



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

SUCCESSION CAUSE NO. 414 OF 2004.

**IN THE MATTER OF THE ESTATE OF THE LATE MAGADALINA ZISIKA AMAKOBE
(DECEASED)**

SIMON SERETE LUSEKO:.....OBJECTOR/APPLICANT.

VERSUS

AGNETA SHIMULI ANEKHA:.....PETITIONER/RESPONDENT.

RULING

INTRODUCTION.

1. The deceased MAGDALINE ZISIKA AMAKOBA died on 14th August, 1991 and a fresh grant of letters of administration issued to AGINETA SHIMULI ANEKHA and SAIMON SERETE LUSEKO on the 26th of October, 2016. Her estate comprised of all that parcel of land known as Isukha/Shirere/2860.

2. By the certificate of confirmation of grant dated 6th November, 2012 the deceased's Estate was subdivided as follows:-

(i) SAIMON SERETE LUSEKO - ¼ ACRE.

(ii) AGINETA SHIMULI ANEKHA - ¾ ACRES.

The Application.

3. SAIMON SERETE LUSEKO through the firm of GABRIEL FWAYA then filed the Chamber summons application dated 23rd January, 2013 brought under rule 49, 63 and 73 of the P & A Rules and Section 3A and rule 100 of the Civil Procedure Act seeking for amongst other orders that the ruling/orders dated 5th July, 2012 be reviewed by distributing the Estate of the deceased as follows:-

(i) SAIMON SERETE LUSEKO - ¾ SHARE.

(ii) AGNETA SHIMULI ANEKHO - ¼ SHARE.

and/or in the alternative the entire ruling/orders be set aside and oral evidence including witness evidence be taken to establish the distribution.

4. The application is supported by the applicant's own affidavit wherein he claims to have been given shares in the deceased's estate by JOHN TEMISTER INJETE and JULIA ALUSA children of the deceased. He claims it was an error for the court to give $\frac{3}{4}$ of the estate to the petitioner instead of him. He claims further that there is an error apparent on record and wants the said orders granted. The application is opposed.

5. AGNETA SHIMULI ANEKHA has responded by her affidavit dated 4th July, 2013 wherein she claims that the property herein was bought and developed by her husband. She explains that she was shocked when the objector herein filed the objection and that JULIA ALUSA and JOHN TEMISTER who claim to have ceded their share to the objector have no legal or succession rights to the said property. She maintains that there is no error or mistake on record of the ruling on distribution of the deceased's estate. She adds that the objector and his relatives have each their respective portions of land from their father which they ought to be satisfied with.

6. She adds that the objector and his relatives have defied orders and rulings issued by this honourable court by chasing her from the suit property herein. She opines that the relief sought by the objector will cause her great injustice. She wants the application for review to be dismissed.

Determination.

7. The main issue to be determined herein is whether to review or set aside the confirmation of grant issued on 5th July, 2012. In the case of **James M. Kingaru & 17 others vs. J.M. Kangari & Mulu Holdings Ltd & 2 others [2005] eKLR Visram J.** as he then was held that:-

“Applications on this ground [review] must be treated with caution. Review cannot be sought to supplement the evidence or to introduce new evidence. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial.”

8. Where the orders or decrees issued by the court in succession causes have errors on the face of the record or a new and important piece of evidence has been discovered subsequent to the making of the order or decree, the court may on the application of a party review the orders or decree on these grounds or for any other sufficient reason.

9. The principles governing review in succession causes are the same as those applied in the pure civil matter governed by the Civil Procedure Act and Rules. In the matter of the **Estate of Hannah Nyangahu Mwenja (Deceased) Nairobi High Court Probate and Administration Cause No. 901 of 1996.** Review was sought of the orders of the court regarding distribution, subdivision and transfer of certain parcels of land. It was ordered that orders cannot be reviewed to change their character and disentitle a party to their right of inheritance.

10. In the matter of the **Estate of Waruru Kairu Nairobi H.C. Succ. Number 2525 of 1997,** the court was faced with an application for review under order XLIV of the Civil Procedure Rules, on the ground that there was an error apparent on the face of the record. The court was not convinced that there was an error apparent on the face of the record and dismissed the record for review. It was pointed out that in an application for review under order XLIV of the Civil Procedure Rules it is a mandatory requirement that an extract of the order or decree sought to be reviewed must be attached.

11. Order XLIV is now Order 45 in the Civil Procedure Rule and it deals with review. Order 45 rule 1 (1) provides:-

“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 form 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”

12. It is therefore upon the applicant who is aggrieved and or dissatisfied by a judgment and/or ruling to demonstrate that there has been a discovery of a new and important matter or evidence which he was not aware of even after exercising due diligence. The discovery should not have been within his knowledge and could not be produced at the time the decree was passed. The applicant also has to show the error apparent on the face of the record.

13. From the affidavit, I find that the applicant has failed to demonstrate that there was an error on record and that the children of the deceased agreed that he be given their portion of the deceased’s Estate.As stated in the above cases if this court will grant the orders sought by the applicant, the same will change the character of the order and disentitle the petitioner of her right of inheritance.

14. For the above reasons the chamber summons application is dismissed with no orders as to costs.

SIGNED, DATED at KAKAMEGA this 10TH day of NOVEMBER,2016.

C. KARIUKI

JUDGE.

In the presence of:-

.....**Minisi****for the Objector/Applicant.**

.....**N/A****for the Respondent.**

.....**ANUNDA** **Court Assistant**