REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CASE NO. 82 OF 2017

IN THE MATTER OF THE ESTATE OF SIMON PETER NGURE (DECEASED)

R U L I N G

1. Before me is a Notice of Motion filed on 29th June, 2018 expressed to be brought under Section 74 of the Law of Succession Cap 160, Rule 43 of the Probate and Administration Rules, Order 12 Rule 7 of the Civil Procedure Rules. The Applicant **Lucy Ngwaro Mbugua** sought orders inter alia that:-

> **"4)… this court be pleased to review the Ruling of this Honourable court made on 5th May, 2017.**
>
> **5) …this court be pleased to order that the only valid schedule of distribution of assets, with respect to KABETE/LOWER KABETE/T. 365, is as indicated in the Certificate of Confirmation of Grant dated the 26th January, 2004 and rectified on 6th July, 2010."**

2. The Application is based on grounds that the court previously allowed the rectification of the certificate of confirmed grant and exclusion from the estate herein the asset described as of the **LR NO. KABETE/LOWER KABETE/448 which had been erroneously listed among the estate assets,** and replaced it with the asset described as **LR NO. KABETE /LOWER KABETE/119** which had been excluded erroneously.

3. In her affidavit in support of the application, the Applicant deposed to the foregoing. She however, contended that the administrators subsequently attempted to re-distribute an asset already distributed, namely, **KABETE/LOWER KABETE/T. 365** thus reducing her portion therein from 0.15 acres to 0.1 acres even though there was no dispute concerning the said property. She stated that the move was irregular and illegal. She further asserted that some of the beneficiaries herein have now entered into a consent to revert back to the mode of distribution as indicated in the Certificate of Confirmation of Grant confirmed on 26th January 2004 , for reasons that latest mode of distribution effected vide the Ruling dated 5th May, 2017 adversely affects the manner in which beneficiaries had set up their respective homes over fifteen years.

4. **IRENE WANGARI NJOROGE,** one of the beneficiaries opposed the application through her replying affidavit filed on 14th August, 2018. She deposed that the manner of distribution of **KABETE/LOWER KABETE/T.365** is spelt out in the Court's ruling dated 5th May, 2017. It was contended that the Applicant did not tender any objection on the application for amendment of grant leading to the said ruling and that the deceased's estate has already been distributed in accordance with the court's ruling. The court was urged to refrain from allowing a review as the same was neither warranted nor consented to by all beneficiaries. In her view, the present application is merely intended to delay the administration and distribution of the estate.

5. Another beneficiary**, ESTHER MUMBI MUCHENE** filed an affidavit on 30th August, 2018. She deposed that she as a daughter to the late **Elizabeth Wanjiku Muchene** a beneficiary of the deceased's estate and supported the application herein. Restating the history of the matter, she asserted that the beneficiaries were desirous of reverting back to the mode of distribution indicated in the Certificate of Confirmation of grant confirmed on 26th January, 2004 to avoid unnecessary strife in the deceased's family. The beneficiary **DAMARIS WANGARI NJUGUNA** the widow to the late **Samson Njuguna Njoroge** an administrator and a beneficiary of the deceased's estate also swore an affidavit in support of the application, which is in similar terms to that of **Esther Mumbi Muchene**.

6. On 28/11/2018, when the application came up for hearing, parties agreed to rely on their respective affidavits.

7. The court has considered the material canvassed in respect of the application filed on 29th June 2018. The application is expressed to be brought under Section 74 of the Law of Succession Act, but looking at the nature of the orders sought, it really ought to be brought as an application for review under Order 45 Rule 1 of the Civil Procedure Rules which provides that:

> **"1. (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."

9. The substantive prayers in the motion are prayers 4 and 5 which respectively seek:

4."THAT this Honourable Court be pleased to review the Ruling of this Honourable Court made on 5th May 2017.

5. THAT this court be pleased to order that the only valid schedule of distribution of assets, with respect to KABETE/LOWER KABTE/365 is as indicated in the Certificate of Confirmation of Grant dated on 26th January 2004 and rectified on 6th day of July 2010."

10. It is evident from the parties' filings and the material on record that this is the 3rd application being made for rectification of the grant confirmed in 2004. On this occasion, some of the beneficiaries including the Applicant herein and the two beneficiaries **Esther Mumbi Muchene** and **Damaris Wangari Njuguna** wish to revert to the confirmed grant rectified in 2010 in so far as one asset, namely **LR No. KABETE/LOWER/KABETE/T 365** (the disputed asset) is concerned while retaining the distribution in respect of **LR. NO. KABETE/LOWER KABETE/119** which was substituted in place of an asset erroneously included in the 2010 Rectified Certificate of Confirmed Grant **(i.e. LR. NO. KABETE/LOWER/ KABETE/ 448.**

11. The beneficiary **Irene Wangari Njoroge** supports the latest rectified grant issued pursuant to the ruling of **Musyoka J** in 2017**,** which is the subject of the present application. The chief grouse raised by the Applicant **Lucy Ngwaro Mbugua** and other beneficiaries who support her application is that the redistribution of the disputed asset namely **LR. NO. KABETE/LOWER KABETE/T 365** though proposed by the Applicants before **Musyoka J,** was not contemplated or granted in the ruling of **Musyoka J.**

12. This court has looked at the application dated 21st September 2015 which was the subject of the ruling of **Musyoka J** of 3rd May 2017 and ultimately giving rise to the latest Rectified Certificate of Confirmation of Grant. The prayers in the application and the ruling of the judge clearly make reference not only to the substitution and distribution of the parcel **LR. No. KABETE/LOWER KABETE/119** but also the redistribution of the parcel No. **LR. No. KABETE/LOWER KABETE/T365**.

13. Thus at paragraph 11 of his ruling of 3rd May 2017, the learned Judge stated that:-

"In the end, I shall allow the removal of Kabete/Lower Kabete/448 from certificate of confirmation of grant and have it replaced with Kabete/Lower Kabete/119. I shall also allow the alteration of the shares of the land as per the dimensions given in the charts in annexure N – 4 of the affidavit of Samson Njuguna Njoroge. I shall also allow the inclusion of the shares in ICDC Investments Company Limited bond then proposed distribution. However, I shall not allow the proposed distribution of the so called wooden houses and their accessories. The application dated 21st September 2015 shall be disposed in those terms, and the certificate of confirmation shall be amended accordingly." (emphasis added**)**

14. The resultant Rectified Certificate of Confirmed Grant was issued under the hand of **Ngugi J** upon the transfer of the suit to this court. In my own view, what the Applicant and allied beneficiaries are effectively seeking is for this court to sit on appeal on the decision of **Musyoka J.** Moreover, none of them have demonstrated any error on the face of the record that requires correction or other sufficient reason to justify review of the orders of **Musyoka J**.

15. On the face of it, the latest rectified certificate of confirmation of grant is in terms consistent with the charts marked annexure **"N- 4"** to the affidavit referred to at paragraph 11 of the ruling of **Musyoka J.** If indeed the Applicant is aggrieved with the resultant changes to her shares in parcel **LR. No. KABETE/LOWER KABETE/T365,** pursuant to the ruling, she ought to file an appeal, rather than an application for review. Thus in so far as the Applicant effectively seeks that this court sits on appeal on the merits of the decision of **Musyoka J,** this court is *functus officio.* For indeed that is what the Applicant is seeking by her application, having not demonstrated any error apparent on the face of the record or new or important matter as envisaged in order 45 Rule 1 (1) of the Civil Procedure Rules.

16. In **Telkom Kenya Limited v John Ochanda** [suing on his own behalf and on behalf of 996 employees of Telkom Kenya Limited] (2014) e KLR the court considered the principle of *functus, officio* and exceptions thereto. The court observed that:

"*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

"The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. ***Where there had been a slip in drawing it up, and,***

2. ***Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"***

17. The Court of Appeal further asserted that:

"The Supreme Court in RAILA ODINGA v IEBC cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, *"The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law"* (2005) 122 SALJ 832 in which the learned author stated;

..."The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

18. The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in JERSEY EVENING POST LTD VS AI THANI [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

19. . In the **Telkom Kenya** case, the court recognized that after the rendering of the final judgment of the court, the court's only recourse would have been to review the judgment and having refused to do so, be rendered *functus officio.* The power of the court to review a judgment for a mistake or error on the face of the record is one of the exceptions to the *functus officio* principle and is embedded in Order 45 Rule 1 (1) of the CPR.

20. As to the circumstances in which an application for review can be granted there have been many pronouncements by superior courts.

In the judgment of **Okwengu JA** in Associated **Insurance Brokers v Kennidia Assurance Co. Ltd [2018] e KLR** the Court of Appeal stated that:

[10] It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In *National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR,* **this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:**

"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. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

[11] In ***Nyamogo and Nyamogo Advocates v. Kogo [2001]1 E. A. 173*** **this Court further explained an error apparent on the face of the record as follows:**

"An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

21. For all these reasons, I find no merit in the application filed on 29th June 2018 and will dismiss it. Parties will bear own costs. The court notes that the grant in this case was first confirmed in 2004 and has been rectified on several occasions subsequently but the administration of the estate is still incomplete. I note also that the initial administrators have died during this long hiatus. The surviving beneficiaries or those representing the estates of deceased beneficiaries ought to be allowed to receive their shares of the estate without further unnecessary delay. I direct that the remaining administrators proceed expeditiously with the distribution of the estate.

DELIVERED AND SIGNED AT KIAMBU THIS 6TH DAY OF FEBRUARY 2020

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C. MEOLI

JUDGE

In the presence of:

Mr. Khisa holding brief for Mr. Njoroge for Respondent

Irene Wangari – Respondent in person

Court Assistant – Nancy/Kevin