DANIEL ANDABWA and MARY MUCHELULE OKOLI and that whether the acreage was 2 or 3 did not matter. He states that the distribution as per the Court's judgment is fair and the applicant cannot allege that the Court was only guided by affidavits from their side when it is clear from the record that the Court considered all the affidavits. He wants the application dismissed with costs.

6. Parties canvassed this application by way of written submissions. I have carefully read through both sets of submissions. The law is that where the orders or decrees issued by the Court in succession causes have errors on the face of the record or a new and important piece of evidence has been discovered subsequent to the making of the order or decree, the Court may on the application of a party review the order or decree on these grounds or for any sufficient reason.

7. The issue raised by the applicant is on the acreage of the parcel of land known as L.R. No.KISA/KHUSHIKU/326. He states that the said land measures 2 acres and not 3 acres. The respondent on his part submits that the issue of acreage does not matter since the Court ordered that the land was to be shared equally between the two beneficiaries. He maintains that the issue of the size of the said land cannot be a ground of review but a matter of appeal.

8. A case in point is **In the matter of the Estate of Hannah Nyangau Mwenja (deceased) Nairobi High Court Probate and administration cause no.901 of 1996** (unreported) in which Koome J (as she then was) stated; and I agree with the learned Judge, as follows:-

“In this regard this Court has the inherent power to give effect to its own orders as may be expedient and to prevent abuse of the process. In my view, judgment cannot be reviewed to change its character and disentitle a party his right of inheritance. This is a matter that can properly be handled on appeal.....”

9. It is my view considered that the issue of acreage is one that will change the character of the judgment herein. It is also my humble view that this is a matter that can properly be handled on appeal, and not on an application for review.

10. For the above reasons the application dated 6/11/2012 is found to lack merit and the same is dismissed with costs.

Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega

This 24th day September 2015

RUTH N. SITATI

J U D G E

In the presence of:

Miss Andia for Rauto (present) for Objector/Applicants

Mr. Elungata for Getanda for Respondent

Mr. Lagat - Court Assistant