



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 1131 OF 1991**

**FLORENCE WAMBUI KUNGU.....PETITIONER**

**VERSUS**

**STEPHEN KAMUYU NDWARU.....1<sup>ST</sup> OBJECTOR**

**ESTHER NYIHA NDWARU.....2<sup>ND</sup> OBJECTORS**

**RULING**

1. Before this court for determination is a Notice of Motion dated 7<sup>th</sup> August 2013, taken under Section 80 of the Civil Procedure Act, Order 45 Rule 1 of the Civil Procedure Rules and all the enabling Provisions of Law. The Applicant seeks for Orders that the ruling and order made on the 27<sup>th</sup> June 2013 be reviewed and that the Notice of Motion dated 2<sup>nd</sup> March 2012 be allowed.
2. The application is premised on the grounds that the court mistakenly found that the application dated 2<sup>nd</sup> March 2012 had not been served on the administratrix of the estate the subject hereof, Florence Wambui Kungu, whereas the said application was served upon the lawyers for the said Florence Wambui Kungu. It is further contended that court mistakenly found that there was no evidence adduced on the payment of the balance of the purchase price whereas deposits of these amounts were made in court and receipts thereto are part of the court record and hence that ought to be a matter of judicial notice.
3. The application is further supported by the annexed affidavit of Charles Muchemi Ikinya sworn on even date. He avers that he entered into a sale agreement over the portion marked D in the mutation form L.R. No. Dagoretti/Riruta/10 with the administrators of the deceased's estate. The purchase price of the said portion was Kshs. 2,200,000.00. He paid a total sum of Kshs. 1,100,000.00 immediately on execution of the sale agreement as provided for in the said sale agreement and that the remaining balance of the purchase price was therefore Kshs. 1,100,000.00.
4. It is his averment that he paid a sum of Kshs. 200,000.00 to three of the beneficiaries, Peter Nguku Kungu, Florence Wambui Ndwaru and Kinyanjui Ndwaru, and that that fact was noted by the court in its ruling of 5<sup>th</sup> August 2005 which is on the court record. He deposited the balance of the purchase price in the sum of Kshs. 900,000.00 vide banker's cheque numbers xxxx, xxxx and xxxx, and was issued with official receipts numbers xxxx and xxxx. he avers to have verily paid the whole purchase price of the portion he seeks to have transferred to his name, and that the court order of 3<sup>rd</sup> March 1999 was to the effect that the property be transferred to his name on completion of payment. He avers that the court ought to note that he is a *bona fide* purchaser for value and has even developed the property in question, and he has thus spent a lot of his retirement resources on the same and it is only fair that he be issued with a formal title document.

5. The application is opposed and a replying affidavit was sworn on 24<sup>th</sup> October 2013 by Florence Wambui Kung'u, an administrator of the deceased's estate. She avers, among others, that the court order of 9<sup>th</sup> March 2012 which ordered her to cause portion D of L.R. No. Dagoretti/Riruta/10 to be transferred in the applicant's name was subject to completion of payment of the purchase price by the said applicant. She avers that the court found as a fact that there was no evidence adduced by the said applicant that he had completed payment of the purchase price so as to entitle him to ownership of the said portion D. Further, that the applicant never completed paying the purchase price. It was her averment that the court found, and rightly so, that there was no evidence of payment of the balance of the purchase price in compliance with the court's order of 3<sup>rd</sup> March 1999 and consequently dismissed the applicant's application. She argues that court made a conscious decision based on evidence before it and she believes that no errors or mistakes were made that would necessitate review of the said decision. She avers that the applicant's remedy lies in appealing the decision as court had made its decision upon evaluation of the evidence before it and the matter rested. She states that the applicant has not proffered an appeal.
6. The application was prosecuted by way of written submissions. The Applicant filed his written submissions on 13<sup>th</sup> November 2013, while the Respondent's written submissions filed on 26<sup>th</sup> November 2013.
7. It is submitted on behalf of the applicant that the order of 27<sup>th</sup> June 2013 ought to be reviewed as having been made in error, mistake, oversight and inadvertence. The applicant's main contention is that the administrators of the deceased's estate received from him a total sum of Kshs. 2,200,000.00 being the total of the purchase price of the portion marked D in the Dagoretti/Riruta/10, as per the two (2) sale agreements dated 9<sup>th</sup> August 1991 and 18<sup>th</sup> August 1991.
8. The respondent's submission is that the applicant's application for review should be dismissed as it is clear that the court did not make any mistake. She reiterates that if the applicant was unhappy with the said ruling, he ought to have appealed. Further, the respondent contends that this court cannot consider the applicant's annexed receipts as evidence in the present application for review as they do not fall under the head of new and important evidence which was not within the applicant's knowledge at the time the relevant application was being presented. It is submitted that the court cannot be faulted as having made a mistake in its ruling when at the first instance the applicant did not adduce any evidence to support his position and even failed to respond to the respondent's claim that he had failed to pay the purchase price in full.
9. This court having considered the application, the affidavits on record and the rival submissions by the respective parties, holds the view that the main issue for consideration is whether the applicant has met the conditions for review.
10. For the court to allow an application for review as sought by the applicant herein, it must satisfy itself that the applicant has met the conditions set by the provisions of the law under which it is brought. Order 45 Rule 1 of the Civil Procedure Rules governs review, and it is one of the provisions of the Civil Procedure Rules imported into probate practice. It provides as follows:

*“(1) Any person considering himself aggrieved—*

- 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, 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.’*

11. Further, section 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, under which the application has also been brought provides that:

*“Any person who considers himself aggrieved—*

- a. *by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
- b. *by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”*

12. The applicant by a Notice of Motion dated 2<sup>nd</sup> March 2012 sought from court an order empowering the Deputy Registrar to sign a transfer form and certain documents under the Land Control Act, to facilitate transfer of the said property from the said estate to his name. The applicant in his affidavit in support of the application did not depose that he had completed payment of the purchase price as was ordered by the court on 3<sup>rd</sup> March 1999. In view of the fact that the applicant did not demonstrate that he had since completed paying the purchase price, the court dismissed the said application. It is the dismissal of the said application that has occasioned the instant application for review. It should be said that the principles guiding the grant of review by the court are well settled.

13. The applicant as has been stated in the above mentioned provisions of the law must satisfy this court that there is 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. Unfortunately, in the instant application, the applicant has not brought any material before court to demonstrate that there is discovery of new and important matter or evidence which was not within his knowledge at the time he was prosecuting the said application. Furthermore, the applicant has not demonstrated that there was a mistake or error apparent on the face of the record, neither has he offered sufficient reason. The applicant did not adduce any evidence before this court that the court failed to consider, he did not offer any evidence of payment of the purchase price to the court and consequently the court was not satisfied that the Applicant was entitled to the orders that he sought.

14. In the circumstances of this case I find that the applicant has not met the conditions for review as set out in the law as stated above. Clearly, there is no *apparent error or omission on the part of the Court that would require this court to correct through review*. In *National Bank of Kenya Ltd vs. Ndungu Njau* Nairobi CA. Civil Appeal No. 211 of 1996 the Court of Appeal pronounced itself as thus:-

*“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached erroneous conclusions of law. Misconstruing a statute or other provision of law cannot be a ground for review.*

*In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in Appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”*

15. It follows that the instant application is for dismissal and I do hereby dismiss the same with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>th</sup> DAY OF October, 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Miss Njoroge advocate for the petitioner**