



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 113 OF 1997

IN THE MATTER OF THE ESTATE OF M'THUATUKU M'MAGAI(DECEASED)

**GEOFFREY MWORIA M'ITWATHUKU (Legal representative of the estate of
KARURI M'ITUATHUKU.....PETITIONER**

VERSUS

CHARITY KAIRIGO.....OBJECTOR

JOHN WYCLIFFE MUREITHI

MARGARET KANYUA GITUMA.....INTERESTED PARTIES

RULING

1. By Chamber Summons under certificate of urgency dated 7/6/2019 brought pursuant to Rules 63(1) & 73 of the Probate and Administration Rules, Order 45 Rule 1 of the Civil Procedure Rules and all other enabling provisions, the objector seeks that; the court reviews its judgement delivered on 18/12/2018 and rectify the grant herein to assign shares of the estate to the beneficiaries thus:-

- i. L.R NTHIMBIR/IGOKI/576 - Geoffrey Mworia
 - ii. L.R NTHIMBIR/IGOKI/577 - Francis Mbaabu M'Tuathuku (Deceased) and be registered in favour of Jane Kairuthi(Widow), Penina Gakii, Martin Kinoti, Purity Ntinyari
 - iii. L.R NTHIMBIR/IGOKI/578- estate of Ayub Mwenda(Deceased)
 - iv. L.R NTHIMBIRI/ IGOKI/581- Charity Kairgo
- Jerica Gakii Jointly
- Lucy Kagendo

2. The grounds upon which the application is premised are that, the grant as confirmed by the court cannot be implemented without occasioning hardship and prejudice to the beneficiaries, as that mode of distribution goes against how the deceased had settled his dependants. She asserts that one Francis Mbaabu, a son to the deceased has totally been left out of the scheme of distribution.

3. In her supporting affidavit sworn on even date, she avers that the deceased was polygamous with two houses consisting of Lucia Karuri and Margaret Karegi. In Lucia Karuri's house, the 1st wife, there are children being; M'Arimi M'Tuanthuku - son, Geoffrey Mworia - son, Ayub Mwenda - son(deceased), Francis Mbaabu - son. Margaret Karegi, the second wife, is deceased but had three children who are Jerica Gakii, John Mwititi and Lucy Kagendo.

4. In 1994, the deceased subdivided his land L.R NTHIMBIRI/IGOKI/308 into 6 portions to create L.R NTHIMBIRI/IGOKI/576, 577, 578, 579, 580 and 581. The deceased transferred L.R NTHIMBIRI/IGOKI/579 measuring 1.21 Ha to Harriet Gaiti M'Ikiao, and L.R NTHIMBIRI/IGOKI/580 to John Mwititi, the eldest son in the 2nd house, during his lifetime. The deceased, during his lifetime, facilitated L.R NTHUMBIRI/IGOKI/5 to be registered in the name of M'Arimi M'Tuanthuku as evidenced by the annexed green card.

5. The deponent deposes that John Mwititi and M'Arimi M'Tuanthuku had settled on their respective parcels, and the deceased died knowing these two would not seek any share in his estate. At the time of the deceased's demise, his estate comprised of L.R NTHIMBIRI/IGOKI/576, 577, 578 and 581. She contends that the deceased had prior to his death shared his estate among his beneficiaries as follows;

1st House

L.R NTHIMBIRI/IGOKI/576 - 0.4 Ha- Geoffrey Mworira

L.R NTHIMBIRI/IGOKI/577 - 0.4 Ha- Francis Mbaabu M'Tuathuku

L.R NTHIMBIRI/IGOKI/578 - 0.81 Ha – Ayub Mwenda

Total Acreage - 1.61 Ha

6. The beneficiaries are settled as such on the ground together with their families, and none of them is desirous of going against how the deceased had shared his estate. She further avers that upon the deceased's demise, he was buried on parcel L.R NTHIMBIRI/IGOKI/581, which she occupies and uses with her two daughters namely Jerica Gakii and Lucy Kagendo.

7. She avers that the beneficiaries are now at a quandary in view of the court's mode of distribution, as it will be difficult and impossible to give effect to it. She states that Francis Mbaabu (deceased) has altogether been excluded from the distribution of the estate. She deposes that M'Arimi M'Tuanthuku and John Mwititi should not partake in the sharing of the deceased estate, because they were settled by the deceased during his lifetime.

8. The only person who is opposed to the application is Geoffrey Mworira, the petitioner herein, who is said to have had a knack of interfering and intermeddling with the estate and accused of having sold L.R NTHIMBIRI/IGOKI/576 to an outsider who is in situ. After the said sale, the petitioner then moved into and erected his home on L.R NTHIMBIRI/IGOKI/577, thereby displacing the family of Francis Mbaabu, whom he hounded out of the estate.

9. She prays that the mode of distribution adopted by the court be reviewed and the grant thereof rectified as proposed by herself. She contends that the said proposed mode of distribution is acceptable to all the beneficiaries and will help alienate suffering and hardship. She has annexed a write up by the area chief to show that this dispute had severally been arbitrated upon by the local administration.

10. The petitioner swore replying and further verifying affidavits on 30/9/2021, which he subsequently withdrew on 5/10/2020. He filed a fresh replying affidavit on 10/6/2021 duly sworn by him on 31/5/2021 in which he contends that he had already preferred an appeal against the judgement and decree herein and has annexed a copy of the memorandum of appeal to that effect. He contends that he served various parties herein with the record of appeal and the supplementary record of appeal, which were duly received by them, as shown by the exhibited affidavit of service.

11. He has also exhibited a certificate of delay to show that the delay in filing the appeal was occasioned by typing of the proceedings. He contends that an application for review cannot stand where there exists an appeal, and the objector should therefore ventilate her issues in the appeal. He prays for the dismissal of the application for being improperly and unprocedurally before the court, incompetent, fatally defective and bad in law.

12. The interested parties neither filed replies nor submissions in response to the application.

13. Submissions were filed by both the objector and the petitioner on 1/2/2021 and 9/6/2021 respectively. The objector relied entirely on the supporting affidavit and the annexures herein and emphasized that the mode of distribution contained in the certificate of confirmation of grant would occasion a lot of hardship and loss if it were to be implemented, because of how the beneficiaries are settled and using the estate. She contends that one Francis Mbaabu, a son to the deceased has totally been left out in the scheme of distribution, despite living and having settled on part of the estate. She urges the court to disregard the affidavit of the petitioner as the same is unintelligible and makes no sense.

14. The petitioner submits that the objector seeks review of the judgement delivered on 18/12/2018 to re-arrange distribution and introduce a new beneficiary yet he has already filed an appeal against the said judgement as evidenced by the annexed memorandum of appeal in his replying affidavit. According to him, the issues raised in the application for review are covered in the appeal, and therefore the objector can ventilate her issues in the appeal. He likens entertaining the application to wastage of precious judicial time and issuance of orders in vain on the basis of the pending appeal in the Court of Appeal. He cites the provisions of Order 45 Rule 1, which stipulates that an application for review lies only where no appeal has been preferred. He submits that the application cannot stand since there is already a pending appeal, and that the objector can file a cross- appeal in the appellate court.

Analysis and Determination

15. This being an application for review, the objector is obligated under Order 45 of the Civil Procedure Rules as imported into the Succession Act by Rule 63 of the Probate and Administration Rules to premise the application upon and demonstrate; mistake or error of fact apparent on the face of the record; discovery of new and important evidence, which was unavailable at the time the decision was made, despite having exercised due diligence or any other sufficient reasons. Here, the applicant says the judgment distributing the estate and confirming the grant is incapable of implementation without hardship and disturbance of the way beneficiaries had been settled on the estate land by the deceased. I read that to mean that there is a sufficient reason to review the decision.

16. An order for review is not always available to the parties and can only be available where there is no right of appeal or where a right of

appeal exists but no appeal has been preferred. The rationale for this limitation is so that the trial court and the appellate one don't end up in the very embarrassing situation of two conflicting decisions. The converse is that for the sake of efficient application of judicial time, once an appeal is filed, any party unhappy with any part of the decision acquires the right to mount challenge within the appeal.

17. In this matter, the petitioner sought to challenge the decision of the court delivered on 18/12/2018 by lodging an appeal being CACA No 217 of 2019 in the Court of Appeal at Nyeri. The fact of existence and pendency of the appeal has not been controverted by the applicant and I deem it conceded. That fact alone dictates that the application for review does not lie for determination by the court because an appeal has been preferred against the decision sought to be reviewed. The application is barred by the statute and invites the court to act against the law

18. The inevitable end and conclusion is that I find no merit in the application dated 7/6/2019 and it is accordingly dismissed with each party bearing own costs.

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

PATRICK J.O OTIENO

JUDGE

NO APPEARANCE FOR PARTIES.

PATRICK J.O OTIENO

JUDGE