



IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 519 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE M'MUGIIRA M'MUGAMBI- ALIAS MUGIRA KAGUNDU- DECEASED

AND

CECILIA IGOKI NYAGA.....PETITIONER

VERSUS

BASIL NTWIGA J. NYAGA.....1ST PROTESTOR

EUPRAIM MIRITI JUNIUS.....2ND PROTESTOR

ANCERIMINA KAARI.....3RD PROTESTOR

RULING

1. This cause relates to the estate of the late **M'MUGIIRA M'MUGAMBI** (deceased) who died intestate on 13th August, 1977 at Ndumbini. The deceased died and left the following dependants namely:-

(i) Cecilia Igoki Nyaga -Widow and the administratrix herein.

(ii) Ephraim Miriti Junius Nyaga

(iii) Basil Ntwiga J. Nyaga

(iv) Nazarine Ithima

(v) Ancerimina Kaari

(vi) Emilio Junius Nyaga

(viii) Lawrence Kaburu Junius

2. The Petitioner did move the court for confirmation of grant on 2nd August 2016 and her proposed mode of distribution met resistance from three of her children namely; Basil Ntwiga J. Nyaga, Euphahim Miriti Junius and Ancerimina Kaari who all filed protests. This court entertained the protests and determined the same through a judgment delivered on 18th December, 2017 where this court determined that the estate comprised in L.R. No. Karingani/Ndagani/1572 be distributed equally among all the children with the widow having life interest on the estate.

3. The widow or the Administratrix/Applicant has now moved this court vide summons dated 16th February, 2018 filed on 16th February, 2018 for the following orders namely;

(i) That this court be pleased to review its judgment delivered on 18th December 2017 so that she no longer holds the estate in trust.

(ii) That the Administratrix/Applicant be authorized to subdivide and transfer the estate to the respective beneficiaries as per the certificate of confirmation of grant.

(iii) That the administratrix be registered jointly with Emilio Junius Nyaga in the portion meant for Emilio Nyaga that is 1.56 acres.

(iv) The grant made to the applicant on 13th July, 2014 and confirmed on 18th December, 2017 be rectified accordingly in terms of prayers 1, 2 and 3 above.

4. The grounds upon which this application has been made are listed as follows;

(i) That the applicant is not desirous to hold the property or estate in trust for her children.

(ii) That she is desirous to share out the estate to the children in her lifetime.

(iii) That the applicant is now advanced in age and is over 90 years old and wishes to leave her children living in peace and harmony rather than the present situation where they are split into 2 camps.

(iv) That in view of the differences among the children quarrels are bound to re-occur unless this matter is brought to a close.

(v) That the applicant is willing to forego her share so that her children can get their respective shares.

(vi) That one of her children Emilio Junius Nyaga is willing to be registered jointly with the applicant so that they jointly own 1.56 acres.

(vii) That if the grant is rectified as proposed no child stands to suffered prejudice.

5. The application is supported by the affidavit of the applicant sworn on 16th February, 2018. The applicant has reiterated the above grounds and maintained that she would rather forego her life interest on the estate for the sake of peace and harmony in the family which she believes will be realized if each child gets his/her share now when she is still alive. Emilio Junius Nyaga has sworn a Supporting Affidavit stating that he is willing to have his mother be registered jointly with him in his share.

6. The application has been opposed by Basil Ntwiga J. Nyaga Euphrahim Junius and Ancerimina Kaari the Respondents herein through grounds of opposition dated 31st May 2018. Their main ground of opposition is that the application intends to fundamentally alter the ratio decidendi of the judgment of this court. It is their view that the applicant has not established any new material information that was not within her knowledge to warrant a review and that if she is dissatisfied with the judgment, she had liberty to appeal.

7. In her written submissions through her counsel I.C Mugo Advocates, the applicant has argued that at 96 years old she has very little interest on land and that her proposal to have each child get his/her portion should be looked at from the view of peace and harmony in the family. She has submitted that the children are likely to quarrel when left on their own and she feels that it is better for her to supervise the subdivisions and distribution when she is still alive as she is the moderator in the family.

8. The applicant has termed the opposition by the Respondents as lacking good faith because to her the Respondents had requested that the estate be distributed equally among all the beneficiaries. She has further argued that in terms of the provisions of **Order 45** of the **Civil Procedure Rule**, she has shown "**sufficient reasons**" to review the judgment as she is surrendering her life interest and that Emilio Junius Nyaga has agreed to host her in this share. It is submitted no child will suffer prejudice and that the only person who should complain is Emilio Junius Nyaga and that because he is not complaining the application should be allowed.

9. The Respondents in their submissions done through Kijaro Njeru & Co. Advocates have dismissed the applicant's contentions contending that the applicant is seeking for a fresh confirmation of grant. It is submitted that in law, review can only be considered when new and important matter is brought up or mistakes or errors are apparent on face of record. The Respondents has termed this application frivolous and vexatious as in their view, the application seeks to re-litigate issues upon which judgment has been rendered.

10. The Respondents have also pointed out that the application is fatally defective as it failed to annex the decree or judgment sought to be reviewed and have relied on the decisions in **Thomas Owen Ondiek- vs- National Bank of Kenya [2011] eKLR** and Supreme Court decision in **Fredrick Otieno Outa -vs- Jared Odoyo Okello & 3 Others [2017] eKLR**.

11. This court has considered the application and the submissions made by Applicant. I have also considered the grounds raised in opposition, the authorities cited and the submissions made.

12. The applicant has invoked the inherent power of this court under **Rule 73** of **P&A Rules** in seeking for review of the judgment of this court. Her main ground is that she is more interested to oversee harmony and tranquility in the family and for that she is ready forgo her life interest in the estate so that each child can get his/her share so as to bring a foreclosure to the acrimony that that has split the family into two.

13. I have perused through the two decisions cited by the Respondent and though the circumstances and grounds obtaining in the two decisions are quite different from this present cause, the general observations made in the Supreme Court decision in **Fredrick Otieno Outa's** case shows that once a court has pronounced itself through a judgment, the decision arrived is final and the finality is intended to bring litigation to an end. A court in the exercise of that power should not be used to rehear a case or alter the rights and obligations of the parties under the ruling or order made. In the cited case the Supreme Court cited with approval an Indian decision in **Northern India Caterers (India) -vs- Lt Governor of Delhi (1980 AIR 674)** where the court had to decide whether it could review its own decision based on the ground that the decision was based on an erroneous appreciation of facts. The court made the following observation which I find relevant

here;

"It is well settled that a party is not entitled to seek a review of a judgment delivered by this court merely for the purpose of rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by this court is final and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so."

A party who is openly aggrieved by a decision of a court is therefore given liberty to appeal and should not be given latitude through revision to arrive at the desired goal open to him/her on appeal. However going by the prayers in this application, the applicant in my view does not want to alter the substratum of the judgment delivered by this court. This court determined that the estate, despite resistance by the Respondents, be distributed equally among all the children. The applicant as the surviving widow and mother was given life interest on the estate pursuant to the provisions of **Section 35** of the **Law of Succession Act**.

14. The widow/Applicant has now come to court and has said that she is too old and is not interested with her life interest given to her and that she would forego that interest for the sake of peace and tranquility in the family which is obviously split down the middle. This presents a circumstance where this court is called upon to review its judgment on the basis that a party given an interest in the judgment backs down and says she is no longer interested with what is given to her and she is ready to forego it for the sake of her children.

15. The Respondents have raised an issue touching on the competency of the application which is failure by the applicant to enclose a copy of the judgment or order it seeks to be reviewed. That ground in my view is one of those technical grounds envisaged under **Article 159(2)(d)** of the Constitution. The judgment of the court is on this file and so to the certificate of confirmation. There is absolutely nothing impeding this court from administering justice in the absence of copies being made of the judgment and being annexed to this application. This court is minded more about the substantive issue on whether I should review my decision on the mode of distribution of the estate of the deceased herein. The applicant in my view has not sought any significant change in the mode of distribution ordered which was that the estate be distributed equally among the children save the widow should have life interest in the entire estate meaning that the distribution was to be actualized only upon extinguishment of her life interest. It is true therefore that the application herein does not prejudice any beneficiary and the only beneficiary who would have felt disadvantaged is Emilio Junius Nyaga who has graciously accepted to share his share with his mother.

15. This court finds that in order to bring a foreclosure to this matter and perhaps avoid potential future conflict, the reasons advanced for the review of my judgment is merited. The applicant is a person really advanced in age and having observed her in court I find that she has demonstrated sufficient reasons (by sacrificing her own interests in the estate for the sake of her children) for this court to allow her wishes and prayers. The application dated 16th February, 2018 is allowed in the following terms;

(1) The estate comprised in that property known as Karingani/Ndagani/1572 shall now be distributed equally among the following:-

(i) Emprahim Miriti Junius

(ii) Nazarene Ithima

(iii) Basil Ntwiga J. Nyaga

(iv) Ancerimina Kaari

(v) Emilio Junius Nyaga

(vi) Lawrence Kaburu Junius

All the above beneficiaries shall have an equal share in the estate. I shall make no order as to costs.

Dated, signed and delivered at Chuka this 9th day of October, 2018.

R.K. LIMO

JUDGE

9/10/2018

Ruling dated signed and delivered in the open court in presence of Mugo for Petitioner/Respondent in absence of Kijaru for Respondent.

R.K. LIMO

JUDGE

9/10/2018