



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 167 OF 1993**

**IN THE MATTER OF THE ESTATE OF M'ITWAMWARI M'RAIJI (DECEASED)**

**JULIUS GATOBU M'ITWAMWARI.....PETITIONER**

**VERSUS**

**ESTHER NKATHA M'ARIMI.....1<sup>ST</sup> OBJECTOR**

**GERICA MBERENYA NKANATA.....2<sup>ND</sup> OBJECTOR**

**RULING**

[1] I am being asked in the Summons dated 26<sup>th</sup> September 2017 to, among other orders, review judgment of 22<sup>nd</sup> October 2010 and make a provision for the applicant/petitioner in estate of the deceased comprising land parcel No. **ABOTHUGUCHI/RUIGA/354** (hereinafter '**Suit Land**') or resultant subdivisions thereof. The application is expressed to be brought under **Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules CAP21 Laws of Kenya and Section 29 of the Law of Succession Act 160** and **all other enabling provisions of the law**.

[2] The application is premised on grounds set out in application, the supporting, 1<sup>st</sup> and 2<sup>nd</sup> supplementary affidavit of Julius Gatobu M'Itwamwari sworn on 26<sup>th</sup> September 2017 and 10<sup>th</sup> January 2018 respectively. The grounds have also been adumbrated in his submissions filed on 8<sup>th</sup> February 2018. The applicant stated that he has not been provided for in the estate of the deceased despite the fact that the deceased who is the father of his mother Jerica Mberenya Nkanata took him in 1981 as his own son and lived with him until he passed on. He took him when he was a minor. After the deceased's death he lived with his grandmother Jerica Kaume and took care of her until her death in 1992. This was affirmed by the affidavits of Jerica Mberenya Nkanata sworn on 10<sup>th</sup> January 2018 and Kiogora Murkira, immediate neighbor, sworn on 10<sup>th</sup> January 2018. He stated that he continued to occupy and settled on the Suit Land all his life and his eviction shall occasion him and his family irreparable loss and damage.

[3] He contended that, before the deceased passed on he summoned his mother, Esther, his grandmother and some elders and stated that his property should go to him. That his grandfather was categorical that he should not return to his father's home. The court revoked the grant and made no provision for him. He beseeches the Court to review the judgment and order a subdivision of the land into equal units for Esther, Jerica and himself as he has demonstrated among others a sufficient reason and that he qualifies as a child of the deceased. The applicant relied on the cases of ***In Re Estate of Cecilia Wanjiru Kibiche (deceased) [2011]eKLR***, ***Elias Kiura Njeru v Samuel Ileri [2015] eKLR*** and ***Ashford Miriti v Daniel Nyaga [2017] eKLR***.

[4] This application was opposed vide the replying and further replying affidavit of the 1<sup>st</sup> respondent sworn on 2<sup>nd</sup> November 2017 and 5<sup>th</sup> March 2018 and her submissions filed on 7<sup>th</sup> March 2018. It is asserted that the applicant who is a grandson of the deceased filed this cause fraudulently under the pretense of being the son of the deceased and giving the court wrong information as pertains to the rightful beneficiaries of the estate of the deceased. The court in its judgment ordered that she and Jerica, are the rightful beneficiaries entitled to ½ share each of the estate. Thus, this application is an afterthought as judgment herein was delivered 7 years ago. She argued that the applicant is trying to frustrate and prevent her from enjoying the judgment taking into account he has sworn not to give out the original title deed to her. The affidavit sworn by Kiogora Mukira who is the purported neighbor does not mean or make sense in this cause since Kiogora is a stranger to her as well as the estate. The applicant has built and married on the portion that belongs to his mother. The applicant has not given any sufficient reason to warrant review therefore the application ought to be dismissed.

**ANALYSIS AND DETERMINATION**

**Review**

[5] Under **Rule 63 of the Probate and Administration Rules**, application of **Order 45 of the Civil Procedure Rules** is permitted. **Order 45 Rule 1** sets out the threshold for review as follows:

**“(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.”**

[6] On **Order 45 Rule 1**, see what the Court of Appeal said in the case of **Francis Origo & another v Jacob Kumali Mungala [2005] eKLR** that:

**“From the foregoing, it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.”**

[7] A meticulous reading of the judgment delivered on 22<sup>nd</sup> October 2010, leaves no doubt that; first, the court found that the applicant was not a son of the deceased and was not entitled to a share in the estate of the deceased. Second, the court also found that the applicant fraudulently obtained the grant and attempted to mislead the court stating that he is a son of the deceased and the only beneficiary. Secondly, that he obtained consent from his mother on behalf of his grandmother who brought him up. In that consent, his mother described herself as the wife of the deceased and he did not adduce evidence to explain the anomaly. Thirdly, he went ahead to produce a birth certificate dated 20<sup>th</sup> May 2010, 37 years after birth which was sourced out by him and he put down his father as Luka M’Itumwari Raji and mother as Jerika Kauma M’Ndiri. It was not relied on as it did not reflect the truth.

[8] It does not make sense that the applicant contrived a design to deceive the court if he really is an adopted son of the deceased. Nothing would have been easier than for him to have said so. He told an umbrella of lies. As the equity maxim goes, *he who comes into equity must come with clean hands*, the applicant has not. Equity and the law would stop such person in his tracks. I am therefore convinced that this application is merely an afterthought to attempt a bite of the cherry for another time. It cannot be said that he has discovered now that he was the adopted son of the deceased for such should have been a reality known to him and within his knowledge even during the trial of the case. On this ground alone the application should fail. However, let me find out whether there is any other sufficient ground on which review may be granted.

[9] There is no error either which would pass the test in the decision of the Court of Appeal in the case of **National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR**

**“...error or omission must be self evident and should not require an elaborate argument to be established.**

[10] The record show that, being dissatisfied with the judgment delivered on 22<sup>nd</sup> October 2010, the applicant filed a notice of appeal in the Court of Appeal. On 14<sup>th</sup> December 2010 he sought for stay pending appeal which was dismissed on 21<sup>st</sup> July 2011. About seven years later the applicant is seeking for a review. One of the requirements under Order 45 of the Civil Procedure Rules is that review ought to be sought without unreasonable delay. In this case seven years is quite a long time of which the applicant has provided no explanation. His actions are quite unfair as he is infringing on the rights of the rightful beneficiaries and going against the orders issued by this court. Again, on this ground the review will fail.

[11] Nothing more is left to say. From the foregoing, it is evident that the applicant has not met the grounds for review. I find the application to be unmeritorious and is hereby dismissed with costs to the Respondent. It is so ordered.

**Dated, signed and delivered in open court at Meru this 14<sup>th</sup> day of November 2018**

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**F. GIKONYO**

**JUDGE**

**In presence of**

Nyenyire for Mwanzia for petitioner

Objector 1 – in person – present

Objector 2 in person – present  
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F. GIKONYO

JUDGE