



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 336 OF 2008**

**IN THE MATTER OF THE ESTATE OF JOHNSTONE HANDA MUTSEMBI ALIAS JOHNSTONE HANDA, DECEASED**

**RULING**

1. The application for determination is dated 8<sup>th</sup> June 2015. It is brought at the instance of Edward Omwaka Handa, seeking two principal orders:-

a. Review of orders that had been made on 19<sup>th</sup> March 2015 with regard to Butsotso/Shikoti/7956; and

b. Redistribution of Butsotso/Shikoti/7956 in the manner proposed in the application.

2. The grounds upon which the application is premised are set out on the face of the application. They include error on the face of the record and discovery of new facts. The applicants claim to occupy one acre of Butsotso/Shikoti/7956 while the rest is occupied by the respondents, and there is a boundary on the ground separating them. It is alleged that one acre was left undistributed. It is alleged that the court only distributed 0.5 acre and left out 1.0 acre.

3. The reply to the application is by Adda Ndakala Handa. She asserts that there was no error apparent on the face of the record. She contends that the proposal that the applicants get one acre out of Butsotso/Shikoti/7956 was advanced before the court at the trial, but was rejected. It is also argued that there has been no discovery of new evidence. The applicants are urged to appeal the decision in question.

4. Directions were given that the parties dispose of the application by way of written submissions. There has been compliance. I have read through the written submissions and noted the arguments made.

5. The decision sought to be reviewed is in a ruling delivered on 23<sup>rd</sup> February 2015, on protest proceedings that were conducted by way of *viva voce* evidence. Four witnesses testified. Eventually, the court decided that 0.5 acre out of Butsotso/Shikoti/7956 should devolve upon Edward Handa and Noah Handa, with the remainder going to Adda Ndagala Handa, Noah Handa, Eglay Nyakowa, Ramona Abdalla, Naomi Mbaye, Lina Awiti and Leah Shikuku, less what was sold to third parties.

6. I have carefully considered the ruling as against the claim that there is an error on the face of the record and discovery of matter that was not before the court. The error alleged has not been demonstrated. The applicants allege that there was an acre that was left undistributed. From the ruling what I note is that the court distributed 0.5 acres to two individuals, and then stated that the balance was to devolve upon seven others, less what had been sold. It is clear from that whatever remained after the devolution of the 0.5 acre was fully distributed. The question of a one acre not being distributed does not in my view arise. There is no material that suggests that there was new evidence that the applicants have stumbled upon which they were not able to place before the court.

7. I agree with the respondents that the applicants have not made out a case for review, and if they were aggrieved by the orders finally made, they ought to have challenged the same on appeal. I find no merit in the application dated 8<sup>th</sup> June 2015. I shall accordingly dismiss the same. The respondents shall have the costs thereof.

**DATED, SIGNED and DELIVERED at KAKAMEGA this 3<sup>RD</sup> DAY OF DECEMBER, 2018**

**W. MUSYOKA**

**JUDGE**