



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 719 OF 2015**

**(FORMERLY EMBU SUCCESSION CAUSE NO. 173 OF 2002)**

**IN THE MATTER OF THE ESTATE OF THE LATE MIERI GICHUNGE (DECEASED)**

**JACK GITAARI MIERI.....PETITIONER**

**VERSUS**

**KAARI MURITHI.....1<sup>ST</sup> OBJECTOR**

**BONFACE RUGENDO.....2<sup>ND</sup> OBJECTOR**

**AND**

**JULIET CIAMWARI.....APPLICANT**

**R U L I N G**

**1. JACK GITARI MIERI**, the Petitioner/Applicant has moved this court vide a Notice of Motion dated 29<sup>th</sup> May 2017 brought under **Section 3A** and **99** of the **Civil Procedure Act Cap 21** Laws of Kenya and **Order 45 Rule 1& 2** of the **Civil Procedure Rule** for the following prayers namely:-

(i) That the Judgment of Honourable Justice A. Mabeya delivered in this cause on 3<sup>rd</sup> November, 2016 be amended so as to rectify clerical errors apparent in the said Judgment.

(ii) That paragraph 27 of the said Judgment be amended to conform with the findings of the said Honourable Judge Mabeya as articulated in paragraph 26 of the said Judgment.

(iii) That paragraph 27 of the said Judgment be amended so as to include the Petitioner/Applicant as a beneficiary of the deceased's estate (one acre) from parcel **NO. L.R NO.KARINGANI/GITARENI/1774**.

(iv) That costs be provided for.

**2.** The applicant seeks the above prayers on the following grounds namely:-

(i) That in paragraph 26 of the Judgment delivered by this court on 3<sup>rd</sup> November,2016 the Petitioner/Applicant was awarded an acre out of **KARINGANI/GITARENI/1774**.

(ii) That unless the said Judgment is rectified, the trial process would be rendered a nullity and ends of justice defeated and/or frustrated.

(iii) That in view of the above there is sufficient cause to amend the Judgment.

(iv) That this application has been brought without delay.

**(v) That it is in the interest of justice to review the said Judgment.**

3. The applicant has supported this application by his sworn affidavit sworn on 29<sup>th</sup> May, 2017 where he has reiterated the above grounds.
4. The Respondents, Kaari Murithi and Juliet Ciamwari have opposed this application vide a Replying Affidavit sworn by Kaari Muriithi on 8<sup>th</sup> June, 2017. The 1<sup>st</sup> Respondent has deposed that the only review that should be done is to distribute the extra one acre that remained undistributed and that one acre should go to her as the daughter in law of the deceased. She has further deposed that giving the petitioner one extra would be grossly unfair as he had benefited from a bigger share as opposed to the other beneficiaries who are ten in number and who have got a smaller share.
5. This court has considered this application and the response made. On the face of it this application is defective and technically incompetent for the simple reason that the applicant has moved this court by way of Notice of Motion invoking the provisions of **Civil Procedure Rules** and **Civil Procedure Act** when the same do not necessarily apply to succession causes. The Law of Succession Act provides its own regulations and procedures applicable in a probate court. Under **Rule 59** of Probate and Administration Rules, the applicant was required to move this court by way of summons as provided under **Rule 59(5)** of the said rules. It is true that there are situations where the rules of procedure under Civil Procedure Rule apply but the same is limited as provided for under **Rule 63 of Probate and Administration Rules**. And although **Order 45** by construction does apply, the procedure provided is through summons and not Notice of Motion. This court is however minded by the provisions of **Article 159(d)** of the Constitution which provides that court should administer justice without regard to technicalities. I will therefore determine this application on merit rather than striking it out for want of form. The applicant as a layman after all may really not appreciate the differences between a Notice of Motion and Summons. For him he has approached this court and expects justice. It is therefore imperative that I render my decision on the substance of the application.
6. The Petitioner has urged this court to amend the Judgment delivered in this court by honourable Justice Mabeya on 3<sup>rd</sup> November, 2017 which Judgment or decision determined how the estate of the late Mieri Gichunge was to be distributed. The estate comprised that property known as **KARINGANI/GITARENI/1774** measuring approximately 10 acres as per the certificate of title tendered to this court. The beneficiaries listed in this cause are as follows:-

- (i) Gladys Ciamatumu - wife
- (ii) Jack Gitari Mieri - son/petitioner
- (iii) Margaret Ciamuru - daughter
- (iv) Priscilla Mutegi - daughter
- (v) Evelyne Kagendo - daughter
- (vi) Mary Kageni - daughter
- (vii) Evangeline Ntuntuni - daughter
- (viii) Juliet Ciamwari - daughter

7 The dispute that arose before this court was that since the Petitioner had benefitted from a previous gift from the late Mieri Gichunge which was a land parcel No. Karingani/Gitareni/1775 measuring approximately 11 acres, he should not be considered in the distribution of the estate on account that the other beneficiaries had not benefitted from any share. The court heard the matter and rendered its decision through the said Judgment delivered on 3<sup>rd</sup> November, 2016. The daughters and the widow were found to be entitled to a share of the estate and the court found out that each of the daughters were to get 1 acre each while the widow was to have life interest on 2 acres and hold it in trust for Kendi Mbuba and Martin Mwiathi. Kendi Mbuba and Martin Mwiathi are both children of Kaari Murithi and late Mbuba Mieri a deceased son to the late Mieri Gichunge. The two were also given one acre to share jointly.

8. The applicant has now moved this court to rectify or review the findings or the decision of this court on the distribution. I have looked at the body of the Judgment more so paragraph 26 of the Judgment and it is apparent that **honourable Justice Mabeya** held that the Petitioner herein had gotten plot No.1775 which he correctly found to be bigger than the estate itself and stated that the Petitioner may not be entitled to the estate but may get one acre. Now in the final Judgment, he leaves out the Petitioner completely. Now the question is, is that a clerical mistake?. I do not think so. It could be described as an error of Judgment but certainly it is not a clerical mistake. This court cannot interfere with such an error for 2 reasons.

- (i) This court has no jurisdiction to sit on its Judgment once it has rendered a decision. The only available avenue is for anyone aggrieved by the decision is to appeal to the Court of Appeal which has appellate jurisdiction to entertain the grievance.
- (ii) Notwithstanding the fact that I do not have jurisdiction to set aside or review a decision of another Judge of concurrent jurisdiction, this court would not have found any basis to grant the applicant his wish simply because the reality is that he benefitted more than any other child of the deceased in this cause.

The provisions of **Section 42 of Law of Succession Act** clearly state that a previous gift to a beneficiary is a factor when determining the question of distribution of an estate. The applicant here got 11 acres after distribution, the other children got one acre each surely what justification does the applicant have to claim an extra acre apart from may be the illusion that being the only surviving male he should get more than the rest because the others are females. The law does not discriminate on gender or marital status and the constitution certainly protects the interests of all in equal measure without any discrimination under **Article 27** thereof.

The 1<sup>st</sup> Respondent has stated that there is an extra one acre which was not distributed. This court does exercises its powers under **Section 74** and **Rule 73 of Probate and Administration Rules** to order that that the acre be distributed equally to all the beneficiaries listed under **paragraph 27** of the Judgment so that each beneficiary named thereat gets something extra to what they were given by this court.

In the premises, this court finds no merit in the application dated 29<sup>th</sup> May, 2017. The same is dismissed with costs to the Respondents. I also direct the administrator to proceed with speed and finalize the administration of the estate as per the certificate of confirmation to be issued by this court and in the event of default I direct the Deputy Registrar of this court to execute the transmission documents and other requisite documents in order to bring this matter to an end.

**Dated, signed and delivered at Chuka this 18<sup>th</sup> July, 2018.**

**R.K. LIMO**

**JUDGE**

**18/7/2018**

Ruling signed, dated and delivered in the open court in the presence of the parties.

**R.K. LIMO**

**JUDGE**

**18/7/2018**