



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 220 OF 1998

**IN THE MATTER OF THE ESTATE OF THE LATE MWIREBUA KABUCHANIA
(DECEASED)**

MARETE MWIREBUA PETITIONER

VERSUS

ELIAS NJABANI MWIREBUA OBJECTOR

RULING

Judgment on distribution of this estate was delivered on 4th April 2008. That distribution is now the subject of an application by Marete Mwirebua (**Marete**) by way of Chamber Summons. That application is dated 16th September 2009. Marete seeks the review of that judgment on the following grounds:-

- (a) *There is an error apparent on the face of the record.*
- (b) *The judgment as read and confirmed cannot be implemented.*
- (c) *The land in question is only 1.78ha. equivalent to 4.5 acres.*
- (d) *The Petition/Applicant mode of distribution was not considered.*
- (e) *The Petitioner/Applicant was omitted from benefiting from the deceased estate unfairly.*
- (f) *The judgment distributed the subject estate to non-beneficiaries.*
- (g) *Land parcel No. Mwimbi/Chogoria/561 was not part of the deceased estate*
- (h) *The only estate in contention by the Petitioner/Applicant is land parcel No. Mwimbi/Chogoria/525.*
- (i) *No prejudice will be caused to any party herein.*

In his supporting affidavit, Marete set out the beneficiaries who survived the deceased as:-

-	Charity Kanyua	-	Widow
-	Marete Mwirebua	-	Son
-	Daniel Kaburu Mwirebua	-	Son
-	Kamundi Mwirebua	-	Son
-	Elias Njabani Mwirebua	-	Son
-	Kambura Mwirebua	-	Daughter
-	Wanja Mwirebua	-	Daughter

- **Muchiri Mwirebua** - **Son**

He listed the properties left behind by the deceased as *Mwimbi/Chogoria/525* and *Mwimbi/Chogoria 541*. Marete deponed in his supporting affidavit as follows:-

(6) That parcel No. Mwimbi/Chogoria/561 was granted to me by my grand father and has never been the subject of the estate of the deceased herein and cannot be considered for distribution (see green card “MM2”).

(7) That I am aggrieved by the judgment dated 7th April 2008 as it even considered my personal property which has never been the deceased estate for distribution nor have I ever held the same in trust for any member of our family.

(8) That land parcel No. Mwimbi/Chogoria/525 measures only 1.78 Ha. which is equivalent to 4.5 acres and not 5.5 acres as the said judgment reflects (See green card “MM3”).

(9) That it will be impossible to implement the court’s judgment as the size of the land is bigger than the reality on the ground and title.

(10) That one Gilbert Kinyua whom the court granted (one) 1 acre is a son-in-law to the objector married to objector’s daughter Muthoni Kamunde and he is not for all intents purposes a beneficiary to the estate of the deceased and indeed it is the said Kinyua who is pushing my brother objector to unjustly gain and alienate me from my truthful share.

(11) That when the court was considering both modes of distribution, my proposed mode of distribution was not considered and was the most genuine proposal as it was really unjust to omit me from the benefit of the estate and import a non-beneficiary to succeed me.

This court by its judgment of 7th April 2008 discussed the provisions of section 40 and 42 of the Law of Succession Act cap 160. In that discussion, the court found that Marete had obtained previous benefit during the lifetime of the deceased in that parcel number *Mwimbi/Chogoria/561* was transferred to him by the deceased in the deceased lifetime. It is as a result of that finding that Emukule J. by his judgment of 7th April 2008 took that benefit to Marete into account when distributing the deceased estate. The said learned judge also found parcel number *Mwimbi/Chogoria/541* was transferred to Kaburu Mwirebua during the lifetime of the deceased. The learned judge therefore found that the only property available for distribution was parcel number *Mwimbi/Chogoria/525* which he distributed thus,

- **Charity Kanyua Mwirebua – ½ acre**
- **Gilbert Kinyua – 1 acre**
- **Elias Njabani Mwirebua – 2 acres**
- **Kamundi Mwirebua – 2 acres**

It is that distribution that Marete seeks by his application to have reviewed. I reproduced part of the supporting affidavit of Marete above and from that reproduction it will be seen that Marete was not suggesting what changes should be made if the distribution is reviewed. Elias Njabani (**Elias**) by his replying affidavit dated 25th September 2009 faulted Marete’s application for review for having been filed one year 5 months after the judgment of Emukule J. without explanation for the delay. Elias admitted that parcel number *Mwimbi/Chogoria/525* measures 1.78 ha. which is approximately 4.4 acres. He conceded that bearing the measurements in mind the land on the ground cannot meet the portions given by Emukule J. to the beneficiaries. He however deponed in his affidavit that the court can rectify the certification of confirmation to conform to the available land on the ground. In my perusal of this court file, I have found at least two different consent filed between some parties but not all the beneficiaries in this cause. But of more particular importance is that in the year 2010 before this court

could consider Marete's application for review, Marete by means of a revoked grant in this cause subdivided parcel number *Mwimbi/Chogoria* 525 into parcels number 4805 and 4806. He registered parcel number 4806 in his name and parcel number 4805 into the name of Daniel Murithi Geoffrey. Although the court by consent of the parties on 11th November 2010 ordered for those titles to be cancelled and the property to revert to the title number *Mwimbi/Chogoria/525* the land registrar Meru South/Maara/Tharaka District failed to implement that order alleging that it was confusing. I will come back to this issue later on in this ruling. The application by Marete is brought under order 45 rule 1 (1) (a) and (b) of the Civil Procedure Rules 2010. That rule is in the following terms:-

“1(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.”

The Court of Appeal in the case ***National Bank of Kenya Limited vs. Ndungu Njau*** Civil Appeal No. 211 of 1996 (unreported) in respect of an application for review stated 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 an erroneous conclusion of the law. Misconstruing a statute or other provisions of law cannot be a ground for review.”

Bearing that case in mind, and order 45 rule 1, I need to consider if the application of Marete meets the provisions of a review application. The learned Judge Emukule by his judgment of 7th April 2008 made a finding that parcel number *Mwimbi/Chogoria/561* fell within the ambits of section 42 of Cap 160. For Marete to seek with his application to overturn the finding of the learned judge that that parcel fell within the ambits of section 42 Cap 160 can only be termed as an attempt to appeal against that judgment. That cannot be allowed as was well stated in the case of ***Njoroge & others vs. Savings & Loan Kenya Ltd*** [1990] KLR 78 where the court held:-

“In the circumstances an application for a review should not be taken as a form of appeal. To warrant a review of an error alleged on the face of a record, such an error ought to be so clear as to be without dispute. Where the very existence of an error on a record is contestable by parties, I think, such a matter is a ground which should be canvassed on appeal.”

It is for that reason that I find the application fails. In order to reach a decision that will meet the ends of justice, it is necessary to issue an order that will capture the agreement of the parties recorded in court on 11th November 2010 which the Land Registrar said was confusing. To issue this order will ensure that the suit property reverts back to its original status. I make the following orders:-

1. The Notice of Motion dated 16th September 2009 seeking the review of this court's judgment of 7th April 2009 is dismissed and the costs thereof will be paid by Marete Mwirebua to Elias Njabani Mwirebua.

2. The parcel numbers Mwimbi/Chogoria/4805 and 4806 are hereby cancelled and the same shall revert back to parcel number Mwimbi/Chogoria/525. In order to carry out the cancellation and the revision to the original title, the land registrar Meru South/Maara/Tharaka District shall dispense with the necessity of having the original titles.

3. On the land reverting to parcel number Mwimbi/Chogoria/525 the land registrar shall register inhibition thereon until further orders of this court.

4. This court will require Charity Kanyua Mwirebua, Gilbert Kinyua, Elias Njabani Mwirebua and Kamundi Mwirebua to file a consent in this matter on how parcel number Mwimbi/Chogoria/525 shall be subdivided amongst them bearing in mind the acreage on the ground. If they fail to reach such a consent the matter shall be referred to the court for further orders.

5. Once such a consent is filed as number 4 above, the parties may fix this matter for mention for the court to adopt the consent and to rectify the confirmed grant to conform to that consent.

Dated, signed and delivered at Meru this 18th day of May 2011.

**MARY KASANGO
JUDGE**