



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

SUCCESSION CAUSE NO. 1181 OF 2013

(IN THE MATTER OF THE ESTATE OF PHILIP WAWERU KARUMBA (DECEASED))

ZULEHA WAMAITHA.....PETITIONER/RESPONDENT

VERSUS

MARY NJERI WAWERU.....OBJECTOR/APPLICANT

RULING

The Objector filed a summons dated 8th December, 2011 seeking:

“That this Honourable court be pleased to review the ruling and/or orders made on 15th day of July, 2011 in theis (sic) matter in repect (sic) of the plot number, LOC. 11/MARAGI/1965 instead of LOC.11/MARAGI/1960 being referred to and the identification of the petitioner herein as widow of the deceased and the ruling be amended accordingly.”

Besides the spelling mistakes, the prayer appeared to me to be a bit hazy but when the summons came up for hearing, counsel for the applicant clarified that in a ruling which the court (Sergon, J) delivered on 15th July 2011, the court erroneously described the deceased’s daughter, who is the petitioner herein as his widow. He therefore sought the ruling to be varied and the error corrected accordingly. The other limb of that prayer is that the parcel of land described in the ruling as **LOC. 11/MARAGI/1965** should have instead read **LOC.11/MARAGI/1960**.

The summons was said to be brought under **Order 45** of the **Civil Procedure Rules, section 3A** of the **Civil Procedure Act** and **section 74** of the **Succession Act** (cap 160). It was supported by the affidavit of the applicant sworn on 8th December, 2011.

Although the application is basically for review based on an error apparent on the face of the record, counsel for the petitioner/respondent contested what he understood to be a prayer seeking the distribution of part of the estate more particularly land parcel numbers **Loc. 11/Maragi/1965** and land parcel number **Loc.11/Maragi/1960** between the applicant and the objector when earlier court directions on the distribution of the entire estate had not been complied with.

The petitioner/respondent’s counsel, however, conceded that the deceased was survived by the objector/applicant as the sole widow; it was therefore a common ground that in his lifetime, the deceased was not married more than once. To this extent the record could be amended accordingly.

Coming back to the distribution of the estate, counsel contended that according to the ruling in issue, the applicant ought to have established her claim before the estate is distributed; as things stand, according to counsel, there is no material before court to establish that the applicant is owed by the estate. Counsel also contended that the court never gave the applicant parcel number **Loc. 11/Maragi/ 1960**.

As far as I understand the applicant's summons, it was supposed to be a simple application for variation of the ruling delivered by the court on 15th July, 2011 on the sole ground that there was an error apparent on the face of the record. Any arguments based on the presumption that the estate has been distributed are, in my view, misplaced. There is nowhere in the ruling where the learned judge ordered the distribution of the estate; if anything, he was clear that the estate will only be distributed once all the liabilities have been settled. To quote the learned judge at page 9 of his ruling, he said:

“In the end I find the protests to be well founded. The confirmation of grant is postponed until the liabilities of the estate is (sic) identified and settled after which the estate should be distributed in accordance with the provisions of section 40 of the Law of Succession Act.”

Of the errors that the applicant has brought to the fore, the only one which appeals to be the error apparent on the face of the record, and which both parties are at consensus that indeed it is such an error, is the learned judge's description of the deceased's daughter as his widow and therefore holding that the law applicable to the distribution of the deceased estate is **section 40** of the Act. The correct position is that the deceased was not polygamous and had not married more than once as contemplated under **section 40** of the Law of Succession Act; in the circumstances the relevant law applicable to the devolution of the deceased's estate would be **section 35** of the Act. The ruling of the court delivered on 15th July, 2011 is varied accordingly.

For the reasons I have stated and as far as I understand the learned judge's ruling, the deceased's estate or any part thereof has not been distributed and such distribution cannot be done in application for review meant to correct an error apparent of the face of the record.

It is also apparent from the learned judge's ruling that the cause was supposed to have been mentioned before him on 7th October, 2011 to confirm whether his directions, apparently given in the ruling, had been complied with. The record indicates that on 7th October, 2011, counsel for the petitioner sought for time to comply with the directions. It is not clear whether this has been done to date.

Restricting myself to the application before me, all I can say is that the applicant's summons dated 8th December, 2011 is allowed only to the extent of the variation of the ruling to describe the petitioner as the daughter and not the widow of the deceased and to vary the law applicable to the devolution of the deceased's estate as section 35 of the Law of Succession Act and not section 40 thereof. It is so ordered.

Signed dated and delivered in open court this 20th June, 2014

Ngaah Jairus

JUDGE