



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 302 OF 2010

IN THE MATTER OF ESTATE OF MACHARIA KARIA ALIAS MACHARIA S/O KARIA(DECEASED)

JANE WAMUYU MAINA.....APPLICANT/PETITIONER

VERSUS

JAMES NDONYO NJOGU.....PROTESTOR

RULING

1. This summons dated 10th December 2019 seeks for review of the judgement delivered on 31/03/2017 and orders for rectification made on 28/05/2019. It further seeks for orders for confirmation of grant in favour of the applicant/petitioner in terms of paragraph 11 of his affidavit.
2. The summons is supported by the affidavit of Jane Wamuyu Maina the applicant. It is deponed that the grant was confirmed in the judgement of Ngaah, J. following hearing of a protest filed by the respondent against summons for confirmation of grant that was initiated by the applicant. There are two beneficiaries who passed on after the distribution of the estate namely Juliana Wairimu and Lydia Wambui Muraya both being daughters of the deceased.
3. It is further deposed that the beneficiaries held a discussion after the judgement and agreed that the distribution made therein is not practical for two reasons:-
 - i. That the land parcels of land available for distribution are too small to make any economical sense after sub-division
 - ii. That some of the beneficiaries have extensively developed some of the properties with permanent structures thereon.

Following the meeting of the beneficiaries and advice of the surveyor, the applicant was authorised to make this application proposing the mode of distribution contained in paragraph six(6) of her affidavit thus:-

A. L.R NO. IRIAINI/KAGUYU/442 approximately 5.98 Acres

1. Tabitha Nyaguthii Wanjiku, Beatrice Wambui Wanjiku, Virginia Njeri Wanjiku, Agnes Wairimu Maina **(0.6645 Acres to be registered as proprietors in common in equal shares)**
2. Agnes Muthoni Macharia and John Mwangi Macharia **(0.664 Acres to be registered as proprietors in common in equal shares)**
3. Esther Wanjugu Njonge, Mercy Muthoni Muraya, Purity Waguthi Afudo, James Ndiritu Muraya, Shelmith Wambia Muraya, Lawrence Ngatia Muraya
(0.664 Acres to be registered as proprietors in common in equal shares)
4. Virginia Njeri Maina – 0.6645 Acres
5. Esther Wangui Wamai – 0.6645 Acres
6. Jane Wamuyu Maina – 0.6645 Acres
7. Mary Wanjiru Karumi-0.6645 Acres

8. Lucy Wandia Macharia -0.6645 Acres

9. Alice Njeri Murimi – 0.6645 Acres

B. IRIAINI/GATUNDU/559 approximately 0.62 Ha to be transferred and registered as below:-

1. James Ndonyo Njogu – 0.32 Ha

2. Jane Wamuyu Maina – 0.10Ha

3. Mary Wanjiru Karumi – 0.050 Ha

4. Alice Njeri Murimi – 0.050 Ha

5. Lucy Wandia Macharia – 0.050 Ha

6. Tabitha Nyaguthii Wanjiku, Beatrice Wambui Wanjiku, Virginia Njeri Wanjiku, Agnes Wairimu Maina (**0.050 Ha to be registered as proprietors in common in equal shares**)

C. L.R NO. IRIAINI/GATUNDU/898

1. Virginia Njeri Maina – 0.0775 Ha

2. Agnes Muthoni Macharia and John Mwangi Macharia (**0.0775 Ha to be registered as proprietors in common in equal shares**)

3. Esther Wanjugu Njonge, Mercy Muthoni Muraya, Purity Waguthi Afudo, James Ndiritu Muraya

4. In the submissions of the applicant filed by her counsel P.M. Kahiga & Co. Advocates, it is argued that the distribution prescribed in the judgement could not proceed for various reasons and if adopted would have resulted in demolishing of permanent structures on the three properties of the deceased namely Iriaini/Kaguyu/442, Iriaini/ Gatundu/559 and Iriaini/Gatundu/898

5. Relying on the case of **Re Estate of Oliokampai Sarapae Sanguti (deceased)Succession cause No. 107 of 2015 cited (2019) as eKLR**, the applicant urged this court to review the judgement in question. It was held in that case that :-

“This court’s jurisdiction to review its decisions under the laws of Kenya is derived from Section 80 of the Civil Procedure Act which stipulates as follows:

“Section 80. Review, 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.”

The power of review may be exercised on discovery of new and important matters or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of Appeal. A power of review is not to be confused with appellate power which may enable an appellate Court to correct all manner of errors committed by the Subordinate Court”.

6. The applicant also relied on the case of **Nyamogo & Nyamogo Vs Kogo[2001] E.A 174** that dealt with the issue of an error or mistake apparent on the face of the record where it was held that orders for review were deserved.

7. In considering this application, I wish to make it clear that there was no error or mistake apparent on record in the judgement of the honourable judge. The facts that have been presented in this application regarding permanent developments and small portions of land that could allegedly result in uneconomic use of the parcels of land, were not brought to the attention of the court during the hearing of the case.

8. However, the subject of this summons falls squarely under the provisions of Order 45 of the Civil Procedure Rules that allows a party to seek review of orders where new and important matters arise following the issue orders and which the parties on exercise of due diligence would not have produced before the court at the time of hearing.

9. It is noted that the beneficiaries in this case included the children and grand children of the deceased who were not less than fourteen(14) in number. As each fought for their rights of inheritance in court through the applicant(who was the petitioner) and the protestor (the respondent herein), the idea of the sizes of the parcels of land and the fact that the subdivision as prescribed by the judgement did not occur in their minds. However, in the process of implementing the grant, the challenges were met and had to be resolved in the interests of justice.

In my view, the said challenges that make it difficult, if not impossible to implement the confirmed grant, qualify to be new and important matters under **Order 45 of the Civil Procedure Act**.

10. This summons is fortified by the fact that all the beneficiaries including the respondent (formerly the protestor) are now speaking with one voice. There is urgent need for the beneficiaries to work as a team in order to address the issues at hand. This application is therefore unopposed.

11. Consequently, I find the application merited and allow it in the following terms:-

a) That judgment of Ngaah J. delivered on 31/03/2010 is hereby reviewed in the following terms:-

A. L.R Iriaini Kaguyu/442(5.98acres)

- i)Tabitha Nyaguthii Wanjiku
- ii)Beatrice Wambui Wanjiku To be registered as proprietors
- iii)Virginia Njeri Wanjiku in common in equal shares for
- iv)Agnes Wairimu Maina 0.6645 acres
- v)Esther Wanjugu Njoroge
- vi)Mercy Muthoni Muraya To be registered as proprietors in
- vii)Purity Waguthii Afudo common in equal shares for
- viii)James Ndiritu Muraya 0.664 acres
- ix)Shelmith Wambia Muraya
- x)Lawrence Ngatia Muraya
- xi)Agnes Muthoni Macharia To be registered as proprietors
- John Mwangi Macharia in common in equal shares for
- 0.664 acres
- xii)Virgina Njeri Maina - 0.6645 acres
- xiii) Wangui Wamai - 0.6645 acres
- xiv)Jane Wamuyu Maina - 0.6645 acres
- xv)Mary Wanjiru Karumi - 0.6645 acres
- xvi)Lucy Wandia Macharia - 0.6645 acres
- xvii)Alice Njeri Murimi - 0.6645 acres

B. L.R. Iriaini/Gatundu/559(0.62) ha)

- i)James Ndonyo Njogu - 0.32ha
- ii)Jane Wamuyu Maina - 0.10ha
- iii)Mary Wanjiru Karumi - 0.050ha
- iv)Alice Njeri Murimi - 0.050ha
- v)Lucy Wandia Macharia - 0.050ha
- vi)Tabitha Nyaguthii Wanjiku

vii)Beatrice Wambui Wanjiku	To be registered as proprietors
viii)Virginia Njeri Wanjiku	in common in equal shares for
ix)Agnes Wairimu Maina	0.050ha

C. Iriaini/Gatundu/898

i)Virginia Njeri Maina	- 0.0775ha
ii)Agnes Muthoni Macharia	To be registered as proprietors in
John Mwangi Macharia	common in equal shares for 0.775ha
iii)Esther Wanjugu Njoroge	
Mercy Muthoni Muraya	To be registered as proprietors in
Purity Waguthii Afudo	common in equal shares for 0.775ha
James Ndiritu Muraya	

12. It is hereby so ordered

DELIVERED, DATED AND SIGNED AT NYERI THIS 11TH DAY OF MARCH, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 11th day of March 2021.