



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 454 OF 2008

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

STANLEY GITONGA MBIJIWE1ST PETITIONER/APPLICANT

VERSUS

CHARLES MBIJIWE M'MBUI2ND PETITIONER/RESPONDENT

R U L I N G

1. Charles Mbiyiwe M'Mbui ("the respondent") is the son of the late M'Mbui M'Imanyara, the deceased in this Cause. On the other hand, Stanley Gitonga Mbiyiwe ("the applicant") is the son of the respondent and therefore a grandson of the deceased. The deceased died on 15/7/1998.
2. By a Summons dated 30/10/2019 brought under **Rule 73 of the Probate and Administration Rules and section 45 of the Law of Succession Act**, the applicant has sought the review, variation or the setting aside of the Judgement delivered on 21/2/2019 and the consequential orders issued pursuant thereto.
3. He contended that on 26/11/2018, when this Cause came up for hearing, he was present in Court but was later taken ill and was rushed to hospital to get urgent medical attention. That when the matter was latter called out for hearing, he was absent and the matter proceeded for hearing in his absence.
4. It was his contention that this Court issued a fresh grant to the Respondent and **Land Parcel No. Abothuguchi/ Kithirune/241** was ordered to be distributed to 6 beneficiaries. That the deceased had, during his lifetime, gifted him **Abothuguchi/Kithirune/1595** (part of the now consolidated parcels in **Abothuguchi/Kithurune/241**) by virtue of being named after him.
5. He alleged that this can be discernible from the respondent's admission in the court proceedings during the hearing of **Criminal Case No. 2784 of 1993** in which he had been charged with cutting down cultivated produce contrary to **section 333 (a) of the Penal Code** and consent obtained from the North Imenti Land Control Board on 13/09/1973 confirming subdivision of **I.R. 89043 and Abothuguchi/ Kithirune/241**.
6. He concluded that he stands to suffer irreparable damage if the fresh grant dated 21/2/2019 was to be executed by the respondent without the court having a chance to hear his evidence and cross-examine the respondent.
7. On 20/11/2019, the Court granted leave to the respondent to reply to the application within 14 days. It also directed the parties to canvass the application by way of written submissions. At the time of writing this ruling, neither has the respondent responded to the application nor have both parties put in their respective submissions.
8. **Order 45** relating to review is one of the Civil Procedure Rules imported into succession practice by **Rule 63 of the Probate and Administration Rules**. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review as set out in **Order 45 of the Civil Procedure Rules**.
9. Under that order, an application for review is to be brought on the discovery of new and important matter or evidence which after due diligence could not be produced at the time the order or decree was made or passed, or there is an error apparent on the face of the record or for any sufficient reason. The application should be made without unreasonable delay.
10. The judgment sought to be reviewed was made on 21/2/2019. The present application was made on 30/10/2019. There was clearly a delay of 8 months. That delay has not been explained. However, there is nothing on record to show that the respondent had taken any steps to execute the judgment. The position therefore may not have changed.

11. Considering that the application was not opposed, the averments in the supporting affidavit are to be taken as true. That the applicant suddenly fell ill and was rushed to hospital.

12. The Court is alive to the fact that litigation must come to an end. However, it is also alive to the fact that this is a succession matter pitting a father and son in respect of the deceased's estate. This is a very old matter. The evidence of the applicant has already been taken. All that the applicant seeks is to cross-examine the respondent and he be granted an opportunity to tender his evidence.

13. The foregoing being the case, I will give the applicant an opportunity to be heard. I allow the application and order that:-

- a) The judgment this Court made on 21/2/2019 is reviewed and set aside.
- b) The respondent is recalled for cross-examination after which the applicant will tender his evidence.
- c) There will be no additional evidence save the one now already on record.

SIGNED at Meru

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 13th day of February, 2020.

F. GIKONYO

JUDGE