



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
(CORAM: CHERERE-J)
SUCCESSION CAUSE NO. 464 of 2015
IN THE MATTER OF THE ESTATE OF GICHUNGE MUTUOTA (DECEASED)
IN THE MATTER OF REVIEW OF ORDERS OF 23RD JULY 2019
BETWEEN
JAMES KINOTI THURANIRA.....APPLICANT

AND

SILAS KABURU THURANIRA.....1ST RESPONDENT
KENNETH MURIITHI M'THURANIRA.....2ND RESPONDENT
ONESMUS GITOBU.....3RD RESPONDENT

RULING

Background

1. Gichunge Mutuota (*Deceased*) died sometimes on 10th April, 1978. His estate is comprised of the following assets:

- i. LR. NO. ABOGETA/U-KIONGONE/123
- ii. LR. NO. ABOGETA/U-KIONGONE/1263

2. Deceased was survived by his grandchildren namely:

- 1) Kimathi Thurania
- 2) Silas Kaburu
- 3) Stella Mugure
- 4) James Kinoti Thurania
- 5) Rosemary Gakii
- 6) Kenneth Muriithi

3. Letters of administration were issued to **James Kinoti Thurania (Applicant)** on 06th October, 2015. A Certificate of Confirmation of Grant was issued on 26th July, 2018 distributing the estate solely to the Applicant.

Summons

4. By summons dated 14th May, 2019, the Respondents applied to compel the Applicant to transfer 0.48 acres of **LR. NO. ABOGETA/U-KIONGONE/123** to **Silas Kaburu Thurania** and **Kenneth Muriithi M'thuranira (1st and 2nd Respondents)** respectively so that they could transfer it to **Onesmus Gitobu (3rd Respondent/Purchaser)**.

5. By an order dated 23rd July, 2019, the court amended the Certificate of Confirmation of Grant was issued on 26th July, 2018 on the terms THAT:

1) LR. NO. ABOGETA/U-KIONGONE/123 be shared equally between James Kinoti Thurania (Applicant); Silas Kaburu Thurania and Kenneth Muriithi M'thuranira (1st and 2nd Respondents)

2) LR. NO. ABOGETA/U-KIONGONE/1263 be held by James Kinoti Thurania (Applicant) on behalf of the children of Moses Kimathi (deceased) in equal shares

6. By summons dated 14th October, 2019 filed on 15th October, 2019, the Applicant seeks an order of review of the orders dated 23rd July, 2019. The application is based on the grounds that the Applicant is entitled to the whole of **LR. NO. ABOGETA/U-KIONGONE/123** for the reasons that the 1st and 2nd Respondents had gotten a bigger share of their father's estate in **MERU HIGH COURT SUCCESSION CAUSE NO. 209 OF 2015** which he asserts is a new matter upon which the order of review is sought.

7. The application is also supported by an affidavit sworn by the Applicant on 14th October, 2019 in which he reiterates the ground on the face of the application.

8. The 1st Respondent in his affidavit sworn on 18th November, 2019 on behalf of himself and the 2nd and 3rd Respondent's stated that **Stella Mugure and Rosemary Gakii** had by their affidavits sworn on

26th June, 2018 renounced their right to share in deceased's estate. He disputed that Applicant got a smaller share of their father's estate and contended that the Applicant got 1.39 acres of the said estate but had subdivided **LR. NO. ABOGETA/U-KIONGONE/123** into two portions **LR. NO. ABOGETA/U-KIONGONE/4612** and **4613** to frustrate the court order issued on 23rd July, 2019.

9. I have considered the application in the light of the affidavits on record and the submissions filed on behalf of the Respondents and the issue in question is whether a case has been made out for review of the order dated 23rd July, 2019.

10. 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”.

11. 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.

12. 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.

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

14. The instant application was filed 2 months after the order sought to be reviewed was made. The application was therefore made

timeously.

15. The Applicant states that 1st and 2nd Respondents had gotten a bigger share of their father's estate in **MERU HIGH COURT SUCCESSION CAUSE NO. 209 OF 2015** which he asserts is a new matter upon which the order of review is sought.

16. I have considered the Applicant's assertion and I find that the issues of fact in **MERU HIGH COURT SUCCESSION CAUSE NO. 209 OF 2015** cannot in my considered view be new evidence for the reason that they were in Applicant's knowledge since he was a party to that cause. Secondly, the affidavit filed by Stephen Kirimi Mwiribua in **MERU HIGH COURT SUCCESSION CAUSE NO. 209 OF 2015** and which affidavit the Applicant relies upon in support of his application demonstrates he got 1.39 acres of his father's estate, 1st Respondent got 1.48 acres whereas the 2nd Respondent got only 0.99 acres.

17. The Applicant's assertion that the 1st and 2nd Respondent got a bigger share of their father's estate and had denounced their share in this estate has therefore not been proved and it is rejected.

18. From the foregoing analysis, the orders which commends to me and which I hereby issue are THAT:

1) The summons dated 14th October, 2019 filed on 15th October, 2019, is misconceived, bereft of legal basis and merit and it is dismissed

2) Applicant is condemned to pay costs of this application to the 1st and 2nd Respondents

Dated at Meru this 04th DAY OF March 2021

T. W. CHERERE

JUDGE

Court Assistant For Applicant For Respondent s

- **Morris Kinoti**

- **N/A for Applicant**

- **Kirimi for Hiram Kirimi & Company Advocates**