



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUE NO. 2600 OF 2000**

**IN THE MATTER OF THE ESTATE OF JOSEPH NJOROGE KUNG'U (DECEASED)**

**REBECCA WAMBUI.....APPLICANT**

**VERSUS**

**ALICE WAGIKUYU NJOROGE.....RESPONDENT**

**RULING**

The applications argued on 5th February 2013 are dated 17th July 2012 and 9th August 2012. The Motion dated 17th July 2012 seeks that the respondent be restrained from collecting rent from five of the houses in Thika Municipality 7/164 in Thika District, and that she be ordered to reimburse the applicant's share of the rent collected in the months of May, June and July 2012.

The grounds in support of the application are set out on the face of the Motion and in the affidavit in support of the Motion sworn on 17th July 2012 by Rebecca Wangui Njoroge. It is alleged that Thika Municipality 7/164 belonged to the deceased, and the widows of the deceased had reached an agreement in September 2000 on the sharing of the rent raised from the said plot. The complaint by the applicant is that the respondent has been unilaterally collecting rent for the months of May, June and July 2012 in contravention of the said agreement.

It transpires that the application dated 17th July 2012 was not served on the respondent. At least there is nothing on record to evidence service. The respondent did not reply to it.

The application dated 9th August 2012 is a Summons for Review of Confirmed Grant. It is premised on Rule 63 of the Law of Succession Act (sic), Section 80 of the Civil Procedure Rules and all other enabling provisions of the law. The application is premised on three grounds:-

1. That plot No. 7/164 belonged to the deceased and had been omitted from the list of assets.
2. That the list of assets included assets which did not belong to the deceased.
3. That the distribution was not fair as the value of the assets distributed to both sides varied.

The grounds in support of the application are elaborated in the affidavit of Rebecca Wambui Njoroge, sworn on 9th August 2012.

On plot No. 7/164 she averred that the same belonged to the deceased yet it was excluded from the list of the assets the subject of the case. She would like the confirmation reviewed so as to include this asset and to have it shared equally between the two houses of the deceased. To support the contention that the same ought to be shared equally she has attached as annexure RWN-1 a document showing that prior to the confirmation of the grant she had agreed with her co- widow to have the rent proceeds from the said

7/164 shared equally.

On the assets which she alleges did not form part of the estate and therefore ought not to have been distributed at confirmation, she lists motor vehicles KKZ 485 and KVU 854, plot NO. 4/206 Kayole and Plot No. 484 Kayole. She says the motor vehicles should not have been distributed as they did not belong to the deceased but to John Gatungu. To support her case, she has annexed copies of the logbooks in respect of the two motor vehicles, the annexure is marked RWN2. The annexure is of no use to the court as the copy relating to KKZ 485 is so faint that nothing meaningful can be deciphered from it, while that relating to KVU 854 is not a copy of a logbook but of a transfer form. It shows new owner of the vehicles as a Paul Ndichu Njoroge. The previous owner of the vehicle is not indicated. She further says that she would like the following assets redistributed so both houses take an equal share, namely:- Thika Municipality/Block 24/2486, Thika 1105//08,4/690 Kayole, Loc. 4/Nguthuru/667 and Kirimini/Block 8/921.

To the application dated 9th August 2012, the respondent Peter Gatungu Njoroge, the co-administrator of the estate with the applicant, has responded through his affidavit sworn on 17th October 2012. He agrees that there should be a review of the confirmation as he has also discovered some new matters, but he says the review should not be in the terms proposed by the applicant. He avers that after the grant was confirmed he sought to have the certificate of confirmation executed, and in his effort to execute it discovered certain anomalies arising from a misdescription of the property allotted to his mother's side of the family.

According to the respondent, the anomalies touched on Thika Municipality/Block 24/545, Thika Municipality/Block 24/486 and share No. 1030. He explains that the deceased had put up rental houses as Thika and Nairobi (Kayole estate). At confirmation, the understanding was that the Thika houses would be given to his mother's household while the Nairobi houses would go to the applicant's household. It was assumed that the Thika houses stood on Thika Municipality/Block 24/545 and 2486. He says that after confirmation, he established that the plots – No. 2486 and 545 were in fact empty and situated at Landless estate, Thika. One of the Thika houses actually stands on plot No. 7/164, and it belonged to the deceased. He has annexed a copy of a letter allotting 7/164 to Virginia Wanja and transfer form showing the said Virginia Wanja ceding 7/164 to the deceased. It had been presumed that the other house was standing on Thika Municipality /Block 24/2486, but it turned out Thika Municipality /Block 24/486 was plot No. 240 comprised in share No. 1030 together with plot No. 1220. The assets in share No. 1030 had been given to Stephen Kungu *intervivos* by the deceased. Share No. 1030 gave rise to plot Nos. 240, 1220 and 2174. The deceased also held share No. 521 which gave rise to plot Nos. 534 and 2400. The documents relating to these shares were said to be in the possession of a son of the deceased called Stephen Kungu. The respondent did not address himself to the issue of the motor vehicles nor the redistribution of some of the assets.

I have carefully evaluated the contents of the affidavits filed by both sides, as well the documents annexed to the affidavits in support of the parties' respective positions. I have also very carefully gone through the judgment of Rawal J., as she then was, delivered on 10th May 2011. I note that the judgment followed the recording of oral evidence from the applicant and respondent herein and their witnesses. I have also taken into account the arguments by counsel in elaboration of the arguments in the application.

The application principally seeks review. Review is governed by Rule 44 of the Civil Procedure Rules. Review is one of the civil processes imported into probate practice by Rule 63 of the Probate and Administration Rules. The Probate and Administration Rules adopts Rule XLIV of the Civil Procedure Rules. Following the reorganization of the Civil Procedure Rules, Rules XLIV has been renamed Rule 45. Rule 45 provides that:-

***" A person who considered himself aggrieved by a decree or order-***

***(a) from which an appeal is allowed, but from which no appeal has been preferred; or***

***(b) from which an appeal is allowed and who-***

- i. *from the discovery of new and important matter of evidence which, after the exercise of due diligence could not be produced by him at the time when the decree or the order was made; or*
- ii. *on account of some mistake or error apparent on the face of the record; or*
  - (iii) *for any other sufficient reason*

*may apply to the court which passed the decree or made the order without unreasonable delay."*

The remedy presented by Rule 45 of the Civil Procedure Rules is available for the purposes of revising the judgment of Rawal J. Review in this application is sought on three grounds: the omission of an asset, the inclusion of assets which did not belong to the deceased, and unfair distribution. The omitted asset is 7/164. It is common ground that 7/164 was not brought to the distribution table. Both sides agree that the asset was omitted and ought to be brought in. The applicant, who is one of the administrators, does not explain how the asset was omitted. The respondent, on the other hand, explains that 7/164 was discovered after the confirmation of the grant. The respondent says that it had always been assumed that the Makongeni house stood on Block 24/545 only for him to discover that the house actually stood on 7/164. It would appear that this was a discovery of new and important matter that could not be produced at the confirmation hearing. It could also be argued that, that is sufficient reason for review of the confirmation order. It would appear that Block/2486 had similarly been omitted and similarly discovered.

On the issue of the assets included which ought not have been included, I have gone through the proceedings conducted before Rawal J. Both sides had occasion to present evidence on the ownership of the said assets, and to confront, by way of cross-examination, the witnesses presented by the other side on the matter. After taking these matters into account, the court concluded that these assets, either formed part of the estate of the deceased or had to be taken into account in determining apportionment. The applicant has in the two applications before court introduced documents seeking to show that the assets did not belong to the deceased. It is my view that this is evidence that ought to have been placed before the trial judge at the time of the proceedings before Rawal J. It has not been suggested that this is evidence that the applicant has just stumbled upon and one which she could not get hold of at the time. These documents in my view do not justify the disturbance of the orders made by Rawal J in respect of the assets in question. The evidence is not new matter, neither can it be said that there is a sufficient reason for me to hold that these assets ought to be excluded, nor can it be argued that there is an error apparent on the face of the record.

The other ground is that the distribution in the judgment was not fair. In the opinion of the applicant it was not even. I have gone through the affidavit sworn by the applicant in both applications and I see nothing to suggest that the distribution was skewed in favour of one side. In any event such a matter cannot be a basis upon which review may be grounded. Review focuses on procedure, the process through which the decision was arrived at. Issues on unfairness in distribution go to the merits of the decision. The applicant does not complain that the process leading up to the decision was not fair, but rather that the end result was not fair or was uneven. Unhappiness with the merits of the decision, instead of the process of getting to the decision, opens up the decision to attack on the grounds of appeal, not review. On this point, the applicant ought to have filed an appeal against the decision, arguing that it contravened the provisions of the Law of Succession Act on distribution of the estate, whose spirit is equality. In view of the foregoing, I am not satisfied that the applicant has established a case for review, except with respect to the inclusion of 7/164. The evidence placed before me by the respondent clearly points to the need to include this asset among the other property of the deceased. The application dated 17th July, 2012, asks for certain orders relating to 7/164.

The applicant would like the respondent restrained from collecting rent from the residential houses in 7/164, as well as reimbursement of half-share of the rents collected in May, June and July 2012. I am inclined not to make any orders on the application of 17th July 2012. The principal reason for this is that

the application was never served on the respondent. He was not given opportunity to respond to it and it would be unjust to condemn him unheard. The application dated 17th July 2012 is therefore hereby dismissed.

The respondent has proposed that 7/164 be entered into the list of assets. He proposes that this asset be given to his mother's side of the family as the spirit of the judgment of Rawal J was that each of the two houses should access developed properties. The applicant's house has the Nairobi houses. The respondent's house was supposed to have the Thika houses. It turned out that the Thika properties which were assumed to house the developments were in fact undeveloped. It is fair that the respondent's side of the family take 7/164. I have reviewed the proposed distribution in paragraph 20 of the respondent's affidavit and I am satisfied that it presents a distribution that is fair and equitable.

The final orders made with respect to the applications dated 17th July 2012 and 9th August 2012 are:-

1. That the application dated 17th July 2012 is hereby struck out.
2. That the confirmation orders made in the judgment of 10th May 2011 are reviewed in terms of paragraph 20 of the affidavit of Peter Gatungu Njoroge sworn on 17th October 2012.
3. That the certificate of confirmation of grant dated 10th May 2011 shall be amended accordingly.
4. That this being a family matter there shall be no orders as to costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 12th DAY OF June, 2013**

**W. M. MUSYOKA**

**JUDGE**