REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 83 OF 2009

NANCY WANJIRA WACHIRA.....1ST APPLICANT/INTERESTED PARTY

JOSEPHINE WANGITHI MWAI...2ND APPLICANT/INTERESTED PARTY

VERSUS

JACOB KINYUA KAGANO.....1ST RESPONDENT

SOLOMON MACHERE MUNGE.....2ND RESPONDENT

TABITHA NJOKI KAGANO.....APPELLANT/ 3RD RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling for the applicants' summons dated 15th March 2018 seeking for the following orders;

> ***a) That this Honourable Court be pleased to review, vary and/or set aside the judgement dated 1st March 2012 to the effect that the interested parties herein are catered for in the distribution of the estate herein .i.e. land parcel nos. Inoi/Thaita/2730 and Inoi/Thaita/2732 be shared equally among all the surviving children and wife of the deceased namely – Tabitha Njoki Kagano, Jacob Kinyua Kagano, Josphine Wangithi Mwai, Nancy Kagano, Pauline Wambui Kagano, Jamlick Simba Kagano and Patrick Kanungu Kagano.***

B. Applicants' Case

2. The applicants deponed in support of their application that she was not informed when the proceedings in Kerugoya Succession Cause No. 73 of 2002 and Civil appeals 83 of 2009 were commenced. She further deponed that the daughters of the 1st house were not included in the proceedings and this was a misrepresentation as the court proceeded to order that the suit properties be merged and shared in the ratio of 2:1 on the understanding that the 1st house had only one son.

3. The 1st applicant further deponed that consequently it was only fair and just that the court orders be reviewed so as to cater for the interests of the applicants.

C. 1st Respondents Case

4. The 1st respondent filed a replying affidavit dated 27th April 2018 in which he deponed that indeed the 1st house of the deceased had 4 children but that the 1st wife predeceased the deceased in this case. He further stated that he did involve any of his sisters as they were married and that he had no objection in involving them

D. 2nd Respondent's Case

5. The 2nd respondent filed grounds of opposition to the summons dated 11th April 2018 in which he stated that the application had been brought with inordinate delay and that the application was res judicata in view of the Court of Appeal judgement in Nyeri Civil Appeal No 37 of 2013.

6. He further stated that the application was full of contradictions and was self-defeating.

E. The 3rd Respondent's Case

7. It was her case that the application was res judicata in view of the Court of Appeal judgement in Nyeri Civil Appeal No 37 of 2013. Further it was the 3rd respondent's case that application was defective as review is only granted where the court wants to correct an apparent error or omission which is self-evident and further whether there is new evidence which was not in the possession of the applicants.

8. The 3rd respondent's further stated that the applicants ought to have brought an application for revocation of grant during the succession cause and prior to the appeal being concluded as they sought redistribution of the deceased's estate. She further stated had brought the application with undue delay as the judgement by the Court of appeal was 4 years earlier,

F. Applicants' Submissions

9. The applicants submitted that Rule 49 and 73 of the Probate and Administration Rules incorporate Order 45 of the Civil Procedure Rules which provided conditions for grant of an order of revision and that they had established new and important evidence to the effect that as the children of the deceased, they were not involved in the distribution of the deceased's estate.

10. On res judicata as raised by the appellant and 2nd respondent, the applicants submitted that they were not parties in Civil Appeal No. 37 of 2013 nor were they aware of it.

G. The 3rd Respondent's Submission

11. The 3rd respondent submitted that the issue of existence of the applicants was not novel as the same had been addressed in Civil Appeal no. 37 of 2013 as well as in this court.

12. The appellant/respondent further submitted that once judgement was delivered by this court, the court became *functus officio* and its findings were upheld by the Court of Appeal.

H. The Determination

13. Before embarking on the determination of any issue in this matter, this court is under a duty to first establish whether it has *locus standi*. In **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR**, the Court of Appeal held: -

> ***"In our view, issues of locus standi and jurisdiction are critical preliminary issues which ought to have been settled before dwelling into other substantive issues".***

14. The main order that the applicants are seeking review of the judgment made on 1/03/2012 that as daughters of the deceased they were not catered for. The 1st respondent had made an application for the revocation or annulment of the grant. That application was heard and by a ruling made on 17th April, 2003. That application was found to have no merit and was dismissed.

15. The applicant has now come back 15 years later to seek similar orders. This court despite being a probate court is still a civil court guided by the Civil Procedure Act. **Section 7 *of the Civil Procedure Act CAP 21*** provides that: -

> **"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."**

16. The question is whether the issues raised in this application can be regarded as issues already heard and finally determined. In the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR,** the Court of Appeal held:-

> ***"In order to rely on the defence of res judicata, there must be:***
>
> ***i) a previous suit in which the matter was in issue;***
>
> ***ii) the parties were the same or litigating under the same title;***
>
> ***iii) a competent court heard the matter in issue;***
>
> ***iv) the issue has been raised once again in a fresh suit.***

17. The net effect of ***section 7 of the Civil Procedure Act*** is that litigation must come to an end. For this court to establish *res judicata*, it must take into consideration if the parties were the same, the issues were the same in both proceedings and whether the issues were ever determined.

18. I have considered the same and it is clear that the applicants have not engaged in these proceedings before. The applicants claim they

were not even aware of the succession proceedings. I therefore find that this application is not *res judicata*.

19. The application is premised **Rule 49 and 73** of the **Probate and Administration Rules**. **Rule 49** of the **Probate and Administration Rules** provides that a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.

20. It was held in **In the matter of the Estate of Mumenya Njogu (deceased)**, Succession Cause No.113 of 1994 at Nyeri, Rule 49 does not provide for the discretionary power to set aside a decree or an order of court. Justice M.S.A. Makhandia expressed himself thus:

> **"Rule 49 aforesaid does not provide for the setting aside of any order made in a Succession Cause. Neither does it provide for the setting aside a judgment..... the rule provides a procedural remedy.... The only rule that deals with exercise of discretion is rule 73 of the Probate and Administration rules. That rule was not cited in the application.....Unlike the Civil Procedure rules which have Order L rule 12 that deals with situation were there is failure to cite a proper order, rule or other statutory provisions under or by virtue of which the application had been brought which failure is not fatal, the law of Succession Act has not such equivalent provision and nothing can come to the aid of the applicant in the circumstances. The application is thus incompetent."**

21. Based on the above, the application as presented is incompetent and ought not to be entertained. Despite this finding I find it necessary to look into the merits of the application.

22. The power to review courts orders (in succession) matters is premised under the parameters provided by virtue of **Rule 63** of the **Probate and administration rules** which renders **Order 45 1(b)** of the **Civil Procedures Rules** applicable to succession matters.

23. Order 45(1) of the **Civil Procedure Act** and which is applicable to succession matters by virtue of **Rule 63** of the **Probate and Administration** rules clearly sets out the parameters for review:

> ***i. Discovery of new and important matter or evidence***
>
> ***ii. Mistake or error apparent on the face of the record***
>
> ***iii. Any other sufficient reasons.***

24. It is not in dispute that the applicants were not involved in the proceedings leading up to the distribution of the estate. The 1st respondent, who was one of the administrators failed to raise this issue before the trail magistrate in Kerugoya who distributed the estate.

25. I have perused the judgment of the Court of Appeal delivered on 30/07/2014. The 1st respondent Jacob Kinyua Kagano who is a brother to the applicants was dissatisfied with the judgment of Ong'undi J. in this appeal in which she distributed the estate between the two houses of deceased as follows: -

> ***Ø 1st house – Jacob Kinyua Kagano – 1/3 share***
>
> ***Ø 2nd house – Tabitha Njoki and her children – 2/3 share***

26. It is against this distribution that the 1st respondent appealed against the said judgment. The grounds relied on by the 1st respondent is that the first house had more survivors that the High Court had considered in distributing the estate. He gave the names of the applicants and two others as beneficiaries in the first house who ought to have been considered so that each house got ½ share.

27. The Court of Appeal in dismissing the appeal observed the following: -

> ***1) "That the 1st respondent who was one of the administrators in Kerugoya Succession Cause No. 73 of 2002 did not include the names of the daughters of the deceased in the list of beneficiaries.***
>
> ***2) That the 1st respondent only brought in his sisters at the stage of confirmation of grant without the participation of his co-administrator.***
>
> ***3) That the 1st respondent's motive as read by the court in his previous omission in before the magistrate's court and in the High Court was that he was fighting for himself to get a bigger allocation in the 1st house.***
>
> ***4) That the issue of whether the four newly introduced persons was a question of fact that ought to have been resolved before the learned magistrate and the Superior Court.***

28. It is not in dispute that the issue of the applicants as beneficiaries of the estate arose during the late stage of confirmation of grant and in the Court of Appeal. The 1st respondent did not explain in his replying affidavit why he omitted his sisters in the list of beneficiaries while he was the administrator with a legal obligation to bring on board all the beneficiaries.

29. The Court of Appeal said: -

"We find it inappropriate (to determine the issue) as we have no means of establishing the same."

30. I would say the same for this court that this issue of additional beneficiaries cannot be introduced in this court which has already determined the appeal and whose judgment has been upheld by the Court of Appeal.

31. It is trite law that this court became *functus official* after rendering its judgment which was delivered on and for that reason should not entertain issues of fact that the applicants want to introduce through their application for review. A judgment that has been upheld by the Court of appeal cannot be reviewed by making an application in the Superior court.

32. Although the applicants denied the allegation that this application has not been brought at the instigation of the applicant, given the history of this case, this court has reason to believe that the applicants have no interest in this cause and that they are being pushed into unnecessary litigation by the 1st respondent for his own benefit. He has always eyed a bigger share in the estate which was correctly observed by the Court of Appeal and seems determined to achieve it.

33. I reach a conclusion that this application is incompetent. The issue of existence of the applicants as beneficiaries is not new and important evidence that would justify review.

34. I further find that this application apart from being incompetent has no merit and is hereby dismissed with costs to the respondents save for Jacob Kinyua Kagano.

35. It is hereby so ordered.

DELIVERED DATED AND SIGNED AT EMBU THIS 16TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Wachira for Mugambi Njeru for 2nd Respondent