



REPUBLIC OF KENYA

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

Succession Cause 447 of 2004

IN THE MATTER OF THE ESTATE OF JOSEPH M'IBURI M'MUJURI (DECEASED)

REBECCA KAGWIRIA JOSEPH PETITIONER

VERSUS

MIRIAM INOKOBIA JOSEPH 1ST OBJECTOR

RUTH KAUNDU UNGU 2ND OBJECTOR

CHRISTOPHER GITONGA M'IBUURI 3RD OBJECTOR

RULING

This court by its judgment dated 23rd July 2009 ordered the distribution of the deceased estate. In so doing, the court found that Christopher Gitonga, a grandson to the deceased, had obtained a gift intervivos from the deceased. The said Gitonga has now moved this court by an application dated 30th July 2009 by way of summons. He seeks for an order of review of that judgment. The basis of seeking a review of that judgment is that there was no sufficient evidence put before court relating to his right of entitlement to the deceased estate. The said Gitonga deponed that he was born and brought up in the house of the deceased and that the deceased took care of his educational needs. That the deceased took him to church for baptism and when he reached the age of circumcision, the deceased paid the traditional fees and expenses for that rite to be performed. Further that the deceased allowed him to manage the tea estate which involved the hiring and paying of casuals on behalf of the deceased. On Gitonga getting married in 1996, the deceased built him a house. Further that the deceased bought him household items which he used to furnish his house. The deceased had intended to put cement on his house but he died before doing so. The materials for that work are still at the homestead. Gitonga then proceeded to indicate that the deceased was the one who paid his dowry and was involved with the negotiations of that dowry. That the deceased paid for the hospitalization of his wife in 1997. Further without stating how, Gitonga said that the deceased helped to enroll his first and second born children into school. It is not clear what that help entailed, if at all. Finally he stated that the deceased had paid the medical bill that he incurred in 1999. In 1992, he said, the deceased showed him a portion which he was to plant his own tea bushes. He mentioned the names of the persons who were present when the deceased showed him the portion he was to cultivate. That application was also supported by an affidavit of Tabitha Mukiri. In reading that affidavit, I find that it adds no value to Gitonga's application. Gitonga annexed to his application a copy of a letter from a primary school confirming that the deceased had taken the children of Gitonga to that school. He also annexed a copy of Kenya Tea Development Agency Ltd certificate showing that Gitonga

has 950 tea bushes on the deceased land. That certificate is dated May 2006. The claims made by Gitonga were refuted in a replying affidavit of Ruth Kaundu Ungu. She said that there was no iota of truth in the claim made by Gitonga in his affidavit. The deponent stated that if the deceased had intended to give Gitonga a portion of his land, he would have done so during his lifetime. In a supplementary affidavit sworn by Gitonga, he annexed a poor copy of a letter allegedly written by the Methodist Church in Maua which seems to suggest that Gitonga was taken by the deceased to the church and that the deceased had confided in the elders of the said church that he had allocated a portion of his land to Gitonga. On behalf of Gitonga, learned counsel Mr. Mwirigi relied on the case of **Mbogoh V. Muthoni & Another** Civil Appeal No. 311 of 2002 where the Court of Appeal held as follows:-

“The High Court has an unfettered to review its own decrees or orders for any sufficient reason under Civil Procedure Rules Order 44. In deciding the application for review, the High Court was exercising a judicial discretion.”

I have considered the material placed before court by Gitonga. In my view, I find that there is no new material or evidence to justify the court ordering the review of its judgment. When the court considered the distribution of the deceased estate, it was well aware that the deceased had taken Gitonga for baptism at the church. The court found that there was no indication that the deceased had maintained Gitonga. With the material placed before court now in this application, there is no clear evidence of the deceased having maintained Gitonga in his lifetime. I have examined the documents annexed to Gitonga’s application. With respect to the letter written by the primary school, it is not clear to the court why Gitonga failed to annex an original document to enable this court to determine the authenticity of that document its authenticity is doubted. Similarly, with the letter written by the church. It was a very poor photocopy. In respect of the certificate of tea bushes, that is in itself not proof of support of Gitonga by the deceased. It does not escape my notice that some cancellation had been effected on that certificate relating to the quotation of the title of the property where the tea bushes are. From the photocopy that was produced of this certificate, it does look to me that the handwriting of the title does not correspond to the other writing on that certificate. I also find that the authenticity of that certificate is doubtful. But perhaps the most that leads me to find that the application must fail is the failure to extract the order of the judgment which the applicant seeks to review. It is only on such extraction that the court would be able to entertain an application for review. That in view was the holding in the case of **East African Portland Cement Co. Ltd Vrs. Rew Limuru Hardware Ltd** High Court Milimani Civil Case No. 1335 of 2001 (unreported). It was stated:-

“.....the question emerges as to the precise character of the grievance which must be experienced by a person applying for a review under Order XLII. A person applying for a review under that order must be “aggrieved by a decree or order.” The words “decree” and “order” are here used in the sense set out in the definitions in Section 2 of the Civil Procedure Act. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should be for a review of the judgment upon which it is based. But..... However, aggrieved a person may be at the various expressions contained in a judgment or even at various rulings embodied therein, unless the person is aggrieved at the formal decree or the formal order based upon the judgment as a whole, that person cannot under Order XLII appear before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The *ratio decidendi* expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to a suit. In these proceedings no resultant decree on the 29th August, 1930, has yet come into existence. It is the duty of a party who wishes to appeal against, or apply for a review of a decree or order to move the court to draw up and issue the formal decree or order.”

In the case of **Githinji Vrs. Kirate Farmers Co-operative Limited**, HCC No. 32 of 1974, a case in which an application for review was made before a formal decree had been drawn up, Nyarangi J, as he then was stated:-

“The appellant should have applied for a decree to be drawn up and issued. At this stage, there is nothing upon which the court’s judgment can be reviewed.”

I reject the respondent’s argument that Gitonga did not have *locus standi*. He is, in my view, the sort of person envisaged in S. 80 of the Civil Procedure Act and Order XLIV, “*Any person considering himself as aggrieved.*” He therefore was entitled to seek review as he did. Gitonga having failed to prove that there is new evidence to justify review, and more importantly having failed to annex an extract of the order following the judgment of this court fails in his application. Accordingly, the summons dated 30th July 2009 is dismissed and the costs thereafter are awarded to Ruth Kaundu Ungu as against Christopher Gitonga.

Dated and delivered at Meru this 5th day of November 2009.

MARY KASANGO

JUDGE