REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

SUCCESSION CAUSE NO.37 OF 1991

IN THE MATTER OF THE ESTATE OF FREDRICK MARANYA (DECEASED)

STEPHEN KINYUA MARANYA.....PETITIONER

VERSUS

BESSY NKIROTE.....OBJECTOR

STEPHEN KIMATHI M'MARANYA.....1ST PROTESTOR

CHARITY NKATHA M'MARANYA.....2ND PROTESTOR

SAMUEL RAARU KIAIRA.....APPLICANT

RULING

1. By consent of the parties, the Notice of motion dated 27.5.2019 and summons by dependants dated 1.7.2019 were ordered to be heard together. The Notice of Motion under certificate of urgency (**hereinafter referred to as the 1st application**) expressed to be made pursuant to Section 63 of the Probate and Administration Rules, Section 80 of the Civil Procedure Act & Order 45 of the Civil Procedure Rules and all other enabling provisions of the law, the petitioner seeks, anomalously, in the main, an order for the review of the judgement of Justice Hon. F. Gikonyo delivered on 13/5/2019 pending the hearing and determination of this application. I would stop at this level and say that such time-bound order would serve no efficacious purpose, but I am mandated to go to the merits and disregard technicalities. On that obligation, I opt to disregard the inelegance in crafting of the prayers and read the application to call upon the court to review its decision aforesaid.

2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Stephen Kinyua Maranya, the petitioner herein, sworn on even date are that the judge erred by failing to include the name of Samuel Raaru Kiaira, who ought to get 0.28 Ha of NTIMA/IGOKI/561**(hereinafter referred to as the suit land),** in trust for his siblings, as per the annexed order dated 2.5.1991. It is further contended that the deceased had a brother (the late Simon Kaburu) with whom they were supposed to share the suit land, the ancestral land, which was registered in the name of the deceased and that in 1990, a year after the demise of the deceased, elders visited the suit land, put beacons and subdivided it into two equal parts. Presently, the family of the late Simon Kaburu has extensively developed their portion of the said land and it would be injudicious not to include them as beneficiaries. In addition, daughter to the deceased namely, Fridah Kanana Owino, was not included in the list of beneficiaries.

3. It is further contended that the deceased divorced one Charity Nkatha upon knowing that she had sired John Ndegwa out of wedlock in 1995. The said Charity remarried after which she got Simon Koome, Gibson Mutea, Jane Karwirwa, Stephen Kimathi and Josephine Gacheri in that subsequent marriage and was buried at the place of the said husband. Lastly, the applicant contends that the parcel of land he intended to settle on still has a pending dispute in court as Meru ELC No. 89/1988, therefore he has not built any home and urges the court to be mindful of his fate. He disputes any entitlement by Simon Koome Gibson Mutea, Jane Karwirwa, Stephen Kimathi and Josephine Gacheri as children of Charity Nkatha and people the deceased never knew or saw in his life time.

4. In opposing the application, Stephen Kimathi, one of the beneficiaries, asserts that the administrator cannot purport to Act for the objectors or persons who have not laid acclaim to the estate and that the annexture marked **SKM1** is not complete but is the decision on distribution that that was set aside by the decision of the court dated 13.5.2019. He then asserts that the question of who are the beneficiaries has been finally determined and it is not up to the administrator to determine who the beneficiaries are at this late hour and that the recourse if any is in appeal not review.

5. In further support of the 1st application, the petitioner swore an affidavit in support of the summons for confirmation of grant on 12.3.2021, proposing his mode of distribution of the deceased estate. That proposal evidently leaves out the beneficiaries the applicant

considers not entitled.

6. The other application is by Summons by Dependants under certificate of urgency and premised upon Section 26 and 29 of the Law of Succession Act (**hereinafter referred to as the 2nd application)**, in which the applicant seeks that he be reasonably provided for from the deceased estate comprised in the suit land. The application is supported by the grounds on the face of it and supporting affidavit of Samuel Raaru Kiaira, the applicant, sworn on even date. In it he contends that he is related to the deceased by virtue of being his nephew. The deceased, who is brother to his father, took him in as his own, after the death of his father. His father lived and was buried on the suit land, which is ancestral land, and which land the deceased held in trust for himself and his family. He contends that his father was buried on the suit land. He asserts to have been among the beneficiaries named by the petitioner but the court omitted his name in determining the beneficiaries. He contends that he lives and works on the suit land, which he has extensively utilized and prays to be given 0.28 Ha of the suit land, in trust for his siblings.

7. On 3/11/2020, Mr. Otieno for the petitioner indicated to court that he was not opposing both applications. On 29.3.2021, Mr. Karanja for the protestor told court that he would only be opposing the 1st application but not the second. On 27.9.2021, Mr. Nyindo for the objector told court that he was not opposed to the 2nd application and would concede to the 1st application only to the extent of including Samuel Raaru and excluding NYAKI/KITHOKA/666 from the estate of the deceased, but left the court to determine whether Fridah Kanana was a beneficiary of the estate of the deceased. At the time of writing this ruling, no response had been filed in respect to the 2nd application.

8. The applications were subsequently directed to be canvassed by way of written submissions, but it appears only the petitioner filed such submissions. I must point out that here the counsel have totally abdicated the duty to court to provide both facts and the law to help court reach a just and fair decision. It is one of those situations where one would be understood that parties and their legal advisors have literally thrown some scanty facts at the court and ask the court do whatever it wishes with such scanty facts. I make this observation noting that for the application for review no attempt was made at all to align same within the known parameters for review. Even the second applicant does very little to demonstrate relationship with the deceased and the difficulty of understanding the claim in that second application is exuberated by total failure by the other parties to bring forth facts as to enlighten the court on the dispute. That notwithstanding, I must try my best to dig out facts from the available material and try to establish the justice of the case

9. In his submissions in support of the 1st application, the petitioner submitted that the erroneous omission of the names of Samuel Raaru Kiaira and Fridah Kanana as dependants of the estate of the deceased, were mistakes or errors apparent on the face of the record, which fell within the purview of review. He submitted that NTIMA/KITHOKA/666 did not form part of the estate of the deceased, as the same is registered in the name of Martin Mugambi Mithega. He cited **Sadar Mohamed v Charan Sign & anor (1963) EA 557**, where it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two(for example error on the face of the record or discovery of new matter). He referred to the testimony of Harriet Karimbi Maranya, at paragraph 11 of the judgement, that the suit land should go to herself, Triposa, Jane and Raaru, son of his brother. He contended that the said evidence was unopposed and it is clear the suit land was ancestral and should have been shared between the deceased and his brother, the late Simon Kaburu, whose share was to be inherited by his son Samuel Raaru Kiaira. He urged the court to take that evidence into consideration. He submitted that there was a mistake apparent on the face of the record and discovery of new and apparent matter to warrant grant of the orders sought.

10. In conclusion, he submitted that he would not be opposing the 2nd application by the applicant.

Analysis and determination

11. For the applicant and the petitioner to succeed in their applications for review, they must establish to the satisfaction of the court any one of the following three grounds as stipulated under section 80 and Order 45 Rule 1 of the Civil Procedure Act.

12. It was held in ***Stephen Githua Kimani v Nancy Wanjira T/A Providence Auctioneers [2016] eKLR,*** that:-

> **Section 80 of the Civil Procedure Act gives the power of review and Order 45 sets out the rules. The rules in my view restrict the grounds for review. The above rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or' (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay."**

13. On when a review can be granted, the court in ***Mwihiko Housing Company Ltd v Equity Building Society [2007] 2 KLR 171*** held and reiterated that '*a review could have been granted whenever the court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another court could have taken a different view of the matter nor could it have been a ground that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review.'*

14. Here, the grounds raised in support of the review are non-inclusion of Fridah Kanana and Samuel Raaru, the daughter and nephew of the deceased respectively, in the schedule of distribution. The question to help resolve that dispute is whether the two were named and disclosed in the petition filed by the applicant in support of the application grant.

15. The petition filed named 15 persons as the dependents of the deceased. That list was founded on the later by the area chief dated the 5.7.1990. I have been unable to lay my hands on any other document that varied or amended that list as confirmed by the affidavit of Harriet Karimi Maranya sworn on the 19.2.1991 before one Mukira Ntoidiri Mbata. That is the appreciation of the facts as captured by the court in the decision of 13.5.2019. In that list the two now said to have been erroneously excluded appear nowhere.

16. However, by a ruling dated 2.5.1991, the court did distribute the estate and among the persons to whom the estate was distributed was Samuel Kaaru Kiaira but Frida Kanana was never mentioned. That ruling, which I have the full copy in the court file, as much it confirmed the grant and distributed the estate was subjected to challenge and the challenge resulted in the decision sought to be reviewed. In the papers filed and considered in the decision now under review, only charity Nkatha put up a case for Samuel Kaaru to the effect that the deceased wished that he gets a portion of Ntima /Igoki/561. No mention was however made of Frida Kanana.

17. My review of the evidence leads me to find that there is no disclosed mistake of fact and apparent on the face of the record nor is sufficient reason revealed to justify review. What the administrator seeks is however to upset the findings of fact based on the material availed. That may be a good ground for appeal but not review.

18. On the exclusion of NYAKI/KITHOKA/666 from these proceedings as it did not form part of the estate of the deceased, the court on page 10 at paragraph 12 of the impugned judgement stated:-

> **"Nyaki/Kithoka/666 seems to be a major point of dispute for the objector stated that this land was given to him by the clan and the deceased to hold it in trust for him. But he went ahead and registered the land in his name which resulted in Meru HCC No. 89/1988 between the deceased and objector. The case is still pending in court. Furthermore, the petitioner and Triposa Mukomeru also sold the said parcel of land to one Martin Mithega. On 26th September 2018, the court directed that the said property's ownership shall be determined in the pending case No.89/1988 and set aside the said property. This court will only give effect to the decision of ELC on the property…Consequently, assets for distribution are Plot N. 1241, Bula Pesa Isiolo, Ntima/Igoki/561 and Kiirua/Ruiri/402.**"

19. The judgment clearly excluded the property Nyaki/Kithoka/666, yet, that property still found its way into the certificate of confirmation of grant issued on 22.5.2019. That inclusion is clearly and vividly erroneously, because the property was set apart pending the disclosed litigation and was not available to be distributed. A certificate of confirmation is summarized version and expression of the judgment of the court and thus can never be at variance with the judgment. It is determined that the certificate of confirmation of grant dated 22.5.2019 was issued in error and shall be rectified to have error which included Nyaki /Kithoka/666 corrected to exclude it from the assets due for distribution.

20. On the contention by the petitioner that Charity Nkatha and her children were not beneficiaries of the deceased, I find that the evidence led was accepted by the court to have demonstrated their entitlement as beneficiaries. That challenge is upon proved facts and is not available to be taken on review but on appeal.

21. From the foregoing, I reach the conclusion that a proper case for review, based on the reasons advanced, has been made, for the exercise of the court's powers for review.

22. On the 2nd applications dated 01.07.2019seeking reasonable provision for the Samuel Kaaru Kiaira, I have said that no evidence was led to establish him as a dependant of the deceased as defined by the Act. The evidence points more toward a claim in trust over the land. That is a claim that is not with the jurisdiction of this court as a succession court. I find it not available for my determination and consequently decline to deal with it. It may be dealt with in the appropriate court as may be advised by counsel. It being a matter on jurisdiction, it matters not that the application was never opposed.

23. It is so ordered that both applications fail and are dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF FEBRUARY, 2022

PATRICK J.O OTIENO

JUDGE

In presence of

NO APPEARANCE FOR THE APPLICANT

MR. KARANJA FOR 1ST PROTESTOR

MR. NJINDO FOR THE OBJECTOR

PATRICK J.O OTIENO

JUDGE