



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1755 OF 2011

IN THE MATTER OF THE ESTATE OF HARRISON MUNIU KUNGU alias HARRISON MUNIU- (DECEASED)

DANIEL MUIRURI MBURU.....APPLICANT

VERSUS

CHARLES KARIBA MUNIU.....RESPONDENT

RULING

1. Under **Order 45 rule 1** of the **Civil Procedure Rules**, for the court to review its decree or order, the aggrieved party has to demonstrate that:-

- a. there is a discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced at the time the decree was passed or the order made; or
- b. there was some mistake or error apparent on the face of the record; or
- c. there was any other sufficient reason. (**Tokesi Mambili & Others –v- Simion Litsanga, Civil Appeal No. 9 of 2001 at Kisumu**).

The application must have been made without undue delay.

2. The deceased Harrison Muniu Kungu alias Harrison Muniu died intestate on 14th November 1978. On 17th August 2011 his eldest son Charles Kariba Muniu (the respondent) petitioned for the grant of letters of administration intestate. The estate comprised:-

- a. Plot No. 25 – Wangige market;
- b. Plot No. 1 – Wangige Market;
- c. Plot No. 21 – Wangige Market;
- d. Kabete/Muthumu/T.119;
- e. Kabete/Muthumu/T.118;
- f. Kabete/Muthumu/T.228;
- g. Kabete/Muthumu/T.357;
- h. 20 shares in Ali Juja Farmers Co. Ltd – Certificate No. 3082;

i. Githunguri/Githiga/116; and

j. 20 shares in Ali Juja Farmers Co. Ltd – Certificate No. 3093

The grant was issued on 30th January 2012, and confirmed on 19th December 2012.

3. The deceased had married twice, and had in all 12 children.

4. The applicant Daniel Muiruri Mburu was the deceased's grandson. He filed an application dated 9th November 2015 under **section 76(b)** of the **Law of Succession Act (Cap 160)** and **rule 44(1)** of the **Probate and Administration Rules** to revoke the grant. He alleged fraud and non-disclosure of material facts, that the respondent had failed to disclose that there had been another **Cause No. 261 of 1981** in respect of the same deceased which had not been brought to the attention of the court; the respondent's intention was to disinherit all lawful beneficiaries, especially those from the house the applicant hailed; the respondent was subdividing the deceased parcels of land without the applicant's knowledge; the deceased had left a Will, and therefore this was not an intestate estate; and that, indeed a grant of probate had been issued to the Kenya Commercial Bank Ltd in **Cause No. 261 of 1981** on 13th July 1981 to the knowledge of the 1st respondent.

5. The respondent filed a replying affidavit in which he admitted that indeed the deceased had died testate, and that a grant of probate had been issued to the Kenya Commercial Bank. He stated that the grant had been revoked by a document by Discharge and Indemnity dated 25th March 2009 and with the consent of the beneficiaries so the deceased. This is what led to the filing of the present cause. These facts, he stated, had been disclosed, and that the applicant had signed a consent to the petition of letters of administration intestate. The respondent's appointment as the administrator had been agreed to by all beneficiaries, and that the distribution of the deceased's estate had been agreed to by all the beneficiaries, except for the applicant who, despite several requests by the advocates of the estate, had refused to sign. Nonetheless, he had been provided for in the distribution.

6. The application for revocation was heard orally by Justice R.E. Ougo who dismissed it on 14th February 2019.

7. The applicant was aggrieved by the judgment. He filed the present application dated 24th June 2019 seeking the review and/or varying of the judgment and subsequent orders, and for the court to direct that parcels Githunguri/Githiga/116 and Plot No. 1 Wangige Market be redistributed equally and fairly to the family of Josephine Wangari in accordance with Kikuyu customary law. The ground was that, since the court had acknowledged that the deceased was a kikuyu who had died before the **Law of Succession Act** had come into operation, and therefore his estate was governed by Kikuyu customary law, the two properties should be redistributed equally and fairly between the two houses of Josephine Wangari and Damari Thitu Muniu in accordance with that law. It should be noted that the two houses that the deceased left were the houses of Josephine Wangari Muniu and Damaris Thitu Muniu.

8. The response by the respondent was that that applicant was seeking to re-litigate an issue that had been heard and determined, and that could not be allowed.

9. The applicant was essentially not satisfied with the distribution of the estate of the deceased as contained in the certificate of confirmation issued on 19th December 2012. He sought to revoke that grant but his application dated 9th November 2015 was dismissed. The present application seeks to review the dismissal of his application for revocation. However, what he wants is for the court to redistribute the estate between the two houses of the deceased; that the distribution in the certificate of confirmation was not fairly done. This is what was submitted by the applicant's submissions:-

“8. The Dispute between the parties herein is in regard to the mode of distribution of the estate of the deceased particularly Githunguri/Githiga/116 and Plot No. 1 Wangige Market. On one part, the 1st Respondent Charles Kiriba Muniu the Respondent's step father, the Administrator misled the court to believe the property Githunguri/Githiga/116 and Plot No. 1 Wangige Market were equally and fairly distributed between the two houses while in real sense it only favoured one side of the family. On the other hand, the Applicant believes that the two said properties should be divided equally according to the number of houses which is in accordance either Kikuyu customary law which court acknowledged. The deceased is of the kikuyu tribe and since he died before the commencement of the Succession Act of 1st July 1981 then the Kikuyu Customary Law of inheritance should be applied.”

10. The application to review the distribution was being brought about seven years later. This offended **Order 45 rule 1 (b)** of the **Civil Procedure Rules** that requires that an application for review has to be brought without unreasonable delay.

11. Nonetheless, the court that heard the application for evocation did it orally. Parties, including the applicant, testified. The court found that the distribution in the certificate of confirmation followed the agreement and consent of all the beneficiaries. The only party who had not consented was the applicant, but that he had been requested to come along without success. He had nonetheless been provided for. The application alleges that the house of Josephine Wangari Muniu was not treated fairly and equally. However, the application was brought in his name. It was not brought on behalf of that house. He is not complaining about the share given to him.

12. The court took into consideration, in dismissing the application for revocation, that the estate was subject to Kikuyu customary law. It declined the invitation to interfere with the distribution. If the applicant was not happy about the court's appreciation of Kikuyu customary law, or its application to the facts of the case, or was unhappy about the way court had distributed the estate, or thought that one house had been done in, he ought to appeal, either against the distribution as contained in the certificate of confirmation or the dismissal of his application for revocation (**Pancras T. Swai –v- Kenya Breweries Ltd [2014]eKLR**).

13. In other words, the applicant did not show that there was new and important matter or evidence that he wanted this court to consider. He

did not demonstrate that there was any mistake or error apparent on the face of the record that this court should correct. He did not disclose any other sufficient reason on which review should be grounded.

14. The result is that I dismiss with costs the applicant's application dated 24th June 2019.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 8TH day of APRIL 2020.

A.O. MUCHELULE

JUDGE