



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Succession Cause 67 of 2002

[IN THE MATTER OF THE ESTATE OF DONATAS WANG'OMBE GACHAGI – DECEASED]

AND

PATRICK IHIGA MUGWARA..... PETITIONER

VERSUS

DAVID GACHAGI..... APPLICANT

RULING

Pursuant to the provisions of XLIV rule 1(1) of the Civil Procedure Rules and Rules 63(1) and 73 of the Probate and Administration Rules, David Gachagi Wang'ombe, the applicant herein, took out the Notice of motion dated 23rd October 2009 in which he applied for the judgment delivered on 17/09/2009 to be reviewed. The applicant swore an affidavit he filed in support of the motion. It is the submission of the applicant that there is affidavit evidence that the applicant repaid Kshs.244,100/- to Patrick Ihiga Mugwara, the petitioner herein. It is averred that the issue was not taken into consideration in the judgment in that the estate was shared out equally before the liabilities were settled. The applicant urged this court to deem the omission as an inadvertent mistake hence amenable by an order for review.

Mr. Karweru, learned advocate for the respondent urged this court to reject the motion because the same does not meet the principles for review. It is said the application seeks to reopen litigation. Mr. Karweru further argued that distribution is complete hence there is nothing new.

I have considered the grounds set out on the face of the motion plus the facts deponed in the supporting affidavit. I have also considered the oral submissions of both learned counsels. The following facts are not in dispute. First, is that the applicant herein repaid Kshs.244,100/- on behalf of the deceased's estate. Secondly, that the issue is stated in the affidavits and in the judgment but was not dealt with as a liability to the estate.

The questions which have been put for determination are:

First: Whether or not the anomaly can be corrected by review.

Secondly: Whether or not the motion meets the principles required in applications for review? Let deal with the two questions together. To begin with, Rule 63(1) of the Probate and Administration rules imports the application of the provisions of order XLIV of the Civil

Procedure Rules to succession proceedings. The court of appeal expounded the circumstances when an application for review can be made in the case of **Kithoi vs= Kioko [1982] K.L.R. 177** where it held **inter alia**:

“The Civil Procedure Rules Order XLIV demands, inter alia, that an application for review must be based on the discovery of new and important evidence which was not within the applicant’s 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. The applicant for review must strictly prove the grounds for review, except for review on the ground of mistake or error apparent on the record, failing which the application will not be granted.”

In the matter before me it is alleged that the assets of the estate were distributed even before liabilities were settled. It is a requirement of the Law of Succession Act and the rules embodied therein that the assets of an estate which are available for distribution are net assets. That was not taken into account when confirming the grant. In my view the omission can be categorized as a mistake or an error apparent on record. There is no evidence that the distribution of the estate is complete. I am convinced the motion meets the principles for review. It can be used to correct the error which is apparent. The motion is allowed as prayed with costs met by the estate.

Dated and delivered this 7th day of May 2010.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Nganga holding brief for Karweru and Mr. Kiminda holding brief for Nderi for Petitioner.