



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 2167 OF 2002
IN THE MATTER OF THE ESTATE OF
MOSES WAMAKIMA KINYANJUI alias WAMAKIMA KINYANJUI - (DECEASED)

SAMUEL KINYANJUI WAMAKIMA..... PETITIONER

VERSUS

GRACE WANJIRU WAINAINA.....1ST OBJECTOR

RAHAB WANJIKU HEHO.....2ND OBJECTOR

RUTH NJERI MUTUA.....3RD OBJECTOR

MARGARET WAIRIMU NG'ETHE.....4TH OBJECTOR

JULIET WANJIRU.....5TH OBJECTOR

RULING

1. Under **rule 63(1)** of the **Probate and Administration Rules** the provisions of **Order 44** (now **45**) of the **Civil Procedure Rules** were imported into Succession proceedings. Consequently, a person aggrieved by a decree or order 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 the review of the same.

2. This dispute involves the estate of the deceased MOSES WAMAKIMA KINYANJUI alias WAMAKIMA KINYANJUI who died intestate on 7th November 1977. He was survived by his wife DAMARIS MUTHONI WAMAKIMA and children. One of the children was SAMUEL KINYANJUI WAMAKIMA. DAMARIS and SAMUEL were jointly granted letters of administration intestate. DAMARIS subsequently died thereby leaving SAMUEL as the only petitioner. On 19th January 2010 he applied for the confirmation of the grant and proposed the distribution of the estate. The deceased had in all 7 sons and 5 daughters. One son had died leaving a wife and one daughter had died leaving a daughter. There was no dispute about the property that comprised the estate. The grand child and daughters of the deceased (they comprise the objectors) did not agree on the mode of distribution

proposed. They filed their own proposal. Judge Kimaru heard the dispute and then directed that the 1st and 4th objectors each gets ½ acre of the parcel. Specifically, the portion from which they were to get was the undeveloped part situated at the extreme end of the suit parcel that was previously cultivated by their late mother. The 5th objector was to inherit the portion where her mother had developed. She has no problem with the order.

3. When the petitioner sought to effect the order, he found (after survey) that the portion meant for the 1st to 4th objectors was not enough to give each ½ of an acre. It could only give each 0.19 acres. The survey also revealed that the portion was not at the extreme end of the suit parcel but in the middle. The petitioner, on the advice of the surveyor, therefore proposed that the four get the 0.19 acres each and then be compensated by the balance from undeveloped portions that are shown as X, Y, Z and B1 in the annexed survey plan. It was to this extent that he sought the review of the ruling by Justice Kimaru.

4. Of the four objectors, three (GRACE WANJIRU WAINAINA, RUTH NJERU MUTUA and MARGARET WAIRIMU NGETHE) have agreed to the new proposal. The 2nd objector (RAHAB WANJIKU HEHO) has opposed the new distribution, and therefore the application for review. In her replying affidavit sworn on 27th June 2014 she was challenging the entire distribution contained in the ruling of Judge Kimaru. Her case was that the distribution had favoured her brothers who had got the most prime land near the road and also got bigger portions. She complained that her two sisters (RUTH and MARGARET) had got plot No 35 at Dagoretti Market which had two shops and her sister GRACE had got plot No. 29 at Ndumbuini which had one shop. She stated that she was the only one who had not got a house and therefore asked to be given plot No. Dagoretti/Riruta/S280. The respondent further proposed that GRACE be given plot portion N and part of undeveloped portion to be hived by 0.1 acres and be joined with portion Q to make 0.5 acres and be given to her. She complained that the portions X, Y, Z and B1 that the petitioner proposes are in a sloppy and rocky area.

5. The petitioner and NANCY NDUTA KURIA (widow of HENRY NGUGI who was the son of the deceased) swore a further affidavit to challenge what the 2nd objector was seeking. Their case was that what she was seeking was beyond the purview of the review request and amounted, instead, to challenging the entire distribution ruling when she had no application of her own, and had not appealed. They stated that:

“6. The petitioner’s application is good as it will give effect to the court ruling by allocating the sister the undeveloped portion previously cultivated by our mother, and since it is not sufficient to cater for the whole allotment, give them additional portions in other undeveloped portion of the land.”

6. I have considered the application, the affidavits sworn and the submissions. It is clear that the application for review has been necessitated by the fact that the petitioner, and indeed all the beneficiaries, did not know at the time of the distribution that the

“undeveloped portion which is situate at the extreme end of the suit land that was previously cultivated by their late mother”

was not enough to accommodate ½ acre each for all the objectors. It was, however, after the survey that it was found that the area could only realise four portions of 0.19 acres each, and therefore the order could not be implemented without prejudicing the objectors, the 2nd objector included. Hence the need to hive off the balance from the lowest undeveloped portions of the suit land which are shown as X, Y, Z and B1. I consider that when the application for confirmation was objected to the objectors did not seek the distribution that the 2nd objector is now talking about. They opposed the one that the petitioner was giving to them and instead asked for a larger portion of undeveloped area of the suit land at the extreme end from the road neighbouring the property of one PHYLLIS.

7. I find that at the time of the ruling sought to be reviewed the court, and indeed the parties, did not have the evidence regarding the acreage of the undeveloped plot that was being allocated to the objectors. The order was given on the basis that the portion could yield four ½ acre portions. It later transpired that the portion could yield four portions but only of 0.19 acres each. I determine that in allowing this application I will be giving effect to the intention of the Court at the time the decision was made. The application dated 10th October 2013 is therefore allowed. Specifically, the portions N, P, Q and R and X, Y, Z and B1 in the annexed survey plan prepared by THAGICHU & ASSOCIATES will go to the respective daughters of the deceased as follows:-

- a. GRACE WANJIRU WAINAINA will get portions Q and X;
- b. RAHAB WANJIKU HEHO will get portions N and Z;
- c. MARGARET WAIRIMU NGETHE will get portions P and Y; and
- d. RUTH NJERI MUTUA will get portions R and B1.

Each party shall bear own costs as this is a family dispute.

DATED and DELIVERED at NAIROBI this 11th February 2015

A.O. MUCHELULE

JUDGE