



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 335 OF 2003

IN THE MATTER OF THE ESTATE OF SAMSON KILONZO NTHEI (DECEASED)

JIMMY MUSYOKI KILONZO PETITIONER/APPLICANT

VERSUS

- 1. MAJOR (RTD) JOHN KYALO KILONZO**
- 2. JOSEPH MUNYAO KILONZO**
- 3. FRANCIS MWAKA KILONZO RESPONDENTS/OBJECTORS**

R U L I N G

1. The application dated 17/9/2012 seeks orders that the court do review or vary and set aside the judgment made on the 06/07/2012 in relation to the distribution of the assets of the Estate of **Samson Kilonzo Nthei** among the beneficiaries.
2. The application is supported by the affidavit of the Applicant, **Jimmy Musyoki Kilonzo** sworn on 19/9/2012. According to the said affidavit, **plot No. 237** which belonged to their late grandfather was originally **0.8 Hectares**. That what was available for distribution was **Plot No. 237A** measuring **0.16 Hectares** which devolved to the family of the deceased.
3. The Applicant's complaint is that the order for distribution took into account **Plot No. 56 at Tala market** as a gift *intervivos* to the Applicant and his step mother. Consequently, the Applicant and the step mother were denied a share in **Kangundo/Isinga Plot No. 304**.
4. It is further contended that the court failed to take into account that the other beneficiaries had also benefited from the properties given to them by the deceased in his lifetime which properties are reflected in the Applicant's affidavit filed in court on 26/8/2008.
5. In opposition to the application, the 1st Respondent, **John Kyalo Kilonzo** swore a replying affidavit on 6/11/2012. According to the said replying affidavit, the surveyor's field sketch plans and mutation forms exhibited by the Applicant (annexture "**JMK 1-111**") which reflect the measurements for the plots in question were rejected by the Department of Lands and by the court as "**fake**".
6. It is further averred that land parcel **No. Kangundo/Isinga/237** measures **0.8 Hectares** and only **0.4 Hectares** devolved to the deceased herein and therefore what is available for distribution herein from land parcel **No. Kangundo/Isinga/237** is **0.4 Hectares**. The Respondents are therefore not opposed to the rectification of this error in the description of the said parcel of land and the measurements of the same but contend that there is no justifiable ground for any other review of the Ruling dated 6/7/2012.
7. I have considered the application, the reply to the same and the written submissions by the counsels for the respective parties. Under **Order 45** of the **Civil Procedure Rules** provides that an order for review can be made in the following circumstances:-
 - v. **Discovery of new and important matter of evidence which after the exercise of due diligence**

was not within the applicant's knowledge or could not be produced by him at the time the order was made.

- v. On account of mistake or error apparent on the face of the record.
- v. For any other sufficient reasons, the applicant is desirous of obtaining a review of the decree or order.
- v. That the application is made without reasonable delay.

8. All the parties are in agreement that land parcel **Kangundo/Isinga/237** is not **0.8 Hectares** as stated in the ruling dated 6/7/2012. The Applicant has stated that the share that devolved to the deceased herein from Plot No. **Kangundo/Isinga/237** and therefore what is available for distribution herein is **0.16 Hectares**. On the other hand, the Respondents have averred that the same parcel of land is **0.4 Hectares**. This is a problem that can only be sorted out by a surveyor's report.
9. After the surveyor's report is availed, the correct description and acreage of what is reflected in the judgment herein dated 6/7/12 against "**Kangundo/Isinga/237**" should then be rectified accordingly.
10. On the issue that the court failed to take into account properties given as gifts to the other beneficiaries during the life time of the deceased, the court gave its reasons in determining what was available for distribution and the mode of distribution, no new evidence has been availed to this court. Consequently, this court cannot re-evaluate the evidence already on record to arrive at a different decision. That would be tantamount to sitting on appeal!
11. With the foregoing, the application is partly successful. Consequently, I direct that the surveyor's report containing the correct description and measurements of land parcel No. "**Kangundo/Isinga 237**" be availed for the correction of the ruling dated 6/7/2012 to be effected. Each party to bear own costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 4th day of September 2013.

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B. THURANIRA JADEN

JUDGE