



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KERUGOYA**

**MISC. SUCCESSION APPLICATION NO. 31 OF 2012**

**IN THE MATTER OF ESTATE OF KIRUCHA MACHERE-(DECEASED)**

**ROSE WANJIKU MAREE.....APPLICANT**

**VERSUS**

**STANLEY NGIGI KIRUCHA.....1<sup>ST</sup> RESPONDENT**

**CICILY WANJA KIRUCHA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Judgment in this matter was delivered on the 8.3.2018 distributing the deceased's estate amongst the three undisputed beneficiaries namely, Stanley Ngigi Kirucha, Cecily Wanja Kirucha and Francis Maree Kirucha as shown in the body of the judgment in respect of **Land Parcel. No. Inoi/Kamondo/288**.

2. By a chamber summons application dated 12.2.2019, the Applicant Wanjiku Maree (Rose Wanjiku Maree) seeks for **orders to be substituted with Francis Maree Kirucha, (deceased), an order of temporary injunction restraining the Respondents, their relatives, employees of anybody else claiming through them from selling, alienating, transferring or in any other way interfering with her (applicant) use and occupation of LR Inoi/Kamondo/5382, 5492, 5493, 5494, 5495, 5496, 5497 and 5498 pending hearing and determination of this application.**

3. The applicant further seeks an **order to review and/or set aside the judgment delivered on the 8.3.2018 to order that the deceased's estate be shared out equally among the applicant and the respondents.**

4. Grounds for the application are stated at the face of the application that Francis Maree Kirucha (deceased) was erroneously held not have been entitled to a share of **LR Inoi/Kamondo/288** as he had land parcel number **Inoi/Kamondo/321** hence was disinherited of his rightful share from the deceased's estate.

5. It is a further ground that the respondents have moved and subdivided the subject land parcel to the resultant sub-titles namely **Inoi/Kamondo/5382, 5492, 5493, 5494, 5495, 5496, 5497 and 5498**, the resultant sub-titles which they have embarked on selling, hence the prayer for an injunction to restrain the respondents from selling the said resultant sub-titles.

6. The applicant swore the supporting affidavit on even dates, and a further affidavit filed on the 17.2.2020.

7. **The 1<sup>st</sup> Respondent Stanley Ngigi Kirucha** opposes the application by **grounds of opposition** dated and filed on the 10.1.2020 as well as a replying affidavit of same date and a supplementary affidavit sworn on the 20.5.2020.

8. **The 2<sup>nd</sup> Respondent Cecily Wanja Kirucha** also filed a replying affidavit in opposition to the application.

All the parties filed written submissions to buttress their respective positions. I have considered them.

**9. the Applicant's Case and Submissions**

The applicant is the widow of the deceased. Her deposition is that the deceased was dissatisfied with the court's judgment but died on 9.3.2018 before he could appeal or apply for review orders. She holds a limited grant of letter of administration **ad litem** and wishes to be substituted with her deceased husband to pursue the application for review and or setting aside of the judgment, to correct the errors and mistakes by the court that disinherited the deceased in land parcel at issue, **LR Inoi/Kamondo/288**.

10. It is her submissions that the court was misled into believing that the deceased had prior to his demise given the applicant's husband **Land Parcel No. Inoi/Kamondo/341**, and further that the deceased never benefited from the deceased's estate and therefore fair and just that the judgment of the court be reviewed and or set aside, and the deceased's estate be distributed equally to the parties in this cause.

#### 11. The Respondent's Case and Submissions

By the various affidavits sworn by both respondents and written submissions. It is their deposition that the applicant's husband had already received his inheritance from his father during his lifetime which is equal to what the respondents have been given by both the subordinate court's judgment of 9.6.2011 and by this court (Gitari J) in her judgment dated 8.3.2018, which was a judgment on review of the judgment date 9.6.2011 whereupon the Learned Judge re-distributed the estate equally between the Respondents in respect of **LR Inoi/Kamondo/288** – each getting 2.90 acres, and to the applicant's husband Francis Maree Kirucha, (deceased) **Inoi/Kamondo/341 – 3.325 acres**.

Having done so, it is submitted that to allow a further review, this court would be sitting on appeal against its own orders/judgment as the court is *functus officio*.

#### 12. Analysis and Determination

The three beneficiaries of the deceased's estate were provided for in the two land parcels, in almost equal shares, **the applicant's late husband in Inoi/Kamondo/342 – 3.325 acres, and the respondents in Inoi/Kamondo/288 – 2.90 acres each**. There is no allegation that the two land parcels are not of equivalent value.

13. The submissions by the applicant that **LR Inoi/Kamondo/341** did not form part of the deceased's estate, and therefore her husband was disinherited in **Inoi/Kamondo/288** was ably discussed and resolved in the two judgments of the subordinate court and Hon. Gitari J judgment delivered on the 8.3.2018, the subject of this application. This judgment arose from an application filed by the first applicant Stanley Ngigi Kirucha, seeking review orders of the judgment made on 9.6.2011, and re-distribution of the two properties.

14. The **Civil Procedure Rules 2010** have been imported to the Law of Succession by dint of **Rule 73 of the Probate and Administration Rules** that provide that:-

*“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.*

15. **Section 7 Law of Succession Act (LSA)** further provides that:-

*“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient”.*

16. The power donated to the High Court by **Section 47 LSA** is however to be exercised judiciously without making mockery of the court process and discretion. The dispute demonstrated in the present application is the distribution of the deceased's estate by the subordinate court.

This court has likewise pronounced itself on the distribution.

The applicant seeks for a **further review** of this court's mode of distribution of the estate, and in effect an order of setting aside its judgment on re-distribution delivered on 8.3.2018.

17. **Order 45 CPR, and Section 80 of the Civil Procedure Act** allow a review of an order or judgment, on the following terms –

*“Any person who considers himself aggrieved by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred of by a decree or order from*

*which no appeal is allowed by this Act may apply for a review of the 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) CPR**

*“....and from whom the discovery of new and important matter of evidence after due exercise of diligence was not within his knowledge or could not be produced by him at the time when such decree was passed or the order made or an account of some mistake of error apparent on the face of the record....”*

19. The applicant's main ground for the application is that the court was misled into believing that the deceased had prior to his demise given her husband (deceased) **Land Parcel No. Inoi/Kamondo/341** and therefore erred by disinheriting him from benefiting **from LR Inoi/Kamondo/288**. 20. I have considered the proceedings and evidence adduced before both the subordinate court and before my sister Judge Gitari. The issue was extensively discussed and both courts agreed that the Applicant's husband had been given the land parcel **Inoi/Kamondo/341** by the deceased during his life time, and therefore that gift must be taken into account during the distribution of the estate.

21. Section 42 LSA is explicitly clear that:-

“Where

**a) An intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house.**

**b) Property has been appointed or warded to any child or grandchild under provisions of Section 26 or Section 35 of this Act that property shall be taken into account in determining the share of the net intestate finally accruing to the child, grandchild or house”.**

22. For a party to benefit from the provisions of **Order 45 CPR**, discovery of a new and important matter that was not within his knowledge, or a mistake or error on the face of the record, of the judgment, or any other sufficient reason must be laid before the court.

23. It is evident that the issues raised in this application were at all material times within the applicant’s knowledge . See **Nyamogo & Nyamogo -vs - Kogo (2001) EA 174.**

Indeed, the proceedings before the two courts are demonstrative that nothing new has been shown or discovered post judgment, to warrant the court to further interrogate and review its decision.

24. If a party is not satisfied with orders of review, the remedy is in an appeal to a higher court, not a further review. There is a clear distinction between an order of review and an appeal.

It appears that the applicant wishes to be substituted to replace her deceased husband, to challenge the judgment of Justice Gitari J, delivered on the 8.3.2018.

25. It is now trite, as stated in the case **Francis Origot & Another V. Jacob Kumali Mungala (CA) Civil Appeal No. 149 of 2001 (unreported)** that:

**“.....an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal.....”**

26. Considering the totality of the applicant’s case, the grounds of opposition and the replying affidavits as well as the parties submissions, it is clear to me that the applicant’s application has no merit, but an abuse of the court process, and further that the matters raised by the applicant could be best canvassed in an appeal as opposed to a review application. This court having pronounced itself on the earlier application for review leading to the challenged judgment delivered on the 8.3.2018, it is **functus officio**, and to entertain the application would be sitting on appeal against its own judgment. This would be illegal and unprocedural.

**27. For the foregoing, the applicant’s application by chamber summons dated 12.2.2019 lacks merit. It is dismissed with no orders as to costs.**

**28. Having come to the above findings, the temporary injunctive orders issued by the court on the 14.2.2019 are hereby lifted and**

**vacated.**

Orders accordingly.

Signed electronically.

**J. N. MULWA**

**JUDGE**

**DELIVERED AT CHUKA THIS 8<sup>TH</sup> DAY OF APRIL, 2021.**

**L. W. GITARI**

**JUDGE**