



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

**PROBATE & ADMINISTRATION NO. 69 OF 2004**

**IN THE ESTATE OF:**

**NATHAN BISAHO LUVITA..... DECEASED**

**BETWEEN**

**WYCLIFFE LUVITA BISAHO.....PETITIONER/RESPONDENT**

**AND**

**MIRIAM WANGARE BISAHO.....OBJECTOR/APPLICANT**

**RULING**

1. By an application dated 8<sup>th</sup> April 2015 the objector/ applicant moved the court under Articles 159(2) (d) & (e) of the Constitution, sections 1A, 1B, 3, and 3A of the Civil Procedure Act and Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules for the following orders:

a) That the ruling delivered on 28<sup>th</sup> May 2014 be reviewed and the consequential orders at paragraphs b, c, d, e and f of the ruling be set aside.

b) That the costs of the application abide to the cause.

2. The application was premised on the following grounds:

a) That there are new and important matters of evidence not available during the entire hearing of the matter.

b) That the new and important evidence will assist the court in arriving at a just conclusion.

c) That the orders will not prejudice the respondent.

3. The application was opposed on grounds that:

a) There was an appeal against the order sought to be reviewed.

b) The application offends the provisions of section 80 of the Civil Procedure Act.

c) The application was filed after a period of one year after delivery.

4. Section 80 of the Civil Procedure Act provides:

**Any person who considers himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred;  
or**

**(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

In the instant matter the objector filed a Notice of Appeal dated 27<sup>th</sup> October 2014 and lodged at the registry on 31<sup>st</sup> October 2014 in respect of the ruling delivered on 28<sup>th</sup> May 2014. The option for review is not therefore available to the objector.

5. The Law of Succession Act is self-sufficient and only allows the invocation of other legal provisions in Rule 63 of the Probate and Administration Rules as follows:

**(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.**

**(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules**

The present application does not fall under of the stated Orders. It therefore incompetent. In the case of **Priscilla Vugutsa Kamaliki vs. Mary Runyanyi Ochieng [2016] eKLR** judge Ruth Nekoye Sitati was confronted by a similar scenario and this is what she said:

**The first issue for this Court to determine is whether the instant application is properly before the Court. The application is expressed to be brought under Section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act Order 40 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules. It is worth noting that the Law of Succession Act is a self-contained Act and provisions of the Civil Procedure Act, unless specifically imported into it are not applicable. A look at Rule 63 of the Law of Succession Act reveals that the provisions under which the present application is brought are not some of the provisions imported into the Law of Succession Act. What this means therefore is that the instant application is incompetent for want of form and is therefore fit for striking out.**

This being the case in the present application, it will suffer the same fate.

6. The application for review is therefore dismissed with costs.

7. On 19<sup>th</sup> October 2018 the objector/applicant moved the court by way of Notice of Motion for orders that this cause be transferred to Kakamega High Court on grounds that land parcel number **KAKAMEGA/ BUGINA/414** is in Kakamega County and that she resides in Kakamega County.

8. The application was opposed on grounds that there is other property that fall within Busia County.

9. The objector/applicant did not disclose to the court that apart from land parcel number **KAKAMEGA/ BUGINA/414** which is in Busia County, the estate of the deceased is also comprised of land parcel number **BUKHAYO/KISOKO/3599** in Busia County. This therefore means that the succession cause can either be heard or determined in the High Court at Busia or at Kakamega.

10. I find that there is no merit in the application for the transfer. The application is dismissed with costs.

11. The petitioner herein is ordered to take a date for confirmation of the grant within 30 days of this ruling failure to do so, the grant will be automatically be revoked.

**DELIVERED and SIGNED at BUSIA this 21<sup>st</sup> day of May, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**