



**CIVIL PRACTICE AND PROCEDURE**

· Application for review of judgment.

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCC. CAUSE NO. 274 OF 2000**

**IN THE MATTER OF THE ESTATE OF M'MURUNGI M'MAITIMA (DECEASED)**

**JOSEPH KITHINJI M'ITONGA ..... PETITIONER**

**VERSUS**

**MBAABU M'MURUNGI ..... OBJECTOR**

**RULING**

The court is faced with an application by way of summons dated 24<sup>th</sup> July 2009. The application is filed by one of the administrators of this estate namely Joseph Kithinji M'Itonga (Kithinji). He seeks an order that the court do review the judgment of this court of 19<sup>th</sup> June 2009. The application is based on the following grounds:-

1. *That there is an apparent error on the face of the judgment.*
2. *That the property sought to be distributed to the parties and other beneficiaries is L.R. No. Abogeta/U-Kithangari/692 measuring 17.15 acres.*
3. *That at page 10 of the judgment dated 19.6.2009, the court has distrusted 22.15 acres.*
4. *That the acreage distributed is therefore more than what is actually available.*

The essence of the application by Kithinji is that the court distributed to the beneficiaries more land than that which was on the ground on parcel number *Abogeta/U-Kithangari/692* (suit property). The application was opposed by Mbaabu M'Murungi (Mbaabu) on the basis that Kithinji in making the present application is seeking to enrich his father's household. In Mbaabu's view, the error in the judgment is that the court erroneously added more beneficiaries who were to inherit the deceased land. He therefore prayed that the review would be to the effect that the suit property would be distributed to the sons of the deceased or their offspring with Kithinji getting a smaller portion of the land. He suggested that the suit property be divided thus:-

1. *Joseph Kithinji* – 2.07 acres
2. *Mbaabu M'Murungi* – 7.54 acres
3. *Silas Kinyua Mutwiri* – 7.54 acres

The reasons he gave suggestion that Kithinji should get 2.07 was because Kithinji's late father had been given land by the deceased during the deceased lifetime. Kithinji's father was given *Abogeta/U-Kithangari/691*. To understand the relationships of the parties in this action, it is necessary to give a little background information. The deceased in this succession cause was called Murungi M'Maitima deceased. He had three sons namely, M'Itonga M'Murungi deceased, Mutwiri M'Murungi, deceased and Mbaabu M'Murungi (Mbaabu). Kithinji, the applicant was the son of M'Itonga M'Murungi deceased. Silas Kinyua Mutwiri was the son of Mutwiri M'Murungi deceased. In the suggestion made by Mbaabu that the land should be divided amongst the deceased sons, he sought that the families of his deceased brothers would be represented by Kithinji and Silas Kinyua Mutwiri respectively. Order 45 rule 1 (1) of the Civil Procedure Rules provides the circumstances under which the court will entertain an application for review. That rule is in the following terms:-

**“45. (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 who from the discovery of new and important matter or evidence which, after the exercise if 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 order without unreasonable delay.”**

The Court of Appeal in discussing this rule had this to say in the case **Harold Kidem Mganga & ano. Vs. Constance Mwai Mtoto** Civil Appeal No. 244 of 2004:-

**“Since the application was for review it was upon the appellants to show that there had been the discovery of new and important matter or evidence which was not within their knowledge or could not be produced by them at the time the decision was made. The appellants could succeed if they were able to show that there had been some mistake or error apparent on the record. They could also succeed if they could show any sufficient reason why the previous decision should be reviewed.”**

It was submitted by the learned counsel Mr. Mwirigi appearing for Kithinji that to distribute the suit property as suggested by Mbaabu would negate the judgment which determined who were the beneficiaries of this estate. I find that I am in agreement with that submission. In the judgment, the subject of this application, it was clear that the court determined who were the beneficiaries of the deceased estate. However, when the court distributed the suit property the court distributed more land than there was on the ground. The court distributed 22.15 acres whereas the suit property comprises of 17.15 acres. Unlike what is suggested by Mbaabu, it is clear that the court was distributing to the named beneficiaries the suit property and there is error apparent in identifying those beneficiaries. I have considered the mode of distribution suggested by Kithinji, which, in my view, is unfair because it takes away a lot more land from some of the beneficiaries. It is for that reason that I make the following orders:-

**1. The judgment of 19<sup>th</sup> June 2009 is reviewed to the extent as it applies to distribution of parcel number *Abogeta/U-Kithangari/692* which I order that it be distributed with Lucy Kagwira getting 1.50 acres. The balance shall be shared equally amongst the following:-**

- **Joseph Kithinji**
- **Silas Kinyua Mutwiri**
- **Magambo Maitima**

2. *There shall be no orders as to costs in respect of the summons dated 24<sup>th</sup> July 2009.*

*Dated, signed and delivered at Meru this 17<sup>th</sup> day of March 2011.*

**MARY KASANGO**  
**JUDGE**