



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 114 OF 2003

IN THE MATTER OF THE ESTATE OF M' IMWITHIA KATHUMA MBARE (DECEASED)

KANGAI M' IMWITHIA.....PETITIONER

-Versus-

ALICE MUKWANJIRU M' IMWITHIA.....PETITIONER

AND

MARGARET MUKWANYAGA IMWITHIA.....APPLICANT

RULING

[1] The Notice of Motion dated 28th March 2007 and expressed to be brought pursuant to the provisions of Order XLIV Rule 1 (b) and Rule 63 (1) of the Probate and Administration Rules, seeks review of the judgment delivered by this court on 17th January 2007. The review sought is on distribution of the deceased's assets and in particular plot number Karingani/Mugirirwa /899.

[2] The Application is supported by the grounds set out in the application and affidavit sworn by the Applicant. They stated that the deceased had purchased the said plot for the Applicant and with the Applicants money. Therefore, the deceased was holding the said plot in trust for the Applicant. But these facts were never made known to the trial judge at the time of writing judgment. The Applicant had no opportunity to air those facts to the trial judge.

[3] The Applicant submitted that, although there was no written agreement between the deceased and the Applicant, it was known to the petitioners and all the children of the deceased that Land Parcel No. Karingani/ Mugirirwa/899 measuring ten (10) points only had been sold to the Applicant by the deceased.

[4] On the other hand, it was submitted for the Petitioner that the orders sought were not tenable under the Law of Succession Act CAP 160 of the Laws of Kenya, for the court was *functus officio* and the only remedy available to the Applicant was to the Court of Appeal.

[5] Is there ground to review the judgment delivered by this court on 17th January 2007 in respect of plot number Karingani/Mugirirwa /899? Review is permitted under Order 45 of the Civil Procedure on grounds:

- 1. That there has been 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**
- 2. On account of some mistake or error apparent on the face of the record, or**
- 3. For any other sufficient reason.**

The application should however be made without unreasonable delay.

[6] From the arguments herein, the Applicant claims new and important matter or evidence could not have been produced by her for she was ill at the time the case was heard. The important matter is that the deceased had purchased the said plot for the Applicant and with the Applicants money, thus, the deceased was holding the said plot in trust for the Applicant. One other claim; that those facts were never made known to the trial judge at the time of writing judgment and that further the Applicant was unwell and so had no opportunity to air those facts to the trial judge. In *National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported))* the Court of Appeal

stated;

“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. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More 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 ground for review.”

“... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”

[7] In this case, I do not think the Applicant is claiming that there has been discovery of new and important evidence which was not within her knowledge. Of course the evidence in issue was in her knowledge. What is being said is that she was unwell and could not bring the evidence to the attention of the court. Is this therefore sufficient reason for review?

[8] The Applicant contended that she had purchased plot number Karingani/Mugirirwa/889 from the deceased. But these facts were not brought to the attention of the judge for she was unwell. I do not find any evidence to show that she was unwell. Even if it were to be believed that she was unwell it was not stated for how long she was unwell. The Applicant further was represented by counsel. I have set out these matters because such application requires strict proof thereof. No such proof. In any event, purchase of land and trust thereof has been claimed; these are not matters for the jurisdiction of probate court in a succession cause. The correct forum to prove trust is CLC. Thus, these questions cannot be a basis for review herein in the absence of a decree by a competent court to that effect. Taking into account the totality of the circumstances in this case, I am not satisfied that the Applicant has made out a sufficient case to warrant review.

[9] Accordingly, the application dated 28th March 2007 is without merit and is dismissed with no order as to costs.

Dated, signed and delivered in open court at Meru this 4th February, 2019

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F. GIKONYO

JUDGE

In presence of

Mutuma Nyamu for applicant

M/s Kiome for petitioner

M/s Wanjohi for co-petitioner

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F. GIKONYO

JUDGE