



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
SUCCESSION CAUSE 2066 OF 2011

IN THE MATTER OF THE ESTATE OF JOHN KAMAU MUGACHA (DECEASED)

JESSE THUO NGUGI

HARUN THUO NGUGI.....APPLICANTS

VERSUS

BENSON THUKU KAMAU.....RESPONDENT

RULING

This ruling relates to the Notice of Motion dated 25.1.2012 which was made on 31.1.2012 by **Messrs Jesse Thuo Ngugi and Harun Thuo Ngugi (the Applicants)** seeking review of the orders issued on 20.5.2011 by the Honourable Mr. Justice Maraga in the High Court (before his elevation to the Court of Appeal) in the Notice of Motion dated 27.1.2011. The grounds for making the application included the contention that of the 6 prayers made in the said application, the learned Judge gave orders only in respect of one prayer relating to the transfer to the High Court at Milimani Nairobi of the court file from Thika in Thika Succession Cause No.203 of 2009. The other prayers in respect of which no orders were granted had sought directions for further hearing of succession cause No.203 of 2009 and for orders for sharing of profits from Plot 39 at Githumu which is ostensibly part of the Estate of the deceased as well as directions for the surveyor at Muranga to subdivide and issue title deed in respect of half of the said plot.

The Applicants did not extract the formal order sought to be reviewed nor did they annexe either the proceedings before the Honourable Mr. Justice Maraga or a copy of the application in which the orders sought to be reviewed were made.

Order 44 contained in the previous Civil Procedure Rules relating to review was imported in succession proceedings by Rule 63(1) of the Probate and Administration Rules but it seems that after the amendment of the Civil Procedure Rules, Rule 63(1) (supra) was not adjusted so as to correct Order 44 to read Order 45 now contained in the 2010 Civil Procedure Rules. Both are *in pari materia*.

By virtue of Rule 2 (2) of Order 45 of the 2010 Civil Procedure Rules, if the Judge who made the Order sought to be reviewed is no longer attached to the court or the Division in which the orders sought to be reviewed were made, any other Judge who is attached to the Court or the Division when the application comes up for hearing can hear it. Although Rule 63 (1) of the Probate and Administration Rules has not

been adjusted to reflect Order 45 instead of Order 44, I hold the view that the court has jurisdiction to review under Section 80 of the Civil Procedure Act, Cap 21, and Section 47 of the Law of Succession Act. Moreover, Article 165 (3)(a) confers on the High Court unlimited original jurisdiction in criminal and civil matters. This constitutional provision alone has clothed the court with power to deal with review applications in succession and other matters.

It was in **SHANZU INVESTMENTS VS COMMISSIONER OF LANDS – C.A. CIVIL APPEAL No.100 of 1993** (Kwach, Muli & Tunoi, JJ.A.) that the Court of Appeal stated with approval that Farrel J. correctly held in *Sadar Mohamed vs. Charan Singh*, (1959) E.A. 708, - *that there was unfettered discretion in court to make such orders as it thinks fit on an application for review and that the omission of any qualifying words was deliberate.*

In WANGECHI KIMITA & ANOTHER vs MUTAHI WAKABIRU (C.A. No.80 of 1985) (unreported), the Court of Appeal held that any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Act: and that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.”

In **NATHAN IFEDHA OBERI V. ELKANA ANAYA OBERI Kakamega H.C.C.C. No.7 of 1986**) I stated:-

*The shift in the later authorities on the construction of “any sufficient reason” in Rule 1 of Order XLIV seems to be in tandem with the more sound jurisprudential thinking as it widens the scope of the court’s discretion to mete out justice. It is more advantageous to litigants who are not confined to furnish reasons analogous with the other grounds. But more significantly, the earlier interpretation limited applicants in scope under Rule 1 of Order XLIV and ignored the amplitude of Section 80 of the Civil Procedure Act when construing Rule 1 of Order XLIV. It is better jurisprudence to interpret the phrase “any sufficient reason” in harmony with section 80 of the Civil Procedure Act which gives unlimited latitude to the court to consider reasons for review. With respect, the Court of Appeal was right in *Shanzu Investments Ltd. v. Commissioner of Lands* when it stated that the earlier interpretation was restrictive and put a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Act.*

It was, with respect, correctly pointed out in ***Kimita and another versus Wakaburu (1985) LLR 246 (CAK)*** that “*the current position of the law would then appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason.*”

In the case of **NATIONAL BANK OF KENYA LTD. V. NDUNGU NJAU (Nbi. C.A. Civil Appeal No.211 of 1996)** the Court of Appeal held that;

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 an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review.”

The Court of Appeal went on to state in its judgement that “*if the Judge of the Superior Court had reached a wrong conclusion of the law, it could be a good ground for appeal but not for review.*”

The power exercised by the Honourable Justice Maraga, now a Judge of the Court of Appeal, when he made the orders in the High Court, was pursuant to Section 18 of the Civil Procedure Act, Cap 21. Under that section, the High Court is enjoined, inter alia, to withdraw any suit pending in any court subordinate to it and thereafter (i) try or dispose of the same or (ii) transfer the same for trial or disposal to any other subordinate court competent to try or dispose of it. It would not be proper for the court at the point of exercising the power under Section 18 (supra) to withdraw a suit from the subordinate court and also to

make contemporaneously orders such as the Applicants state should have been made. Such orders should normally be left to the judicial officer presiding in the court to which the suit is transferred.

To the extent to which the Applicants seek by way of review inclusion of orders they contend the honourable Judge should have granted but did not, the application is misplaced. It cannot be said that exclusion of such orders/directions as were not granted amounts to an error on the face of the record. There would be no basis for such construction or inference not least because it would be absurd to hold that once one prayer is granted in an application, all other prayers in the application must also be granted! If that were the law, which it is not, it would form the basis for stating that the court erred. But even then, such error would not give rise to review. It would be a ground for appeal.

I hold the view that the application does not show discovery of any new and important matter or evidence nor does it disclose any mistake or error apparent on the face of the record. It does not also show that there is any sufficient reason for the review the applicants seek.

I observe as earlier stated, that the formal order which is sought to be reviewed was not annexed next to the application for review nor were the proceedings or pleadings in the application in which the orders were made.

For the above reasons, I have no hesitation in dismissing the Notice of Motion dated 25.1.2012 with costs to the Respondent.

Dated at Milimani Law Courts, Nairobi, this 21st day of June 2012.

G.B.M. KARIUKI, SC
JUDGE

COUNSEL APPEARING

Mr. Kanyi, Advocate, of Karanja Kang'iri & Co. Advocates for the Respondent

Mr. Njuguna, Advocate, of Muri Mwaniki & Wamiti, Co. Advocates for the Petitioner

Mr. Kugwa – Court Clerk