



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 286 OF 2011

In the Matter of the Estate of Francis M' Ikiara Alias Ikiara Kimotho alias M' Ikiara Kimotho-Deceased

TERETHINA NCHENGE M' IKIARA.....PETITIONER

Versus

PETER KIMOTHO.....APPLICANT

RULING

[1] Before me are two applications dated 3rd March 2015 and 16th September 2015: hereafter referred to as 1st and 2nd application respectively. I will determine each application. But I will start with the 1st application- a Summons filed in court by Peter Kimotho pursuant to Section 47 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules Article 159 of the Constitution of Kenya and Order 45 Rules 1 and 2 of the Civil Procedure Rules in which he seeks the following significant orders:

1. That pending the hearing of this application interpartes or until further orders of the court an order be issued staying the execution of the judgment dated 6th November 2014 to the extent of the share due to Terethina Ncenge M' Ikiara out of L.R ABOTHUGUCHI/IGANE/184, concerning the house under construction.

2. That the honourable court be pleased to review its judgment dated 6th November 2014 and especially the order giving Trethina Ncege the house under construction on L.R NO. ABOTHUGUCHI/IGANE/184 and direct that the said house is property of Peter Kimotho.

3. That costs of the application be provided for.

[2] The 1st application is premised on the following grounds:

1. That the house under construction is the property of the applicant.
2. That the applicant was deprived of the said house on false evidence by the petitioner.
3. That unless the order sought herein is granted the applicant stands to lose his investment.
4. That it is in the interests of justice the application be allowed.

[3] The Applicant's case is that in the early 1990's his late father showed him where he was to build his house if he wished to settle on the suit land. Upon these instructions, in the year 2007, he commenced building the said house from his wages earned from his employment at in Isiolo. He said that he used to send money to his late father to pay workers and buy materials and at times he would bring the materials himself. He had used at least Kshs 1,000,000 in materials and labour. Accordingly, the incomplete house was not constructed by his late father. The chief argument by the applicant is therefore, that he was aggrieved by the petitioner's life interest on the portion where the house under construction and deceased's grave are premised, and that upon her demise the said property to be divided equally among her sons. That is the basis of his application.

[4] For some strange reason none of the parties filed submissions despite having been given ample time to do so by the court. This prompted the court to rule on 15th March 2016, that it would determine the two applications on the material before it. It is worth noting that there had been deliberate attempts by the applicant to dispose of the two applications. But be that as it may, Anicia Kajijo, Julius Kimotho and Gerald Mugiira all swore supplementary affidavits where they deposed inter alia that the petitioner had separated from the deceased prior to his death; that they were not seeing eye- to- eye with her; and that the house in question had been built by Kimotho (the applicant).

[5] The petitioner on the other hand in reply to the above averments asserted that the said affidavits were full of falsehoods and that it was clear that from the record that the objector herein (Anicia Kijijo) did not mention in court while she was testifying that the house in question was built by her son Kimotho (the applicant). She further contended that the applicant always attended court during the hearing and that he fully participated in the proceedings but he did not offer to testify in court to show that he had an interest in the house. She made further contentions; that indeed it was the applicant who was not seeing eye to eye with the deceased as he had ran away from home many years when he was in primary school; that the allegations that she never used to step on the land were untrue as she used to visit her husband on the land and even assisted in plucking coffee. According to the Petitioner, this application was intended to ensure that all developments on the land were given to the house of Anicia Kajijo after she got the permanent house where she resides and has business section. She was of the view that it would be grossly unfair for her as the 1st and only legal wife of the deceased to be denied what was rightly hers.

[6] The applicant, however, averred that he was not a party to the succession cause and he was not called as a witness and that he was shocked to see his investment being awarded to the petitioner. He further contended that he was not claiming land due to the petitioner but was only claiming the house as he was the one who had built it.

DETERMINATION OF 1ST APPLICATION

[7] After careful consideration of the 1st application and the averments by the parties, I take the following view of the matter. Except for the prayer for stay of judgment, this application is essentially one for review of judgment dated 6th November 2014 and especially the order giving Trethina Ncege the house under construction on L.R NO. ABOTHUGUCHI/IGANE/184. Instead thereof, the Applicant seeks for an order that the said house is the property of Peter Kimotho. Review of judgments is permitted under Order 45 of the Civil Procedure Rules. This remedy has been imported into the law succession through Rule 63 (1) of the Probate and Administration Rules which provides that:-

"Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, X1, XV, XV111, XXV, XL1V, and XL1X, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules."

Therefore, the threshold for review as formulated under Order 45 of the Civil Procedure Rules will apply in succession matters. But let me first settle the competency of this application. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any

interested party. I now turn to the substantive requirements for review as set out in Order 45 of the Civil Procedure Rules. The court will order review of its judgment:-

- a. Where there has been 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*
- b. On account of some mistake or error apparent on the face of the record, or*
- c. For any other sufficient reason; and*
- d. The application is made without unreasonable delay.*

[8] What are the grounds being argued herein? The Applicant has not specified the exact grounds upon which he is applying for review. He has only sought a general review order of the judgment of this court dated 6th November 2014 and especially the order giving the petitioner house under construction on LR NO. ABOTHUGUCHI/INGANE/184. According to the applicant he was shown in the 1990's by his late father where he was to build his house if he wished to settle on the suit land. His claim is that in the year 2007, using his own money, he commenced building the house in issue. He said that he used to send money to his late father to pay workers and buy some materials, but sometimes he would bring some building materials himself. Save for these general averments there is absolutely no evidence to support his claims. Although the Applicant was not a party in this succession cause and he was not called as a witness, does not mean he was totally unaware of these proceedings or what was happening. Anicia Kajijo (the objector herein) is the applicant's mother and she fully participated in these proceedings which culminated into the judgment delivered on 6th November 2014. She had even filed her proposed mode of distribution. She was the only witness who gave evidence for the objector. It is inconceivable that his own son (the applicant) was not aware of these proceedings if he indeed had a genuine claim to the house that he is now claiming to have built. There is no remotest chance that he discovered new material or evidence which could not have been in his knowledge at the time the judgment was delivered. I must state that mere *discovery of new and important matter or evidence is not enough to warrant a review of a judgment. It must be shown that, even after the exercise of due diligence, the new and important matter or evidence for which review is sought was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made. That is where the remedy of review on that ground lies. And, it bears repeating, given the facts of the case it is not possible to say that the Applicant did not have knowledge that the house was his investment or that it had been distributed to the Respondent. I do not also think that there is any other sufficient cause for which I can order a review of the judgment of the court because this is a succession cause and the court distributed the estate after consideration of all relevant factors. The Applicant stated clearly that he was not claiming land due to the petitioner but only the house which he alleges he had built. Is he making a claim for money expended on the estate property, or some kind of gift inter-vivos? Whatever the nature of his claim as described by him should be litigated in another forum against the administratrix of the estate but not as a ground of review. Again, this is bare information being given now and is not novel at all. Perhaps the Applicant is under illusion that the matters he is raising would have led the court to reach a different conclusion on the matter. Such matters cannot even be portent grounds for review. I am content to cite the case of **NANCY WANJERI & 5 OTHERS vs. MICHAEL MUNGAI (2014) eKLR** which quoted the decision of the Court of Appeal decision in **National Bank of Kenya Limited vs. Njau (1996) LLR 469 (CAK)**, where it stated that:*

“A review may be granted wherever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law”.

See also the case of **MWIHOKO HOUSING COMPANY LIMITED v EQUITY BUILDING**

SOCIETY [2007] 2 KLR, where the court sated as follows:

“It is trite law, and we reiterate, that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court.

The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. See Nairobi City Council v Thabiti Enterprises Ltd [1995 – 98] 2 EA 251 (CAK).

In the instant case it is plain that the matters in dispute had been fully canvassed before the learned Judge. It is plain from his ruling that he made a conscious decision on the matters in controversy and correctly exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.”

[9] In addition, the arguments that the Respondent was separated from the deceased prior to his death are neither here nor there in this application for review. They are not portent grounds for review at all. But taking into account all the factors, it is safe to conclude that the Objector and the Applicant want a second bite of the pie. I should also state that there is a valid certificate of confirmation of grant which has not been challenged to date. Accordingly, there are no grounds for which a review can be ordered. Looking at the application before me, the Applicant is asking this court to sit on appeal on its own judgment. For the above reasons, the upshot is that the application dated 3rd March 2015 is without merit and I accordingly dismiss it with no order as to costs.

The 2nd Application

[10] I now turn to the a summons dated 16th September 2015 brought by the Petitioner pursuant to Rules 49 and 73 of the Probate and Administration Rules. I will refer to this application as the 2nd Application. The significant orders sought in the 2nd application are:

1. An order compelling the objector herein Anicia Kajijo to release and hand over the original title in respect of L.R NO. ABOTHUGUCHI/IGANE/184 to the applicant or in the alternative an order directing the Land Registrar Meru to dispense with the requirement of the production of the original title in respect of L.R NO. ABOTHUGUCHI/IGANE/184 and proceed to effect the transfer to the administrator/applicant by way of transmission.

2. Costs be made out of the estate of the deceased.

[11] The said application is premised upon the following grounds:

1. That the applicant has requested the objector to release and hand over to her the original title in respect of LR ABOTHUGUCHI/IGANE/184 but has refused.
2. That the applicant is in the process of completing the administration of the estate.
3. That the original title is required by the land registrar before the transfer by way of transmission can be effected.

[12] The petitioner’s case was that the grant herein was confirmed by the court and a certificate of confirmation issued on 12th August 2015. Thereafter, the petitioner moved with speed to complete the administration of the estate in accordance with the judgment of the court and that she had obtained the necessary land forms for transfer of LR NO. ABOTHUGUCHI/IGANE/184 to herself by way of transmission among other parcels of land but when she presented the transfer form for registration the

land registrar demanded that she produces the original title of the said land. She stated that she had demanded that the objector does produce the said title but the objector had refused thus this application.

[13] Like in the 1st Application, the parties did not file submissions despite having been given ample time to do so. However, the objector filed a replying affidavit on 2nd November 2015 and deposed *inter alia* that the petitioner has never demanded from her the original title and that the petitioner's application was misconceived and an abuse of the court process.

DETERMINATION OF THE 2ND APPLICATION

[14] By the judgment by Makau J dated 6th November 2014, the court confirmed the grant herein and ordered due distribution of the estate of the deceased. A certificate of confirmation of grant was subsequently issued on 12th August 2015. The judgment and the grant are in force. The Petitioner as the administratrix of the estate of the deceased is under a stern statutory obligation to distribute the estate without delay. I have no reason to doubt her averments that she had moved with speed to complete the administration of the estate in accordance with the judgment of the court except that the Objector refused to release the original title deed in order to facilitate expeditious and actual transfer of LR NO ABOTHUGUCHI/IGANE/184 to herself. I note that the Objector has been embroiled in a tussle with the Petitioner; as the objector and as the witness of her son, the Applicant in the 1st application. It is not, therefore, far-fetched when the Petitioner averred that the Objector refused to release the original title for purposes of transfer of the suit property to the Petitioner. Now therefore, it would be most unfair to permit any further delay herein; in the interest of justice distribution of the estate must be completed sooner rather than later. As there is no lawful cause to prevent administration of the suit estate, I allow the application dated 16th September 2015 in order to give effect to the judgment of this court dated 6th November 2014. More specifically I make the following orders which are necessary for the ends of justice and to prevent any abuse of the process of the court:-

1. An order that the objector shall release the original title deed in respect to LR NO. ABOTHUGUCHI/IGANE/184 to the petitioner within seven days from today's date which failing the land Registrar Meru will dispense with the production of the original title document in respect thereof and shall register the transfer of the said parcel of land to the Petitioner as per the court's judgment dated 6th November 2014.

2. This being a succession matter involving close family members, I will make no order as to costs.

It is so ordered.

Dated, signed and delivered in open court at Meru this 6th day of May 2016

F. GIKONYO

JUDGE

In the presence of:

M/s. Meme advocate for Mr. Murago advocate for petitioner.

Mr. Mwirigi advocate for applicant.

Mr. Mwirigi advocate for E. Kimathi advocate for 4 other applicants.

F. GIKONYO

JUDGE