



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 14 OF 2013

JASON NYAGA.....1ST APPLICANT

JANE MUTHONI NGOROI.....2ND APPLICANT

VERSUS

MONICA WANGARI MUGO.....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling for the application dated 19th June 2019 in which the 1st applicant seeks for orders of review of the judgment delivered on the 30th May 2019 and the certificate of confirmation of grant showing that the size the land parcel No. **LR. Gaturi/ Nembure/877** is approximately **0.82Ha.** and not **1.82Ha.** as shown in the official search.
2. It is the 1st applicant's case that this difference in acreage of the suit property became clear to him after carrying out a search after the amended certificate of grant was issued and as such the court should redistribute the remaining 1.00Ha. left out in the grant to the deceased beneficiaries.
3. The respondent opposes the application for review on the grounds that the same can only be addressed on appeal and not through a review. It is further argued that in any case the two applicants are the wrong persons to institute the said application on behalf of other applicants. The respondent is further at loss as to why the applicants have instituted the suit against her.
4. The parties urged court to determine the application from their affidavits.

B. Analysis & Determination

5. I have considered the pleadings and affidavits on record.
6. It is now settled law that there are certain orders of the Civil Procedure Rules that imported to matters of Succession and Order 45 is one of them. This is provided for under Rule 63 of the Probate and Administration Rules. **Order 45 Rule 1** provides that: -

“(1) Any person considering himself aggrieved—

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

(b) by a decree or order from which no appeal is hereby allowed, and who from the 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, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.

7. For this court to exercise its jurisdiction under the said Order and grant a review, there must be discovery of new and important matter or evidence which was not within the knowledge or could not be produced at the time by an applicant; or on account of a mistake or error apparent on the record or any sufficient reason. In addition, the application must be made timeously.
8. Firstly, the 1st applicant made the present application thirteen days after the judgment was delivered. In this regard, I am satisfied that the

application was made timeously.

9. As to the ground for review, the 1st applicant contends that after going through the judgement with a surveyor it became evident that the size of the deceased's estate distributed to the beneficiaries was less compared to the results emanating from a search carried over the suit property. I have perused the court record and note that the size of the deceased's estate was bigger than that which was distributed by the trial court and this court respectively.

10. In **Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR**- Apaloo, JA stated: -

“I think a distinguished equity judge has said:

‘Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits’.

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.” (Emphasis).

11. I am persuaded that the variance in acreage of the suit property was a mistake that this court did not foresee in its judgment. I have perused the search of L.R. Gaturi/Nembure/877 and confirmed the error in the judgment and in that of Runyenjes Magistrate's Court in Succession Cause No. 84 of 2012.

12. I find the application for review dated 19th June 2019 merited and allow it in the following terms: -

A. Paragraph 30 of the judgment is amended to read: -

a) Gaturi/Nembure/877 measuring 1.82 Ha. to be shared equally between the following beneficiaries: -

i. Monica Wangari Mugo

ii. Jason Nyaga

iii. Jane Muthoni Ngoroi

iv. Agness Wangeci Mugo

v. Bancy Wairimu Mugo

vi. Purity Igandu Mugo

vii. Margaret Wambui Mugo

b) That an amended certificate to issue in tandem with the amendment whereas each beneficiary will get a share of 0.26Ha.

B. That paragraph 32 of the judgment is hereby deleted and replaced with the following words – “It is hereby so ordered”.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mutegi for Andande for Respondents

Both Applicants present