

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 4 OF 2009

**IN THE MATTER OF THE ESTATE OF NDUGIRE WANJIHIA ALIAS NGUGIRE WANJIHIA
(DECEASED)**

RULING

1. The Motion dated 30th October 2014 invites the court to review the orders that were made herein on 23rd May 2014 and to grant the orders that had been sought in the application dated 14th February 2012.

2. The grounds on the face of the application, as well as in the affidavit sworn in support of the Motion, state that the orders made on 23rd May 2014 were premised on the existence of a suit in Nairobi HCCC No. 973 of 2000, which suit has since been withdrawn by the respondent. It is also averred that the applicant had filed written submissions in respect of the application dated 14th February 2012, which were not considered by the court, presumably because they had not been placed in the court file, and possibly if the court had had opportunity to peruse it it would have come to a contrary conclusion in its ruling of 23rd May 2014. She has attached copy of a handwritten document that is purported to be an extract from the record in Nairobi HCCC No. 973 of 2000, being an order signed on 9th December 2009 by a deputy registrar marking the suit as withdrawn. There is also copy of the written submissions filed herein on 24th September 2012 with respect to the application dated 14th February 2012, dated 24th September 2012.

3. Upon being served, the respondent, David Macharia, sworn an affidavit on 16th January 2014, and filed it herein on 17th February 2015. He expresses surprise that the suit in Nairobi HCCC No. 973 of 2000 had been withdrawn. He states that he had not given his advocates in that cause instructions to withdraw the same. He has attached a document, dated 8th December 2009, filed in that suit giving notice of the withdrawal of the suit. He states that he has subsequently instructed an advocate to take over the conduct of that matter so as to have the said withdrawal order set aside.

4. Directions were given for disposal of the application on the basis of written submissions. Both parties complied with those directions. I have perused through the written submissions filed herein and noted the arguments advanced by both parties.

5. I did deliver a ruling on 23rd May 2014. I dismissed an application dated 14th February 2012 and stayed the execution of orders that had been made at the confirmation of the grant to await determination of Nairobi HCCC No. 973 of 2000. The dismissal of the said application was not on its merits, but rather because it sought to have the confirmation orders executed yet there was a pending suit touching on the ownership of the property that the applicant in that suit had been given during the confirmation process.

6. I am now being invited to review the said ruling on the grounds that the suit in question, Nairobi HCCC No. 973 of 2000, did not exist as at 23rd May 2014 and therefore the order made therein ought not to have been made. The invitation then is that should that be the case, I should revisit the matter and consider the application, the subject of that ruling, on its merits.

7. Is there jurisdiction for me to review the order as prayed? Rule 63 of the Probate and Administration Rules has adopted a number of processes that are governed by the Civil Procedure Rules, including the review of court orders and decrees. The Probate and Administration Rules came into force on 1st July 1981. I am aware that the Civil Procedure Rules was recently reorganized, and its provisions may now not be as they were in 1981, but that does not take away the spirit of Rule 63. In any event, this court has

inherent power, as saved in Rule 73 of the Probate and Administration Rules, to make such orders as may be necessary for the ends of justice or to prevent abuse of court process.

8. An order or decree may be reviewed on three grounds – on the basis that there is a glaring error on the face of the record, that there has been discovered a new and important matter of evidence that was not at hand at the time the order or decree was made, and for any other sufficient reason.

9. It is common ground that the suit in Nairobi HCCC No. 973 of 2000 was withdrawn sometime in 2009. The final orders made in the ruling delivered on 23rd May 2014 were hinged on that suit, which, it now transpires, had ceased to exist. Had that fact been brought to the attention of the court, clearly the orders made on 23rd May 2014 would not have been made. It would appear to me that the facts as they stand now establish an error on the face of the record and discovery of a new fact that was not in the knowledge of the applicant at the time. A case has been made out for the review of the said orders. It is my finding that the application dated 14th February 2012 ought not to have been dismissed in the circumstances and should now be considered on its merits. I shall accordingly proceed to do so consider it.

10. The grant herein had been confirmed on 27th September 2010. The applicant had been allotted 1.5 acres from Loc. 2/Makomboki/1086. The application dated 14th February 2012 sought orders that would have facilitated implementation of the confirmation orders of 27th September 2010. I do not have before me anything that should stop implementation of the certificate of confirmation of grant on record, in order to have the estate distributed as had been ordered by the court.

11. I shall accordingly allow the application dated 14th February 2012 in the terms proposed. The applicant shall have the costs of the application. The estate herein comprises of property situated within Murang'a County, I shall accordingly order that the cause herein be transferred to the High Court of Kenya at Murang'a for final disposal.

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF FEBRUARY, 2017.

W. MUSYOKA

JUDGE