REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 2083 OF 2008

IN THE MATTER OF ESTATE OF CHEGE MURIRA Alias NJIHIA

MURIRA (DECEASED)

STEPHEN IRUNGU WANJENGA.....OBJECTOR/PROTESTOR

-VERSUS-

KARANJA MURIRA.....PETITIONER/APPLICANT

R U L I N G

1. The Applicant herein has come to court by way of a Summons under a Certificate of Urgency dated 18th May, 2017, supported by the Affidavit of the Applicant, Karanja Murira. The Application is brought under **Section 74** of the **Law of Succession Act and Rules 43** of the **Probate and Administration Rules**.

2. The Applicant seeks orders that pending the *inter partes* hearing and determination of this application the Objector/Protestor his children, wife, servant's agents and or employees or otherwise howsoever be restrained by way of temporary injunction from entering on, remaining on, conveying, selling, subdividing, leasing, charging, developing, bequeathing and/or dealing with Land parcel No. Loc.3/Mukuria/945.

3. That the court do review, vary and/or set aside the orders and Ruling made on 24th April, 2017 together with any further and consequential orders, and that matter do proceed for hearing of the Objection/Protest on viva voce evidence.

4. The Applicant states that he was not accorded an opportunity to file replying affidavit and witness statements. That the Objector misled the court:

(a) When he said that he had the original title deed while it was with the Applicant;

(b) That he had carried out developments on the Land, as the only developments on the land while the land has permanent buildings with tenants.

(c) That he had a valid agreement whereas he had only bought land which is adjacent, but is not connected to the suit land.

(d) When he told the court that he had constructed a house for the deceased and took care of him during his lifetime which is not true and the deceased had relatives and also actively farmed the land.

The Applicant stated further that the deceased was buried on the land and thus making it manifest that the land had not and could not have been sold.

5. The Respondent opposed the application in his grounds of opposition dated 29th May, 2017 stating that the application is bad in law, is fatally defective and is incompetent. He contended that the Applicant wants the court to sit on its own appeal by considering facts and evidence again subsequent to its final decision. The Respondent argued that the issues raised in the application are of factually substantive nature and the applicant would want the court to hear the matter denovo.

6. The Respondent argued that **Section 74** of the **Succession Act and Rule 43** of the **Probate and Administration Rules** do not mandate this court to delve into the substantive issues of facts and law raised in the protest to the application for the confirmation of grant by the Petitioner/Administrator. That the court is only mandated to rectify errors as to names or description of any person or thing or as to the time

and place of death of the deceased.

7. Mr. Odawa, learned Counsel for the Applicant, submitted that Rule 73 of the Probate and Administration Rules under which the application was brought is comparable to the **Civil Procedure Act Sections 3A and 3B** and **Article 159** of the **Constitution**. That it is formulated or encapsulates the oxygen provision to give this court wide inherent powers to make orders necessary for the ends of justice to be met, to prevent abuse of court process. Counsel relied on **Rule 63(1) of the Probate and Administration Rules** which provides that:

> **"Save as in the Act or in these rules otherwise provided, and subject to any order of the court a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order V, X, XI, XV, XVIII, XXV, XLIV and XLIX together with the High Court practice and Procedural Rules, shall apply so far as relevant proceedings, under these rules."**

8. Mr. Odawa also referred the court to **Order 45** of the **Civil Procedure Act 2010** which provides for review where there is:

> a. Discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicant's knowledge at the time when the decree was passed or the order was made;
>
> b. Mistake or error apparent on the face of the record;
>
> c. Or any sufficient reason;
>
> d. The application must be made without undue delay."

9. Mr. Odawa submitted that the Objector has failed to comply with the provisions of **Rule 7(7) (a) (b) and (c)** of the **Probate** and **Administration Rules** which provides that:-

> **"where a person who is not a person in the order of preference set out in section 66 the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion."**

10. Mr. Odawa contended that the orders made on 24th April 2017 were made in error since the Applicant was never informed by his Advocate on record that he was required to prepare affidavits or witness statements leading to the court proceeding on erroneous apprehensions of the facts which are not in dispute; thereby leading to the ruling and orders which have numerous mistakes. He argued that the Objector failed his cardinal responsibility as an officer of the law to bring out material issues like the fact that he lacked the original title deed and that he has never occupied, nor developed the land as the structures and developments thereon nether belonged to him or his father.

11. Mr. Odawa contended that the Applicant being extremely old had relied on third party's information and third hand communication and miscommunication and mistakes of Advocates should not be visited on the innocent Applicant. He urged that due to lack of proper communication between the Applicant and his Advocate, key material facts which were never brought to the court's attention which require viva voce evidence include the fact that the deceased Chege Murira and Njuguna Murira had differed and as a result the deceased told Njuguna Murira not to attend his funeral which he did not. That the deceased gave the Applicant his title and the land which he developed and farmed and for which he proceeded to petition the court for letters of Administration.

12. Counsel also submitted that Njuguna Murira was charged and convicted for the offences of assaulting the deceased which confirms that they had a grudge both in life and death. Thus Njuguna Murira could not have been a witness as he has always been against the interest of the deceased. Further that the value on the sale agreement was fabricated and falsified. Lastly, that the deceased was buried on the said land a clear indication that the land had not and could not have been sold.

13. Learned Counsel Mr. Kariuki for the Respondent opposed the application on grounds that it is incompetent and fatally defective, the Applicant having brought the application under **Rule 73** of the **Probate and Administration Rules** whereas the Rule indicated is Rule 74. That the Applicant also relied on **Rule 43 and not 63** as claimed in his submissions. Mr. Kariuki submitted that the application for review is guided by **Order 45 Rules 1 and** 2 of the **Civil Procedure Rules.**

14. Mr. Kariuki argued that the Applicant has not specifically stated in his supporting affidavit or the submissions, the grounds/conditions he is relying on. That in his supporting affidavit, he is relying on new facts and evidence. That the Applicant is therefore inviting the court to sit on appeal on its own judgment by putting facts and issues that had already been handled in the determination made by the court. That the Applicant wants the court to revoke the grant under Section 76 Law of Succession Act on grounds of material non-disclosure of facts.

15. Mr. Kariuki contended that the only appropriate recourse for the Applicant was to file an appeal to the Court of Appeal since the facts and conditions deponed by the Applicant do not fit under **Order 45 Rule 1** of the **Civil Procedure Rules.**

16. Order 45 Rule 1 of the Civil Procedure Rules provides that:

> **"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."

17. It is obvious that the code contemplates procedure by way of review by the court which has already given judgment, as being different from that by way of appeal to a court of appeal. The three cases in which alone review is permitted are those of new and important material overlooked by excusable misfortune, or for mistake or error apparent on the face of the record, or for "any other sufficient reason". Originally the expression "sufficient" was naturally read as meaning sufficiency of a kind analogous. to the first two specified, that is to say, excusable failure to bring to the notice of the court new and important matters, or the error on the face of the record.

18. This was the holding of Phadke, J in **Yusufu vs Nokrach [1971] EALR pg.106** where he stated that Rule 1 of Order 45 must be read as in itself definitive of the limits within which review is permitted, and the expression "any other sufficient reason" is to be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously.

19. It was argued that the expression "any other sufficient reason" does not give a discretion to the court to consider generally the merits of an application for review. It was feared that if such a contention were to prevail every decree or order could be reopened for review on any ground whatsoever as if the application were an appeal. It is trite that a review is not the same thing as, or even a substitute for, an appeal. As observed by the Privy Council in Yusuf v Nokrach (supra) there are definite limits within which review is permitted. A point which may be a good ground of appeal may not be a good ground for review.

20. The Kenya Court of Appeal revisited the third head under **Order XLIV rule 1(1)** of the **Civil Procedure Rules** enabling a party to apply for review "for any other sufficient reason" and held that it is not necessarily confined to the kind of reasons stated in the two proceeding heads in that sub-rule which do not form a genus or class of things analogous to that general head. See - **Kimita v Wakibiru [1985] KLR pg. 317.**

21. In the case before me it is evident that not all the facts pertaining to the matter at hand were placed before the court which may have led to the court to overlook important materials in the cause. It is imperative that for the ends of justice to be met all material facts should be placed before the court for consideration. For the foregoing reasons the court finds that there is sufficient reason to review the decision of this court made on 24th April, 2017 as I hereby do. The summons dated 18th May, 2017 is consequently allowed.

Costs be in the cause.

SIGNED DATED and DELIVERED in open court this 7th day of March, 2018.

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L. A. ACHODE

JUDGE