



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 499 OF 2011

IN THE MATTER OF THE ESTATE OF KERICHIO MAKARA

ALIAS KIRICHA MAKARA ALIAS KIRICHIO MAKARA

JOEL KOBIA KERICHIU.....1ST APPLICANT

HARRIET MWENDA MUSA.....2ND APPLICANT

TERESIA KANANA MUSA.....3RD APPLICANT

PETRO MUGAA KIRICHIU.....4TH APPLICANT

JERIKA KARITU KIRICHIU.....5TH APPLICANT

VERSUS

STANLEY KIRICIU MAKARA.....RESPONDENT

RULING

1. **Kericho Makara** (*“the deceased”*) had, during his lifetime, divided **Parcel No(s). Ithima/ Ntunene/148** measuring 11.40 acres into seven portions. In its Judgment dated 30/05/2019, the Court observed that the deceased had distributed in his lifetime **parcel nos. Ithima/ Ntunene/1722, 1724, 1725 and 1726** leaving behind **Parcels No. Ithima/Ntunene/1723, 1727, 1728**.

2. After hearing the objection that had been lodged by the objectors, **Joel Kobia Kirichiu, Peter Kimani Kirichiu, Teresia Mukonjira Kirichiu, Petro Mugaa Kirichiu** and **Jerica Karitu Kirichiu**, the Court distributed the estate as follows: -

i. Ithima/Ntunene/1723 -Stanley Kirichiu Makara

ii. Ithima/Ntunene/1727- Jerica Karitu Kirichu

iii. Ithima/Ntunene/1728- Magdalene Mami Kirichu

3. The objectors filed a Notice of Appeal on 30/5/2019. They thereafter filed a summons for revocation of grant dated 5/12/2019. On 30/01/2020, the objectors withdrew both the Notice of Appeal dated 30/5/2019 and the Notice of Intention to Appeal dated 14/06/2019, respectively. The application dated 5/12/2019 was withdrawn on 9/12/20219.

4. The applicants then filed an application dated 24/12/2019 seeking the review of the judgment dated 30/5/2019. On 27/1/2020, the Court directed the parties to canvass the application by way of written submissions. Both parties have since filed their submissions which I have carefully considered.

5. The application was supported by the affidavits sworn by **Harriet Mwenda Musa and Joel Kobia Kirichiu**, respectively. They deposed that, the 2nd and 3rd applicants were children of one **Moses M’Mweti Kirichiu**. That they were not involved in the Cause. That in the said judgment, their late father was given parcel no. **Ithima/Ntunene/1726** yet the same was still in the name of the deceased and those distributed had already been transferred to the appropriate beneficiaries.

6. They also contended that the petitioner had been catered for and had parcel nos. **Ithima/Ntunene/1727 and Ithima/Ntunene/1728** registered in his name as the deceased had allocated the same to him. That they had already constructed their homes on **Ithima/Ntunene/1723** and that the petitioner misled this Court when he stated that the Parcel in **Ithima/Ntunene/1726** had been granted to their late father yet it was still in the name of the deceased.

7. They submitted that whilst the petitioner already had **parcel nos. 1727 and 1728**, he misled the Court to allocate him **parcel no(s). 1723** from which he was now evicting them. That this would be manifestly unjust as it will render the applicants homeless.

8. The application was opposed by the petitioner vide his replying affidavit sworn on 23/01/2020. He contended that although **parcel no. Ithima/Ntunene/1726** had not been transferred to **Moses Kirichiu**, the same should still be distributed to his said late brother and the judgment of this Court of 30/05/2019 should not be disturbed.

9. The petitioner further contended that the application was incompetent as the applicants had already preferred an appeal against the impugned judgment. That in the premises, the applicants could not pursue the remedy of review and appeal at the same time.

10. Order 45 relating to review is one of the **Civil Procedure Rules** that was 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**.

11. The issues for determination are; **does the application lie in light of the Notice of Appeal lodged against the impugned judgment? Is the judgment amenable to review in the circumstances of this case?**

12. The petitioner raised an objection to the present application on the basis that the objectors had lodged a Notice of Appeal against the said judgment. It is trite law that the route of review under **Order 45 (1) (a)** is only available to a party who has not exercised his right of appeal. Once an appeal has been preferred, the remedy of review does not lie. The lodging of a Notice of Appeal is equivalent to preferring an appeal. See **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] Eklr**.

13. In the present case, the objectors filed a Notice of Appeal against the impugned judgment. The Notice of Appeal was not exclusively filed by the present applicants. The 2nd and 3rd applicants were neither objectors in the previous proceedings nor did they prefer an appeal against the said judgment.

14. For the reason that two of the present applicants were not involved in the subject Notice of Appeal, the caveat in **Order 45** against those who have appealed is not applicable in the present case. This is so because, inviting and or applying the said principle, in this matter, would prejudice the 2nd and 3rd applicants who were not party to the offending Notice of Appeal.

15. In any event, the Notice of Appeal and Notice of Intention to appeal were both withdrawn by a Notice of Withdrawal dated 31/01/2020 and filed in Court on the same day. That being the case, no appeal can be deemed to have been preferred.

16. Even if that was not the case, **Sections 47 and 73 of the Law of Succession Act** grants this Court jurisdiction to grant any order that is necessary to meet the ends of justice. In this regard, the ends of justice demand that any irregularity in the proceedings leading to the judgment be undone. Accordingly, I hold that this Court has jurisdiction to deal with the present application. The filing and subsequent withdrawal of the Notice of Appeal is no bar to the present application for review.

17. In an application for review, an applicant must establish that there was an error apparent on the face of the record, that there had been discovery of new and important evidence that was not available at the time the order or decree was made despite diligence and for any sufficient reason.

18. In the present case, the applicants swore that the petitioner had contended and lied on oath that he had not been catered for. That he did not disclose to Court that the deceased had distributed to him parcel nos. **Ithima/Ntunene/1727 and 1728**. That the two properties were in his name as at the time he appeared in Court and swore that he had not been allocated anything by the deceased.

19. The petitioner's answer was, that the two properties had not been allocated to him but they came to his name during the pendency of this Cause. That the deceased died in 1992 yet the two properties came into his name in 2013.

20. In order to understand the issue at hand, it is imperative to put everything in perspective. In his statement which was adopted as evidence in chief, the petitioner stated:

“Our father subdivided parcel No. ITHIMA/NTUNENE/148 into seven (7) parcels running from Parcel No. Ithima/Ntunene/1722 to 1728.

He further transferred four (4) Parcels to the 1st, 2nd, 4th Objectors and my brother ERASTUS KIRICHO KIRICHIU.

The 1st Objector was given one (1) Acre being Parcel NO.ITHIMA/NTUNENE/1722.

The 2nd Objector and my other late brother ERASTUS KIRICHO KIRICHIU were given Parcel No.1726.

The deceased then retained Parcel Numbers 1723, 1727 and 1728 in his name.

When the deceased was sharing the Land he did not give any share to me because I was away in Mombasa.

...

Therefore the three parcels which remained in the names of the deceased was for myself and my two sisters, the 5th Objector and MAGDALINE MAMI.

... ”.

21. In cross-examination, he stated: -

“My father did transfer of land to all of you. It is only that you have refused to collect them from the lands. I am not lying. I was not there when OW1 was given land and a title given to him. You were given plot number 1722, OW2 was given 1724, OW4 was given 1725. OW5 was not given any land. She is still at home. Moses Ithabo was given 1726.

I was not given Plot 1727. Plot 1728 was left in the deceased’s name.

While in Mombasa, the deceased called me. He gave me 1723 but died before he could transfer it. It is not true that plot No. 1723 belonged to the deceased and/or they have constructed thereon”.

22. In the impugned Judgment, the Court observed: -

“Having analysed the evidence on record, I am satisfied that the deceased subdivided his land into 7 portions and intended that each get a portion as nearly equal as possible.

...

I am satisfied that the three subdivision that were left were intended for those who had not received any portion. Even if that was not the case, there is evidence that the three are the only children of the deceased who were not catered for during the lifetime of the deceased”.

23. From the affidavits filed subsequent to the said Judgment, it became crystal clear that: -

- a. parcel no. **1726** which the petitioner alleged that it had been given to the late **Moses Ithabu** was still in the name of the deceased;
- b. the children of the late **Moses Ithabu**, including the 2nd and 3rd Applicants herein, were still living on parcel no. **1723**;
- c. parcel nos. **1727 and 1728** were in the name of the petitioner having been so registered as such on 26/02/2013 and he admitted that fact.

24. The question that begs is, the petitioner being the administrator of the estate, he must have known how parcel nos. 1727 and 1728 were registered in his name in 2013. Why did he not disclose this to the Court when he hesitated and made denials in his testimony? Did he not lie on oath when he stated that parcel no. 1726 had been given to his late brother and that parcel nos. 1727, 1728 and 1723 were still in the name of the deceased?

25. In his replying affidavit to the present application, he did not deny that the children of his late brother **Moses Ithabu** were living on plot no.1723. He also did not deny the fact that he had not involved them in the lodging and prosecution of this Cause.

26. In this regard, I find the foregoing to be sufficient reason to review the impugned judgment. The petitioner had lied to this Court which lies the Court relied on to distribute the estate. Had the Court knew of the matters aforesaid, it would have distributed the estate otherwise than it did.

27. The foregoing being the case, I am satisfied that there is a sufficient reason to review the Judgment dated 30/05/2019.

28. In rectifying the grant, the Court will have regard to the fact that **Joel Kobia, Peter Kimani Kirichiu, Erastus Kirichiu, Stanley Kirichiu Makara** have properties registered in their own names. These are parcel nos. 1722, 1724 and 1728, respectively. The Court has also noted the area of the said properties.

29. In redistributing the estate, the Court will take into consideration that plot No. 1723 seems to be one fought over and that plot No. 1726 is on a sloppy area. It is imperative that each beneficiary has a feel of each place/plot.

30. In this regard, the judgment dated 30/05/2019 is hereby reviewed, the certificate of grant is rectified and the estate will be distributed as follows: -

a. Ithima/Ntunene/1723 - 0.81Ha

i. Harriet Mwendwa Moses

Teresia Kanana Moses

Hellen Karimi Moses

Jacob Murangiri Moses - 1.1 acres

ii. Stanley Kirichiu Makara - 0.2 acres

iii. Jerica Kiritu Kirichu - 0.4 acres

iv. Joel Kobia Kirichiu - 0.2 acres

b. Ithima/Ntunene/1727 - 0.542Ha

Stanley Kirichu Makara - Whole

c. Ithima/Ntunene/1728 - 0.2Ha

Magdalene Mami Kirichu - Whole

d. Ithima/Ntunene/1725 - 0.542Ha

Peter Mugaa Kirichiu - Whole

e. Ithima/Ntunene/1726 - 0.542Ha

i. Harriet Mwendwa Moses

Teresia Kanana Moses

Hellen Karimi Moses

Jacob Murangiri Moses - 0.4 acres

ii. Stanley Kirichiu Makara - 0.2 acres

iii. Jerica Kiritu Kirichu - 0.3 acres

iv. Joel Kobia Kirichiu - 0.2 acres

v. Peter Mugaa Kirichiu - 0.2 acres

f. This being a family matter, each party to bear own costs.

DATED and DELIVERED at Meru this 14th day of April, 2019.

A. MABEYA

JUDGE