



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 474 OF 2011

IN THE MATTER OF THE ESTATE OF M'MUREMERA IRIA MUGUNA

Alias MURUMERA IRIA MUGUNA Alias MURUMERA IRIA(DECEASED)

EDWARD MURIUKI MUREMERA.....1ST OBJECTOR/APPLICANT

VS

FLORENCE MWARI MUREMERA.....2ND OBJECTOR/ RESPONDENT

GLADYS MUKUBA MUREMERA.....3RD OBJECTOR/RESPONDENT

JULIA MAKENA MUREMERA.....4TH OBJECTOR/RESPONDENT

DAVIS KIUMBE MUREMERAPETITIONER/RESPONDENT

RULING

[1] Before me is a Summons dated 15/5/2019 expressed to be brought pursuant to **Rule 63 of the Probate and Administration Rules, Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules CAP 21 of the Laws of Kenya and all other enabling provisions of the law**. The applicant seeks amongst other orders review of the judgment delivered on 13/12/2018.

[2] The grounds upon which the application is premised are set out in the application and supporting affidavit of Edward Muriuki Muremera sworn on 15/5/2019. It is contended that the honorable judge erred in interchanging some of the estate property to beneficiaries whom it was not intended for. It was stated that Ntima/Igoki/1443 which was distributed to him (1 ½ Acres) and Davis (1 Acre) was given wholly to Davis which was erroneously interchanged by the advocate on record. He argued that he has extensively developed his share where there is a clear cut boundary which was placed by the deceased and some elders.

[3] As for Ntima/Igoki/1745 it was wholly given to him but it is used by Davis. Land parcel Ngusishi Settlement which is a five (5) acre land was shared out as follows: Edward (1 Acre), Davis (1 Acre) and balance (3 Acres) to be shared equally amongst his three sisters. For land parcel Kiirua/Ruiri/280 was to be shared as follows he (4 Acres), Davis (4 Acres) and balance (8 ½ Acres) be shared equally amongst the sisters. As for land parcel Kiirua/Ruiri/280 be distributed as follows: four bedroom house on 1/8 acre be shared amongst the sisters, ½ of the remainder and semi-permanent house to Davis and the other ½ to him and wooden house and granary.

[4] This application was opposed by the petitioner through his affidavit sworn on 4/6/2019. He deposed that it is false that the honorable court interchanged some of the estate property to the beneficiaries for whom it was not intended. The mode of distribution in the judgment should remain as it is illogical for the applicant to seek that the court goes back to his proposed mode of distribution. The application is an abuse of the court process, unmeritorious and ought to be struck out. If the applicant is not satisfied with the judgment of the court he ought to appeal.

[5] This matter was canvassed by way of written submissions. The applicant submitted that he has satisfied the ingredients for a grant of the order for review of the judgment as stipulated under **Order 45 Rule 1 of the Civil Procedure Rules**.

ANALYSIS AND DETERMINATION

[6] Has the applicant established any reason known to law that may warrant **review of the judgment herein?**

[7] By dint of **Rule 63 of the Probate and Administration Rules, Order 45 of the Civil Procedure Rules** is one of the Orders that apply in probate and administration proceedings. **Order 45** stipulates that a review may be granted on the following grounds:

(a) 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

(b) on account of some mistake or error apparent on the face of the record, or

(c) for any other sufficient reason

However, the application for a review of judgment to the court which passed the decree or made the order must be made without unreasonable delay.

[8] This application was filed on 15/5/2019, yet, the judgment sought to be reviewed was delivered on 13/12/2018. It took the applicant about five months to file this application. The delay has not been explained. That notwithstanding, I will excuse the delay and determine the application on merit in the interest of justice.

[9] According to the applicant, there is discovery of new and important matter in that the houses on L.R No. Kiirua/Ruiiri/280 was not disclosed to the court and thus was not considered in the judgment. The kind of discovery of new and important matter or evidence envisaged in law has to be of something that was not within the applicant's knowledge or could not even with exercise of due diligence be produced by him at the time when the decree was passed. From the applicant's own application, it is clear that the structures that are on the said property was a matter that was within the applicant's knowledge. One wonders why he did not raise it in the nine (9) years this matter has been in court. Such does not qualify as discovery of new and important matter. The matters pleaded in the application cannot even qualify to be an error or mistake apparent on the face of the record or sufficient reason.

[10] The record shows that the applicant is attempting to have the court adopt his mode of distribution; something the court considered and made its decision on distribution. This is clearly an attempt to make the court sit on appeal on its own decision. This is quite an ominous invitation; the court cannot and will never be deluded to sign such petition.

[11] Fathom these; as for L. R No. Ntima/Ngoki/1443 the applicant alleged that the mode of distribution was erroneously interchanged by the applicant's advocates that the beneficiaries Edward Muremera and Davis Kiumbe were to share 1 Acre and 1.5 Acres respectively yet it ought to have been the other way round. It bears repeating that the court determines distribution of the estate of a deceased in accordance with **the Law of Succession Act**. As clearly stated in the judgment it placed reliance on **Section 38 of the Act**. To be able to effect equality this court has been placed with the discretion to make any orders as it deems this. This is so stipulated under **Section 27 of the Law of Succession Act** which states:

“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”

It is clear that the mode of distribution adopted by this court was based on equality which it made its orders to achieve so. The fact that the court did not adopt the applicant's mode of distribution as seen from the submissions does not mean that there was an apparent error or mistake on the face of the record.

[12] The applicant submitted that he has sufficient reasons as to why the estate should be distributed as he has stated in his pleadings. The reasons why he thinks L. R No. Ntima/Ngoki/1443 should be distributed to him is that he has lived there for over fifty years; he has built a residential home and planted various crops. This matter has been in court for quite a long time. The fact that the applicant has not raised these matters which were within his knowledge for this whole period of time and he waited until judgment has been delivered to raise them is wanting. Clearly, this is not a sufficient reason taking into account he has not provided proof as required; whoever alleges must prove.

[13] From the foregoing I find that the applicant has failed to meet the grounds required for review of an order or decree. He says that he is unsatisfied with the determination of this court but that has failed to satisfy that the judgment should be reviewed.

[14] Accordingly, the application herein is dismissed with no order as to costs.

Dated signed and delivered in open court at Meru this 17th day of February, 2020

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F. GIKONYO

JUDGE

In presence of

Mrs. Otieno for applicant

Muchiri for petitioner/respondent

Kaumbi for 2nd – 4th objector – absent

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F. GIKONYO

JUDGE