



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**SUCCESSION CAUSE NO. 287 OF 2013**

**IN THE MATTER OF THE ESTATE OF MUNYUKO KIBA MURAGE alias MUNYUKU MURAGE(DECEASED).**

**JOHNSON KAGO MUNYUKO.....APPLICANT**

**VERSUS**

**JULIA WANJIKU MUNYUKO.....1<sup>ST</sup> RESPONDENT**

**MERCY WAGATWE MUNYUKO.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Judgment in this cause was delivered on the 20/12/2017. The dispute was on the distribution of the estate of the late Munyuko Kiba Murage alias Munyuku Murage (deceased).

The Court, upon hearing a protest by two daughters Julia Wanjiku Munyuko and Mercy Wagitwe Munyuko and the rest of the beneficiaries distributed the estate. The estate comprises of land parcel No. Mutira/Kangai/1306,659,1307,1308,1305,659 which parcels had been distributed according to the mode of distribution agreed up at the confirmation of grant.

2. In the Judgment dated 20/12/2017, the two protestors were allocated 2.5 acres each out of land parcel No. Mutira/Kangai/1305. The court made a further order that the money left behind by the deceased, being Kshs 62,000/- be shared equally by the surviving children's with the share of Peter Nyaga Munyuko going to his widow.

3. **By an application by summons dated 7/5/2019**, brought under Section 47 of the Law of Succession Act, and Rule 73 of the Probate and Administration Rules, Johnson Kago Munyuko, son to the deceased, and a beneficiary moved the court for **ORDERS: -**

1. That this court be pleased to review and/or set aside the Judgment and or orders delivered on the 20/12/2017 and there be issue orders to the effect that land parcel to **Mutira/Kangai/1305 be distributed as hereunder;**

**(a) Gladys Warutui Ngondi**

**Cecily Mabuti Gichobi            To get 0.8 Acres each.**

**And**

**Mercy Wagitwe Macharia.**

**(b) Julia Wanjiku Muyundo ..... 1 Acre**

**(c) David Muriuki            ..... To get 0.8 Acres**

**Peter Kithaka Nyaga**

**(d) Johnson Kago Munyuko to get a portion of 1.8.Acres.**

4. The applicant swore the supporting affidavit sworn on the 7/5/2019.

The application is opposed by the earlier protestors/respondents by grounds of opposition dated 26/7/2019 and filed on even dates; on

grounds that;

- 1) **The same is ambiguous and an abuse of the court.**
- 2) **That the applicant raises no new issues capable of being addressed by the court.**
- 3) **The applicant raises no reason as to why the court should revisit its earlier decisions.**
- 4) **The applicant advances no reason at all why he was not satisfied with the Judgment.**
- 5) **The applicant has failed to disclose that Peter Kithaka Nyaga Wamunyuko has since passed on.**
- 6) **If the application is allowed or even entertained, that shall amount to this court sitting on its own appeal.**

5. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further filed written submissions on the application. The Interested Party stated to support the application. (It is however not clear from the court records as to who the Interested Party is, as there are only three parties to this cause).

6. The application before me is premised on **Order 45 of the Civil Procedure Rules, seeking orders for review of the Judgment delivered on the 20/12/2017 and introducing a fresh distribution of the estate drawn by the applicant.**

The Law of Succession Act and the rules made thereunder is a self contained legislation. However, some provisions of the Civil Procedure Rules are improved to the Law of Succession of Act, those dealing with service of summons, interrogatories, discoveries, Inspection consolidation of suits and summoning witnesses to attend court, Review and computation of time. Thus, a beneficiary or any Interested Party may bring an application for review.

7. An application for Review, as the one before me must meet the requirements set out under **Order 45 of the Civil Procedure Rules** to succeed.

These are essentially;

- a) **Discovery of new and important matter.**
- b) **Mistake or error on the face of the record.**
- c) **Other sufficient reasons, and application must be made without undue delay - see**

**John Mundia Njoroge & 9 Others –v- Cecilia Muthoni Njoroge & Another (2016) eKLR.**

8. I have carefully combed through the reasons for the application as stated in the affidavit in support, and in the submissions filed by C. S. Macharia & Co. Advocates for the applicant, that the applicant was dissatisfied with the Judgment for reasons that he was not awarded any portion out of land parcel No. Mutira/Kangai/1305, arguing that it ought to have been shared between himself, David Muriuki and Peter Kithaka and wished it be shared amongst all the beneficiaries of the estate, as was the intention and wish of the deceased which the court failed to take into account citing the case **Peter M. Murungi & Another –v- Enid Gaturie Mwongera & Another (2016) eKLR** where the court held, inter alia, that once the deceased had settled his family in his life time, the same cannot be subject to disruption after death.

9. As for **Order 45 Civil Procedure Rules**, the respondents urged that the application does not meet the requirements stated under the rule, stating that nothing new, or error have been demonstrated by the applicant. It is further stated that the applicant has not shown any reasons why the Judgment ought to be interfered with by a review order.

10. By the above, it is evident that the applicant was dissatisfied with the court's judgment on the distribution of the deceased estate. It is also evident that the applicant has not appealed against the court's judgment delivered on the 20/2/2017. Obviously, the statutory period for lodging an appeal is long past leaving the applicant with the option for a review.

11. Even then, **Rule 1(b) of Order 45** mandates that such application ought to be brought without unreasonable delay. A delay of almost 2 ½ years cannot be said to be reasonable delay, and no reasons for the delay have been explained.

12. The Court of Appeal in the case **National Bank of Kenya Ltd –v- Njau (1995-98) EA 249** held that:

***“ 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 must be self evident and should not require an elaborate argument to be established. Nor can it be a ground for renew that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of law cannot be a ground for review -----“.***

13. In the present application, the Judge fully canvassed all the matters before it to reach the conclusion it did. The court, in the above case continued

*“----- if he had reached a wrong conclusion of the law, it could be a good ground for appeal but not review -----“*

14. In **Election Petition No. 28/2017 Samuel Mathenge Ndiritu –v- Martha Wangare Wanjira & Another (2017)eKLR** the court discussing the matter of Review –v- Appeal came to a conclusion that the appropriate remedy for the petitioner was by way of an appeal. There being no apparent error on the record, or a mistake, I need not go further. The application by the applicant herein is but an afterthought. The grounds for the application all point to matters that ought to have been taken up in an appeal, not through review. To do so would constitute this court sitting on appeal of its judgment.

15. To that extent, I find the summons dated 7/5/2019 to be without merit. It is dismissed with costs.

**Dated, Signed and Delivered at Kerugoya this 5<sup>th</sup> day of November 2020.**

**J. N. MULWA**

**JUDGE**