



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELCA NO. 4 OF 2015**

**(Formerly HCCA No. 159 of 2002)**

**LAWRENCE WACHIRA MBOTHU.....APPLICANT**

**VERSUS**

**EPHANTUS MACHARIA MBOTHU.....RESPONDENT**

**RULING**

1. **Lawrence Wachira Mbothu** (hereinafter referred to as “**the applicant**”) filed the application dated **21st December, 2012** seeking to review or set aside all the proceedings and Orders issued in this matter (read Nyeri HCCA No. 159 of 2002).
2. The application is premised on the grounds that the estate that was the subject of the appeal was distributed in another cause to wit Murang’a Senior Principal Magistrate Court Succession Cause No. 21 of 1972; that the proceedings that were the subject matter of the appeal herein had no basis in law (were *res judicata* the proceedings in Murang’a SPM’s Succession Cause No. 21 of 1972 aforementioned).
3. The applicant explains that he lost the appeal herein because his advocate was unable to produce the proceedings in Murang’a SPM’s Succession Cause No.21 of 1972.
4. Arguing that had his advocate availed the proceedings in the said suit the court would have arrived at a different decision concerning the appeal, the applicant states that he has now obtained the proceedings which he desires to place before the court.
5. Explaining that his family and he have lived in distinct portions of the suit properties and that they have effected massive developments thereon, the applicant is apprehensive that unless the orders sought are granted, the respondent may evict him from the suit properties causing him irreparable injury/damage.
6. The application is also premised on the affidavit of the applicant sworn on **21st December, 2012** in which the grounds on the face of the application are reiterated. 77
7. Besides reiterating the grounds on the face of the application, the applicant has deposed that the court in 21 of 1972 had ordered that the estate of his father (Mbothu Manga) be distributed equally between the respondent and himself; that no appeal was preferred against that decision. He points out that another succession cause to wit Murang’a SPM’s Succession Cause No.73 of 1992 was filed in respect of the same estate.

8. Dissatisfied by the decision made in that cause, he appealed to this court (read High Court) but lost the appeal because his advocate did not produce the proceedings in the previous suit.

9. While admitting that he participated in the second suit, he explains that he did so out of ignorance and maintains that he lost the appeal because his advocate did not produce the proceedings in Muranga SPM Court Succession Cause No. 21 of 1972 which would have enabled the judge to enter judgment in his favour.

10. For the foregoing reasons, the applicant urges the court to review the judgment hereto which he terms an obstruction of justice.

11. In reply and opposition to the application, the respondent has deposed that the application is incompetent and an abuse of the court process. In this regard, he explains that during hearing of Muranga SPMC Succession Cause No. 73 of 1992, parties herein entered into a consent to the effect that all issues concerning distribution of the estate of the deceased were to be decided in the later cause (73 of 1992). In view of the foregoing, it is contended that it is not true that there were two succession causes over the same estate.

12. Pointing out that the orders of the High Court hereto were not appealed from, the respondent terms the current application an attempt to appeal the decision of the High Court through the back door.

13. It is further contended that there has been inordinate delay in bringing the application, which is said to be a scheme meant to delay the respondent's access to the fruits of his judgment.

14. It is pointed out that some of the documents referred to in the application supporting affidavit have not been annexed.

#### **Analysis and determination:**

15. This being an application for review or setting aside of orders of this court, the principles that guide the court are now settled. For instance in the case of **National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported))** it was held:

*“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. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More can it be a ground for 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 ground for review.”*

*“... the learned Judge. He made a conscious decision on the matters in controversy and 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. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”*

16. In **Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557** it was held:-

*“A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal”*

16. **Chittaley & Rao in the Code of Civil Procedure (4<sup>th</sup> Edn) Vol.3, pg 3227** also explained the distinction between a review and an appeal thus:

*“A point which may be a good ground of appeal may not be a ground for an application for review.*

***Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.”***

17. In applying the said principles to the current application, I start by reviewing the judgment on which the application is premised with a view of determining whether the applicant has made up a case for review or setting aside the orders in question. In this regard, on 22nd October, 2007 this Court (read High Court; **Makhandia J.**, as he then was) delivered judgment in favour of the respondent in the following terms:-

**“In this appeal, the appellant thinks that the appeal can be disposed off merely on the doctrine of *Res judicata*. It is incumbent upon a litigant who basis his claim on a concept of law to bring forth evidence to support that claim and or the concept or doctrine of law relied upon. In the instant case, the appellant states that the land parcel Nos. Loc.8/Gitura/Kairichi/195, Loc 2/Gacharage/12 and Loc.8/Gakanda 558 were the subject of litigation in succession cause No. 21 of 1972 at Muranga Senior Principal Magistrate Court. However, no proceedings, judgment or even decree of the said cause was tendered in evidence before the sub-ordinate court or before this court during the hearing of the appeal. It is not sufficient for a litigant to merely allege something without cogent evidence. Yes, the parties may have agreed that indeed there were such proceedings but still it was incumbent upon the appellant to prove by irrefutable evidence that indeed the said pieces were subject of previous proceedings upon which a decision had been made.”**

18. Apparently, it is the above pronouncement that prompted the applicant to file the current application with a view of introducing the evidence that allegedly his previous advocate failed to produce during the hearing of the case both before the sub-ordinate court and the High Court. However, the applicant seems to have failed to consider the other reasons given by the judge and which, in my view, the judgment of the court seems to have been premised. In this regard see the following observation by the court:-

**“Even if this court was to agree that indeed the said parcels were the subject of previous litigation, there is yet another mountain which the appellant has to surmount if he is to succeed in this appeal. Much as the learned magistrate had on 28th April, 1999 made an order excluding land parcel Nos. Loc.8/Gitura/558 and Loc.2/Gacharage/12 from the proceedings, it would appear that the said order was subsequently reviewed and vacated by consent of both parties when the appeal was withdrawn on 20th January, 2000. In withdrawing the appeal, the parties expressly and emphatically agreed by consent that-**

**“All the estate of the deceased to be listed to be distributed per the decision in this succession cause...”.**

**...It does appear to me therefore, that by consent of the parties herein they vacated the order that might have been made in the Succession Cause No. 21 of 1972 touching on the said parcels of land. That being the case, the appellant cannot be heard to raise the issue of *Res judicata*. In my view, it is the height of dishonesty for the issue to be raised now in the manner it has been...Taking all the foregoing into account, I don't think that in all the circumstances of the case the doctrine of *Res judica* is available to the appellant.”**

19. It is clear from the above review of the judgment of the High Court, that some of the grounds on which the current application is premised were subject of consideration by the High Court. Such grounds include the question as to whether Murang'a SPM Succession Cause No. 21 of 1972 is *res judicata* Murang'a SPM Succession cause No.73 of 1992. That being the case, and this not being an appeal against the determination by the High Court on that issue, I find the application, as far as it is premised on that ground, to be unsustainable.

20. The other reason given by the applicant is that had his advocate availed the proceedings in Muranga SPMC Succession Cause No.21 of 1972 the court might have reached a different decision concerning his appeal. With regard to this ground, I also note that the judge was categorical that his decision did not merely hinge on the failure of the applicant to avail proof of the proceedings in that cause but on the fact

that the parties to the dispute recorded a consent vacating the orders issued in that cause and agreed to have all the issues touching on distribution of the estate of the deceased determined in the later cause. This not being an appeal against that determination, I, similarly, find the application, as far as is premised on that ground to be unmaintainable.

21. It is also noteworthy that whereas the applicant's intention was to provide the proceeding in Muranga SPMC's Succession Cause No. 21 of 1972, he did not do so. Be that as it may, having reviewed the judgment on which the application I find no error apparent on the face of the record or any other sufficient cause to warrant review or setting aside the orders in question. Consequently, I dismiss the application with costs to the respondent.

**Dated, signed and delivered at Nyeri this 17th day of August, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Lawrence Wachira Mbothu in person

Ms Wambui h/b for Mr. Kiminda for the respondent

Court assistant - Lydia