REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 26 OF 1988

IN THE MATTER OF THE ESTATE OF THOMAS MBUI NJENGE ALIAS THOMAS NCHENGE (DECEASED)

DAVID MBUKO T. MBUI.....PETITIONER/APPLICANT

VERSUS

SUSAN GACHERI.....OBJECTOR/RESPONDENT

RULING

1. The Petitioner/Applicant filed an application for review dated 28th July 2020 seeking to review the Court's Judgment dated 18th October 2018 and order for transfer of 0.202 Hectares out of the Respondent's share that is way above her share back to the Petitioner. The Petitioner's application was premised on the grounds that his share of land is less by about half an acre (0.18 Hectares) and is in the portion already given to the Respondent and that when the Court gave Judgment that the land be shared equally, this difference was not within the knowledge of the Petitioner/Applicant.

2. In response, the Respondent filed a Notice of Preliminary Objection dated 17th August 2020 on the following grounds: -

i. The Petitioner/Applicant relinquished his right to file an application for review when he filed the Notice of Appeal dated 25th October 2018 thereby kick starting the process of appeal to the Court of Appeal of Kenya by dint of Order 45 Rule 1 and Rule 75 of the Court of Appeal Rules.

ii. That Application is incompetent for being brought by an Advocate who is not properly on record by dint of Order 9 Rule 9 of the Civil Procedure Rules.

iii. The issue of distribution and the quantum thereof was directly in issue in the proceedings leading to the Judgment sought to be reviewed and the Court having pronounced itself on the same in the Judgment, the same cannot be raised afresh through an application for review without breaching the rules of res judicata by dint of Section 7 of the Civil Procedure Act, Cap 21.

iv. None of the requirements for the grant of review orders under Order 45 Rule 1 is alleged to have been met in the application.

3. This Court gave directions that the preliminary objection would be canvassed by way of written submissions. The preliminary objection is being heard in priority to the application.

Objector/Respondent's Submissions

4. The Objector/Respondent file submissions dated 1st February 2021. She reiterated the provisions of Order 45 Rule (1) (1) (a) of the Civil Procedure Rules which provide for when an application for review may be made and she submits that the Petitioner, having filed a Notice of Appeal pursuant to the provisions of Rule 75 (1) of the Court of Appeal Rules, 2010 on 25th October 2018, and which notice has never been withdrawn, he is barred from applying for review of the same Judgment he desires to appeal from thereby rendering the application bad in law. She further submits that up to and until the date delivery of the Judgment, sought to be reviewed, the Petitioner's Advocates were M/S Charles Kariuki & Co. Associates Advocates. She submits that under Order 9 Rule 5 of the Civil Procedure Rules, an Advocate for a party remains as such until final conclusion of the cause or matter, including any review or appeal unless and until a Notice of Change of Advocate is filed and served and further, that under Order 9 Rule 9 of the Civil Procedure Rules, no change or withdrawal of Advocate may be effected after Judgment without leave of Court. She submits that in the instant case, both the application and the Notice of Appointment of Advocates are dated 28th July 2020 and the Notice was only filed on 29th July 2020 and this indicates that by the time of filing the application, the Advocate was improperly on record and that there is no evidence of service of the notice upon the former Advocates on 29th July 2020 before the application was filed and that a notice of appointment only takes effect upon service. She further submits that the Petitioner's

application offends the provisions of Section 7 of the Civil Procedure Act, Cap 21, on the doctrine of *res judicata* as throughout the proceedings, the identification of the estate of the deceased, his dependents and the mode of distribution of his estate was in issue. She highlights the record of the proceedings of 23rd April 2014 where the issues for determination were identified as follows: -

a. Whether the Objector is entitled to a portion of the deceased's estate in equal measure with the Petitioner.

b. What are the net assets of the deceased's estate for distribution between the parties.

c. Whether the grant can be revoked or annulled for having been obtained fraudulently or secretly or contrary to the provisions of the law.

5. She further submits that in answer to the second issue, she produced a copy of the green card/register in the name of the deceased being L.R No. NTIMA/NTAKIRA/524 clearly showing the said parcel measuring 1.988 Hectares equivalent to 4.97 Acres (each to get half being 0.994 Hectares equivalent to 2.485 Acres). She submits that the Petitioner himself divided the said parcel into 12 portions as a result of which the size of the land that she, the Objector was entitled to was reduced from 0.994 Hectares to 0.923 Hectares. She submits that all these factors were considered by the Court as it rendered Judgment and that since the issue had been litigated upon and a finding made thereon, it cannot be reopened in the review application and this is not a new and/or important fact which was not within the knowledge of the Petitioner at the time of hearing.

6. She finally submits that the Petitioner's application does not meet the requirement of Order 45 of the Civil Procedure Rules. To add onto the fact that no new evidence has been discovered, she submits that the Petitioner during hearing i.e cross-examination analyzed how the original acreage of 4.97 Acres came about claiming that he had bought a net of 4.74 Acres and the deceased's share in the suit land was only 0.23 Acres of which he was of the opinion that he is automatically entitled to 4.74 Acres before the sharing of the 0.23 Acres that was the deceased share in the suit land. She further submits that there is no error apparent on the face of the record since by dividing the entire suit land by 2, she would have been entitled to 2.485 Acres but she only got a total of 0.923 Hectares equivalent to 2.28 Acres, thus losing 0.205 Acres due to the Petitioner's acts of wastage by subdividing the land into 12 portions.

7. She finally submits that the application has been made with unreasonable delay since the Judgment was delivered way back on 18th October 2018 but the Petitioner's application was only filed on 29th July 2020, more than 1 year and 9 months later and that no reason whatsoever has been given for the delay of over 21 months. She urges that the application is an afterthought, is lacking in merit and ought to be dismissed.

Petitioner's Submissions

8. The Petitioner/Applicant filed submissions dated 8th February 2021. In answer to the first ground on the Respondent's preliminary objection, the Applicant contents that he is in no way opposing or challenging the Judgment of the Court but it seeks to have an apparent oversight error be corrected in tandem with the said Judgment, and which error came to light after an expert report revealed the same. He submits that at page 59, the Court explicitly stated that the distribution of the suit land NTIMA/NTAKIRA/524 be done equally between the Objector and the Petitioner and that the instant application does not seek to change this status but it seeks to enforce the Judgment of the Court both in letter and spirit. He submits that a survey report reveals that his land is smaller in size by 0.18 Hectares which difference lies on the Objector's portion and that this information was not within the parties' knowledge at the time of distribution. He submits that the issue of him having relinquished his right to review by virtue of having filed a Notice of Appeal does not arise since he is not seeking to interfere with the Judgment. He submits that although there is a Notice of Appeal, there is a distinction between an appeal and an application to have a correction on the face of Judgment occasioned hitherto, by nobody but due to lack of accurate measurements on the ground which is clearly provided for under Order 45 Rule 1 on the basis of discovery of new and important matter or evidence which upon exercise of due diligence remained unknown to the parties of the Court. On the second ground of the preliminary objection, he submits that Order 9 Rule 9 talks about change of Advocates in a matter already determined. He submits that no notice of change has been filed by any person or Advocate but only appointment of a Counsel alongside an existing one. He submits that the Respondent may have interpreted the provisions in his favour which should not be the case. He further submits that his application merely seeks to have the order be revoked to rectify an error anomaly not foreseen by any one and which rectification does not interfere with any manner interfere with the structure form or spirit of the Judgment but only to have the Judgment implemented without affecting the rights of either party. He submits that it is for the Court to determine whether the grounds for review under Order 45 Rule 1 have been met. He submits that there is a new and important matter that prompted his application for review and that the said application is *res ipsa loquitur*. He prays that the preliminary objection be dismissed.

Determination

9. This Court has to consider whether the Preliminary Objection raised by the Respondent is merited. What properly constitutes a preliminary objection has been defined times over including in the *locus classicus* case of ***Mukisa Biscuit Company v Westend Distributor Limited (1969) EA 696*** as follows: -

> **A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.**

10. In the circumstances, a preliminary objection should only be raised where there are no disputations on matters of facts by parties. Although parties did not address the Court on the import and tenor of a preliminary objection, this Court finds this to be an important matter which has the potential of either granting or divesting this Court with jurisdiction to entertain the preliminary object which forms the subject of this Ruling. This Court cannot overlook the question of jurisdiction, even with respect to entertain the preliminary objection. Should this Court find that there any disputations of fact which will require it to look at evidence adduced and interrogate factual issues, the Court will not have jurisdiction to entertain the preliminary objection.

11. In the *locus classicus* of ***Owner of Motor the Motor Vessel "Lilian S" Vs Caltex Oil (Kenya) Limited***, Nyarangi J sitting in the Court of Appeal held as follows: -

> **"…Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction...."**

> **"…by jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given..."**

12. Against this backdrop, the Court will now consider each of the points as raised by the Objector/Respondent herein.

Whether the Petitioner relinquished his right to file an application for review

13. The Respondent argues that the Petitioner/Applicant relinquished his right to file an application for review when he filed the Notice of Appeal dated 25th October 2018 thereby kick starting the process of appeal to the Court of Appeal of Kenya, which Notice of Appeal has never been withdrawn.

14. The Petitioner/Applicant on the other hand has argued that he does not seek to challenge or disturb the Judgment but rather to have an apparent error/oversight corrected in tandem with the said Judgment, which error he only discovered much later. His contention is that despite the Court directing that the properties be shared equally between him and the Respondent, he has realized that he has a lesser portion than that of the Respondent. He further contends that the issue of him having relinquished his right to review by virtue of having filed a Notice of Appeal does not arise since he is not seeking to interfere with the Judgment and that although there is a Notice of Appeal, there is a distinction between an appeal and an application to have a correction on the face of Judgment.

15. This Court finds that the question of whether a party wo has filed a Notice of Appeal against a decision is precluded from filing an application for review against the same decision is a pure point of law. It matters not what the reasons for the application for review are. In civil procedure practice in Kenya, once a party is dissatisfied with the outcome of a matter, there are only 2 recognized ways of challenging the same. The first is by appeal and the second is by review. These two options are mutually exclusive and cannot be exercised concurrently but there are rules as to when each applies.

16. It is not in dispute that a Notice of Appeal was filed by the Petitioner/Applicant against the Judgment dated 18th October 2018 which Judgment is the very subject of his Application for review. This Notice of Withdrawal has never been withdrawn. This Court finds that the filing of a Notice of Appeal is a good as filing an appeal. Section 2 of the Court of Appeal Rules, 2010 define an appeal as follows: -

> **"appeal" in relation to appeals to the Court, includes an intended appeal and "appellant" includes an intended appellant.**

17. This means that as it stands, there is indeed a valid appeal pending in the Court of Appeal against the decision of this Court delivered on 18th October 2018.

18. Turning to the provisions which allow for the filing of an application for review i.e **Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya** which is replicated in **Order 45 Rule 1 of the Civil Procedure Rules, 2010** the instances when an application for review may be made are limited to the following: -

> **Any person who considers 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 allowed**

19. It is therefore clear that a litigant may only apply for review if he has not filed an appeal, either because the rules do not allow for it or because he has opted not to do so. This was the finding of the Court of Appeal in the case of ***Otieno, Ragot & Company Advocates Vs National Bank of Kenya Limited Civil Appeal No. 60 & 62 of 2017 (2020) eKLR*** where P. O. Kiage JA and Asikhe Makhandia JA in expressing disapproval of litigants who seek to review a Court's decision whilst there is a pending appeal held as follows: -

> **"…If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed…"**

20. This was also the finding in the case of ***Karani & 47 Others Vs Kijana & 2 Others, Civil Appeals No. 43 and 153 of 1986***

(Consolidated) (1987) KLR 557, 562 the Court of Appeal, Plat JA held as follows: -

> **"…once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal. It would not be possible for example to pray for review because there was error on the face of the record, on the grounds that the court had no jurisdiction to pass the decree or the order complained of, and then by an appeal, complain of misdirections on the evidence. That would be an absurd use of the appeal process, because if the court had no jurisdiction, the misdirections on the evidence would, of course, be unimportant. The proper approach would be to put all the complaints into one appeal."**

21. This was also the finding in the case of ***African Airlines International Limited Vs Eastern & Southern Africa Trade Bank Limited (2003) 1 EA 1(CAK)*** where it was held as follows: -

> **"Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed, it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal. (See Kamalakshi Amma Vs A Karthayani (2001) AIHC 2264. The respondent's application for review was therefore incompetent hence the court did not have jurisdiction to grant the order sought under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. This determination is sufficient to dispose of the appeal…"**

22. Without delving much on the possibility that the Petitioner/Applicant may be gambling and/or forum shopping with the aim of obtaining orders by all means, this Court finds that a party who files a Notice of Appeal against a decision is barred from subsequently filing an application for review against the same decision. The first point raised by the Respondent in its preliminary objection therefore succeeds.

Whether the *Application is incompetent for being brought by an Advocate who is not properly on record*

23. On this point, the Respondent urges that it being that the Petitioner's Advocates were M/S Charles Kariuki & Co. Associates Advocates at the time of delivery of Judgment, the said Advocates remain on record including in any review or appeal unless and until a Notice of Change of Advocate is filed and served, and that no such change may be effected unless with leave of Court. She submits further that the Notice of Change of Advocates herein was only filed on 29th July 2020 and yet the application is dated 28th July 2020 indicating that by the time of filing the application, the Advocate was improperly on record and further, that there is no evidence of service of the notice upon the former Advocates on 29th July 2020 before the application was filed and that a notice of appointment only takes effect upon service.

24. The Petitioner on the other hand urges that no Notice of Change has been filed by any person or Advocate but only appointment of a Counsel alongside an existing one. He submits that the Respondent may have interpreted the provisions in his favour which should not be the case.

25. The above point, on whether or not an Advocates representing a party is properly on record is indeed a point of law. However should the Court fid that he is not properly on record, the fatality of the same is questionable.

26. The provisions of law relating to the question of change of Advocates is found in Order 9 of the Civil Procedure Rules, 2010. The relevant sections, Rule 5 and Rule 9 provide as follows: -

> **Order 9, rule 5 Change of advocate.**
>
> **A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.**
>
> **Order 9, rule 9 Change to be effected by order of court or consent of parties.**
>
> **9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—**
>
> > **(a) upon an application with notice to all the parties; or**
> >
> > **(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.**

27. This Court agrees with the submission by the Respondent that the firm of M/S Charles Kariuki & Co. Associates Advocates, being the firm which was on record for the Petitioner at the time of delivery of Judgment remain on record including in any review or appeal unless and until a Notice of Change of Advocate is filed and served.

28. The Petitioner's argument that the new firm, M. G. Kaume & Co. Advocates is only coming in to act together with its said other firm does not hold water. This Court finds this to be a flimsy excuse to give the Petitioner a reason to avoid acquiescing. Had it been that the new firm was coming in to act together with the older firm, the Petitioner ought to have indicated as much in the Notice of Change of Advocates

which ought to have been filed. A Notice of Appointment is normally file at the inception of a matter when a client decides to instruct an Advocate to represent it. When this matter came up for directions on 17th September 2020 which is the last time a representation of the Petitioner came to Court, the person who appeared indicated that he was holding brief for Mr. Kaume for the Petitioner. There was no mention of the fact that he was holding brief for Mr. Kaume who was acting jointly with Mr. Kariuki or any other person for that matter.

29. In the circumstances, all evidence points to the fact that the firm of M/S Kaume & Co. Advocates is coming in to replace the other firm of M/S Charles Kariuki & Co. Associates Advocates. In this case, this Court finds that the Petitioner ought to have sought leave of Court to have his new advocates appointed or in the alternative, to have the two firms file a consent indicating that the new advocate would be taking over conduct of the matter.

30. Finally, as pointed out by the Respondent, there is indeed no evidence of service of the Notice of Change upon the firm of M/S Charles Kariuki & Co. Associates Advocates. The Petitioner has not refuted this claim. The omission to serve the Notice of Change is contrary to the provisions of Order 9 Rule 5.

31. This Court therefore finds that the firm of M/S Kaume & Co. Advocates are not properly on record for the Petitioner.

Whether the matter is res judicata

32. The Respondent has urged that the issue of distribution and the quantum of the land was directly in issue in the proceedings leading to the Judgment sought to be reviewed and the Court having pronounced itself on the same in the Judgment, the same cannot be raised afresh through an application for review without breaching the rules of res judicata by dint of Section 7 of the Civil Procedure Act, Cap 21.

33. The Respondent urges that the identification of the estate of the deceased, his dependents and the mode of distribution of his estate were all issues which were canvassed and determined in the matter.

34. The Petitioner has not adequately responded to this matter of whether or not the application is ***res judicata.*** He only submits that his application merely seeks to have the order be revoked to rectify an error anomaly not foreseen. The Petitioner however has not indicated to the Court how this error came to manifest.

35. This Court is of the view that owing to the finding already made that the application for review is not properly before the Court, it is not then obliged to determine whether the matter is *res judicata.*

Whether the requirements for the grant of review orders under Order 45 Rule 1 have been met.

36. This is the final issue raised by the Respondent in its preliminary objection. The issue in itself defeats the essence of a preliminary objection in that it invites the Court to determine whether the 3 grounds for review as outlined in Order 45 have been met. In essence, to determine the merits of the application.

37. This Court does not find it necessary to determine this issue as to do so would be to go into the merits of the application for review despite the application not being properly before the Court.

38. This Court ultimately finds that it does not have jurisdiction to go into the merits of the application before it.

ORDERS

39. In the end, this Court makes the following orders: -

i. Grounds 1 and 2 of the preliminary objection dated 17th August 2020 are hereby upheld.

ii. The Petitioner's Application for review dated 28th July 2020 is hereby dismissed with costs to the Respondent.

Order accordingly.

DATED AND DELIVERED ON THIS 6TH DAY OF MAY, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S M. G. Kaume & Co. Advocates for the Petitioner/Applicant

M/S Mwenda, Mwariana, Akwalu & Co. Advocates for the Objector/Respondent