



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

**Civil Appeal 106 of 2001**

**MWAURA KIBUNJA ..... APPELLANT**

**VERSUS**

**JOSEPH KAMANDE KIBUNJA ..... RESPONDENT**

**RULING**

This appeal was heard and judgement was delivered on 16<sup>th</sup> July 2008. In that judgment the court ordered distribution to be as follows:-

1. Parcel No. LOC 6/GIKARANGU/974 to be shared equally between Joseph Kamande Kibunja and Peter Mwaura Kibunja.
2. Parcel No. LOC 6/MUNGINI/227 to go to Mwaura Kibunja absolutely

The appeal related to the decision of Resident Magistrate's Court Succession Cause No. 95 of 1998 delivered on 7<sup>th</sup> September 2001. The deceased estate consisted of Loc 6/Gikarangu/974 and Loc 6/Mungini/227. The learned magistrate in her judgment found that the deceased had sold one acre of land to his daughter Jane Wambui Mbae. In her judgment the learned magistrate proceeded to give the said Jane one acre of Loc 6/Mungini/227 and ordered that the remaining acres in both properties be shared equally between the deceased sons Joseph Kamande, Peter Mwaura and Mwaura Kibunja. In the judgment of this court in this appeal the court found that there was no evidence tendered in the lower court to prove that Jane had purchased one acre from her deceased father. The finding in that respect in that judgment is as follows:-

*“In respect the contention by the Petitioner that his sister Jane Wambui purchased one acre I find that I am in agreement with the appellant that there was no clear evidence of that purchase. In addition the said Jane Wambui did not give evidence to confirm such purchase.”*

This court proceeded in that judgment to find that the lower court erred in finding that Jane had purchased one acre which was not supported by evidence. The court is now faced with a notice of motion dated 8<sup>th</sup> October 2008 seeking the following prayers:-

1. **THAT** an order to issue restraining the 1<sup>st</sup> respondent and/or his agents/servants from cultivating or interfering or disturbing in any way applicants occupation of one acre out of LOC.6/MUNGUINI/227 pending the hearing and determination of this application.
2. **THAT** the honourable court be pleased to review the judgement and decree given on

16.07.08.

3. **THAT** upon the granting of prayer one {above}, this honourable court be pleased to order that this matter (hearing to determine distribution of the estate of KIBUNJA CHEGE) only up to the extent of one acre out of LOC.6/MUNGUINI/227) be remitted back for hearing at any court of competent jurisdiction.

That application was filed by Jane and is the subject of this ruling. She deponed in her affidavit in support of that application that Mwaura Kibunja is her step brother while Joseph Kamande Kibunja is her real brother. She stated that she was listed in the chief's letter as one of the beneficiaries of this estate and that letter was filed in the lower court together with the petition for letters of administration intestate. That although she was a beneficiary she was not invited to participate in the hearing on distribution of this estate. She accordingly did not ventilate her rights. The lower court she said failed to have her summoned at the hearing whilst she was an interested party to this estate. She stated that Mwaura Kibunja on 15<sup>th</sup> September 2008 began to harass her and on her making inquiry she found out the existence of this court's judgment which denied her one acre of the estate property. The application was opposed by Mwaura Kibunja. In his replying affidavit he state that the applicant is a stranger to this cause that she was all along aware of this proceedings in the lower court and as well as this appeal. That despite that knowledge she did not seek to be made a party nor did she lay any claim over the estate property. Section 80 of the Civil Procedure Act provides as follows:-

***“Any person who considers himself aggrieved-***

***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is allowed by this Act,***

***may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”***

Similarly Order XLIV of the Civil Procedure Rules provides that any person who is aggrieved by a decree or order may seek the review of such decree or order. That rule provides as follows:-

***“(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.”***

As it is clear from those two provisions any person can approach the court when they are aggrieved by any order of the court or decree. The use of the term any person implies that it does not matter who approaches the court provided such a person is aggrieved by the order or decree being sought to be reviewed. The opposition made by Mwaura Kibunja to the applicant approaching this court therefore is defeated by those provisions. The applicant having had judgment in her favour in the lower court which awarded her one acre it is obvious that she is aggrieved by the judgment of this court which took her from her that one acre. The court in doing so did not invite her to be a party to this appeal. The applicant

therefore is entitled to have the judgement of 16<sup>th</sup> July 2008 reviewed as set aside. Order XLI rule 22(1) (a) (b) provides as follows:-

**“(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if-**

**(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or**

**(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause**

**the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.”**

That rule allows the court whilst hearing an appeal to admit additional evidence. In this case since the applicant was not heard in the lower court there is no record of her evidence on her claim of one acre. The deceased died in 1967. The beneficiaries in this estate have waited many years to have a final determination of their inheritance of this estate. It is with that in mind that this court will order that there be an admission of additional evidence from the applicant and from the other parties to this appeal. Such evidence will relate only to the issue of this applicant's claim of one acre over the deceased property. Order XLI rule 23 allows such evidence to be recorded by the court where the appeal is preferred. I am of the view that it is expedient for the evidence relating to that issue to be recorded by this court. If the parties were to be remitted back to the lower court there would be a long delay in this matter. I therefore grant the following orders:-

- 1. That this court does hereby review and set aside the judgment of this court in this appeal dated 16<sup>th</sup> July 2008.**
- 2. The court orders that additional evidence be tendered by Jane Wambui Mbae, Mwaura Kibunja and Joseph Kamande Kibunja on the issue of Jnae Wambui Mbae's claim of one acre over the deceased property. Each such parties will be at liberty to call witnesses.**
- 3. The hearing of that additional evidence shall be fixed at the reading of this ruling.**
- 4. The cost of the notice of motion dated 8<sup>th</sup> October 2008 shall abide with the judgment of this appeal.**

**Dated and delivered at Nyeri this 18<sup>th</sup> day of December 2008.**

**MARY KASANGO**

**JUDGE**