



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 248 OF 2003

IN THE MATTER OF THE ESTATE OF M'MUGAMBI M'IMANYARA (DECEASED)

BETWEEN

DAVID KINUU.....APPLICANT

AND

JUSTUS MBAYA M'MUGAMBI.....1ST PETITIONER/RESPONDENT

FREDRICK MWORIA.....2ND RESPONDENT

GEOFFREY MUGAMBI.....3RD RESPONDENT

MARTIN MWENDA.....4TH RESPONDENT

NICHOLAS MUGAMBI.....5TH RESPONDENT

JANE WORUU MUGAMBI.....6TH RESPONDENT

RULING

Introduction

1. **M'MUGAMBI M'IMANYARA (deceased)** died sometimes on 14th October, 1985. The deceased had five wives and 15 children who include the parties herein.

2. In 1957 during demarcation, the deceased was allocated Land Parcel No. Abothuguchi/Kithirune/97 measuring 24 acres. His 3 sons were also allocated land as follows:

- 1) M'Mbogori M'Mugambi – Land Parcel Abothuguchi/Kithirine/352 (7 Acres)
- 2) Justus Mbaya - Land Parcel abothuguchi/Kithirine/123 (4.61HA)
- 3) Stanley Ntiriti - Land Parcel No. Abothuguchi/Kithirine/125(3.92 HA)

3. The deceased then subdivided parcel Abothuguchi/Kithirune/ 97 into four portions which are Nos. 1360, 1361, 1362 and 1363. He then allocated them as follows:

- a) Samuel M'Kiara - Land Parcel No. 1360 (2 Acres)
- b) Fredrick Mworira Mugambi - Land Parcel No. 1361 (2 Acres)
- c) Geoffrey Mugambi - Land Parcel No. 1362 (2 Acres)

d) The deceased - Land Parcel No. 1363 (18 Acres)

4. The deceased then further subdivided Land Parcel No. 1363 into four portions where he distributed it as follows:

a) Fredrick Mworira - Land Parcel No. 1624 (5 Acres)

b) Geoffrey Mugambi - Land Parcel No. 1625 (5 Acres)

c) Richard Mugambi - Land Parcel No. 1626 (5 Acres)

d) The deceased - Land Parcel No. 1627 (3 Acres)

5. Before deceased's death, a dispute arose between him and his sons concerning the distribution of the family land on the basis of that he had disinherited them. Four of his sons filed **MERU HCCC NO. 60 OF 1884** against the deceased and two of his sons seeking orders for redistribution of the land.

6. By a judgment dated 03rd August, 1989, Oguk J held that:

“For reason given, I disregard the WILL of the deceased dated 20th January, 1983 (Exhibit 1) and hold that as far as possible, the family land registered in his name as land parcel number ABOTHUGUCHI/KITHIRUNE/1363 should be distributed equally amongst all his sons. He was holding this land in trust for himself and the rest of his family. Although he has now sub-divided the said land secretly and transferred or was in the process of transferring portions thereof to some of his chosen sons, equity will still follow them and hold that they are holding these portions of land as trustees for the other brothers who were not provided for by their father (the 1st Defendant)

Doing the best I can in the circumstances of this case, I hold that the 3rd Defendant, Fredrick K. MWORIA who is holding or was given a portion of family land parcel number ABOTHUGUCHI/KITHIRUNE/1624 measuring 5 acres by the 1st Defendant, is holding this land to the extent of 2 acres as a trustee for the 1st Plaintiff, DAVID KINUU M'MUGAMBI. The interest of the said FREDRICK K. MWORIA on this land in my judgment is only limited to 3 acres and he should transfer the 2 acres thereof to DAVID KINUU M'MUGAMBI.

Similarly, I hold that GEOFFREY MUGAMBI who is holding or was given a portion of the family land, parcel number ABOTHUGUCHI/KITHIRUNE/1625 measuring 5 acres hold this land to the extent of 2 acres as a trustee of 2nd plaintiff, JOSEPH MEME MUGAMBI. His interest in this land in must Judgment is limited to only 3 acres and he should transfer 2 acres thereof to JOSEPH MEME MUGAMBI.

I further hold and declare that the 1st Defendant, M'MUGAMBI M'IMANYARA (now deceased), who held the portion of the family land, parcel Number ABOTHUGUCHI/KITHIRUNE/1627, measuring approximately 3 acres in his name, holds the said parcel of land as a trustee for each of his sons, JULIUS KIMAITA and MUTHURI MUGAMBI (3rd & 4th Plaintiffs) to the extent of 1 ½ acres for each of them. This parcel of land shall be sub-divided into two portions of 1 ½ each and transferred to each of the 3rd and 4th Plaintiffs.

Each of the 2nd and 3rd Defendants are ordered to sign all necessary documents of transfer to confer title to the 2 acres of land awarded to the 1st and 2nd Plaintiffs in respect of the portions of the land they are holding. Should they or any of them refuse to do so, which I do not think is likely, to happen, then I empower and authorize the Executive Officer of this Court to sign all such documents on their behalf and also on their behalf of the 1st Defendant (now deceased).

For the avoidance of doubt, I state that land parcel number ABOTHUGUCHI/KITHIRUNE/1626 measuring 5 acres which was given to RICHARD M'MUGAMBI, is not affected by this Judgment as he was never a part to this suit and the said portion of land was not one of the parcels of land upon which the Plaintiffs' prayer was based.”

7. The judgment of the High Court was upheld on appeal in **NYERI CIVIL APPEAL NO. 153 OF 1989**.

8. Subsequently and more particularly in 2003, **M'MBOGORI M'MUGAMBI and JUSTUS MBAYA M'MUGAMBI (Petitioners)** petitioned for the letters of administration where they stated the deceased's asset comprised of ABOTHUGUCHI/KITHIRUNE/1363 measuring 18 acres.

9. On 17th September, 2003 the Petitioners were issued with the grant of letters of administration intestate. An objection and cross-petition dated 15th October 2003 was raised by the objectors. Thereafter, two protests were filed vide affidavit of protest by Janet Wooru Mugambi and Stanley Ntiritu M'Mugambi sworn on 15th April 2009 and 16th April 2009 respectively. Stanley however withdrew his protest.

10. By summons dated and filed on 04th June, 2020 **DAVID KINUU (Applicant)** prays for an order that this Honourable Court be pleased review and set aside its ruling and consequential orders issued on 14th February, 2019.

11. The application is based mainly on the ground that **LR. ABOTHUGUCHI/KITHIRUNE/1363** is still registered in the name of the

deceased. The Application is also supported by an affidavit sworn and filed by the Applicant on 04th June, 2020 in which he reiterates the grounds on the face of the application. Annexed to the affidavit is a certificate of search for **LR. ABOTHUGUCHI/KITHIRUNE/1363** in the name of in the name of the deceased.

12. **JUSTUS MBAYA M'MUGAMBI (1st Respondent)** by his affidavit sworn on 10th December, 2020 supported the application.

13. **GEOFFREY MUGAMBI (2nd Respondent)** by his replying affidavit sworn on 11th September, 2020 on his own behalf and on behalf of the **JANE WORUU MUGAMBI (2nd Respondent)** contends that the issues raised by the Applicant were settled in **MERU HCCC NO. 60 OF 1884** whose judgment distributing **LR. ABOTHUGUCHI/KITHIRUNE/1363** was upheld by the Court of Appeal in **NYERI CIVIL APPEAL NO.153 OF 1989**.

14. The **MARTIN MWENDA** and **NICHOLAS MUGAMBI (4th and 5th Respondents)** respectively, similarly opposed the application by way of a replying affidavit sworn and filed by the 5th Respondent on 11th September, 2020 in which they reiterated that **LR. ABOTHUGUCHI/KITHIRUNE/1363** does not exist the same having been distributed in **MERU HCCC NO. 60 OF 1884** and confirmed on Appeal in **NYERI CIVIL APPEAL NO.153 OF 1989**.

15. The Applicant in his supplementary affidavit sworn and filed on 05th November, 2020 restated that distributing **LR. ABOTHUGUCHI/KITHIRUNE/1363** does not exist and in support thereof annexed a search certificate with entry number 7 cancelling title numbers **LR. ABOTHUGUCHI/KITHIRUNE** No. 1624 and **LR. ABOTHUGUCHI/KITHIRUNE** 1625 which were part of subdivisions of **LR. ABOTHUGUCHI/KITHIRUNE/1363**.

16. I have considered the application in the light of the affidavits on record and the submissions filed on behalf of the parties and the only issue for determination is whether a case has been made out for review of the ruling issued on 14th February, 2019.

17. The applicable law for grant of review is Section 80 of the Civil Procedure Act which provides *inter alia*: -

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.

18. Order 45 rule 1 of the Civil Procedure Rules on the other hand provides that: -

(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.

19. Section 80 of the Civil Procedure Act and order 45 rule 1 of the Civil Procedure rules gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, as it has been constantly stated, this discretion should be exercised judiciously and not capriciously. In **National Bank of Kenya Limited v Ndungu Njau (1997) eKLR** the Court of Appeal held that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter”.

20. The main grounds for review are discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or any other sufficient reason and most importantly, the application has to be made without unreasonable delay.

21. The summons before the court was filed 04th June, 2020 which is 16 months from 14th February, 2019 when the impugned ruling was delivered. The 16 months' delay has not been explained to the satisfaction of the court or at all.

22. The Applicant **LR. ABOTHUGUCHI/KITHIRUNE/1363** is still registered in the name of deceased. I therefore understand the Applicant to say that there is an apparent error on the face of the record.

23. No evidence was availed before the court to demonstrate that **LR. ABOTHUGUCHI/KITHIRUNE/1363** is still registered in the name of deceased. Be as it may, the distribution of the said parcel of land was made vide this court's judgment in **MERU HCCC NO. 60 OF 1884** which decision was upheld on appeal in **NYERI CIVIL APPEAL NO. 153 OF 1989**.

24. That **LR. ABOTHUGUCHI/KITHIRUNE/1363** was already distributed restated by this court in a ruling dated 14th February 2019 where Onginjo J stated as follows:

It is clear that the both the objectors and petitioners seem to have ignored the orders of the court made in Civil Case No. 60 of 1984 and upheld in Civil Appeal No. 153 of 1989. This is because the court already distributed the estate property, **ABOTHUGUCHI/KITHIRUNE/1363, of which the parties seem to seek to redistribute again in their own favour disguising it under the umbrella of a succession cause. I acknowledge that the objectors in their submissions seek to distribute the estate according to the judgment that was given by the court. Though that was not their intention when they were arguing their case. This court cannot go ahead and distribute **LR. ABOTHUGUCHI/KITHIRUNE/1363** as it does not exist for it has already been distributed. Parties should ensure that they comply with the court order that was issued for their disobedience may be termed illegal. Accordingly, I am of the view that this cause ought to be dismissed as there is no asset that belongs to the deceased that needs to be distributed.**

25. By seeking an order of review, I understand the Applicant to ask this court to take a different view from the previous decisions by this court and the Court of Appeal concerning the distribution of **LR. ABOTHUGUCHI/KITHIRUNE/1363**.

26. With respect, the issue raised by the Applicant is *res judicata*. The Court of appeal in the case of **William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR** addressed the issue of *res judicata* and stated as follows:

“The philosophy behind the principle of *res judicata* is that there has to be finality. Litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives in. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.....”

27. In yet another case, the Court of Appeal in **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR** cited with approval the decision in **Lal Chand v Radha Kishan, AIR 1977 SC 789** where it was stated that;

“The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.

The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

28. Most unfortunately, this application appears to be a repudiation and negation of the salutary aims of the *res judicata* bar. This court declines to allow the Applicant to improperly and impermissibly re-litigate endlessly, for litigation must come to an end.

29. From the foregoing analysis, I have come to the conclusion that no case has been made out for review of the ruling issued on 14th February, 2019.

30. Instead of litigating endlessly, wasting judicial time and the parties’ resources, the Parties herein should ensure that they comply with the court order that was issued in **Civil Case No. 60 of 1984** and upheld in **Civil Appeal No. 153 of 1989**.

31. In the end, the summons dated and filed on 04th June, 2020 is dismissed with costs to the Respondents for being *frivolous, vexatious* and an *abuse of the court process* on account that the issues raised in the summons are *res judicata*.

DATED AT MERU THIS 11TH DAY OF MARCH 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Applicant - N/A

For 1st Respondent - Mr. Thangichia for Thangichia M. David & Co. Adv’s

For 2nd to 6th Respondents - Mr. Kariuki for Mithega & Kariuki Advocates