



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Murunga Simwa alias David Murunga Simwa (Deceased) (Succession Cause 613 of 2004) [2024] KEHC 6225 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 613 OF 2004**

PJO OTIENO, J

MAY 24, 2024

**IN THE MATTER OF THE ESTATE OF MURUNGA SIMWA ALIAS
DAVID MURUNGA SIMWA (DECEASED)**

BETWEEN

ELEMINA KHAMUYA CHETO PETITIONER

AND

CATHERINE NALIKA MISIKO OBJECTOR

RULING

1. By the Notice of Motion dated November 7, 2022 and filed in court on the November 9, 2024, the Petitioner seeks that the order by which the court distributed the estate dated September 1, 2016 be reviewed or set aside and that the estate be redistributed afresh.
2. The reason put forth for the request is that the Applicant was never notified by her Counsel, Ms. Phoebe Munihi Muleshe, in time to enable her take remedial steps and bring to the court's attention that prior to his death the deceased had never sold any portion of the estate land to anybody and that the court was misled by the Respondent to include third parties. In the scheme of distribution those grounds on the face of the Motion were reiterated in the Affidavit of the Applicant, sworn on the April 7, 2022 and filed with the Motion.
3. After the Summons was served upon the Respondent and a Replying Affidavit filed and served, the Applicant then filed a further Affidavit on the 5.2.2024. In the further Affidavit, the Applicant terms the contents of the Replying Affidavit as full of falsehood including the allegation that the Applicant's husband sold a portion of the suit land. She also denied having inordinately delayed before bringing the application for review while underscoring the fact that an order for review against distribution can be sought and granted at any time.



4. The Applicant stressed the fact that she is illiterate and cannot read nor comprehend the contents of the said orders and only became aware of the orders when she visited the Land Registry in November, 2022. The Applicant described the Respondent as a daughter who was happily married, whose marriage failed and the person she graciously gave one acre share out of her husband's share.
5. The application was opposed by a Replying Affidavit sworn by the Respondent and a witness Affidavit sworn by Micah Munyayi Mwonyonyo.
6. In the Replying Affidavit the Respondent stresses that the application is belated after the Applicant failed to challenge the same by way of appeal or a request for rectification of any errors in the decision.
7. She then went on to assert that she is a daughter to the deceased who was married to only one wife called Martha Inzeyi Murunga who also died in 1998. With her she sired eight (8) children, five daughters and three sons. The Respondent took the position that the Applicant's husband was given land by the deceased, twice, which he sold but squandered the proceeds without buying alternative land like his two brothers had done.
8. At the time of the deceased's death, the Respondent contended, he directed that what remained of his land be shared between three daughters; namely; the Respondent, Rodah Mutende and Jerida Mutakale and that Mr. Abwoba be given the share he had bought from the Applicant's husband. She then gave the details of how land was subsequently sold and that even though the land was to be shared between the three daughters and the buyers, she, out of empathy, accommodated the Applicant and the children of Samson Makamu; that pursuant to a Judgment by Chitembwe J, the land was surveyed and distribution done in accordance with the Judgment as implemented by the Survey Report. He concedes that the Applicant became a beneficiary of the estate having been gratuitously awarded a portion of land by the Judgment. She therefore insists that the distribution be not disturbed save for the correction of the rightful person to take the share of Mr. Abwoba to be changed from Margaret to Nashon Abwoba, the name Margaret having been a typing error.
9. For Micah Munyayi Mwonyonyo the position taken is that he is the area assistant Chief since 2009 and knows the two parties as her subjects in the area. He confirms having been to the land during survey and that everybody who claimed a portion of the land including the Applicant who alleged to have been occupying no portion, was present and survey was conducted with physical occupation of the property being observed and respected. He then accuses the Applicant for perpetuating the discrimination of the female gender.
10. The application was argued orally with parties relying on the Affidavits filed and addressing the court briefly.
11. For the Applicant, she was content to say that she be given 1 ½ acres while the Respondent gets 0.5 acres while Abwoba gets one acre.
12. For the Respondent, the position taken was that being an application for review, the application of section 8 and Order 45 as well as Rule 65 are called into play. He stressed the fact that the Applicant was duty bound to prove the grounds for review but has merely alleged an error of giving shares to persons who are alleged to have bought the land but not heirs. The application was equally faulted for having been brought in a belated manner, some six (6) years, after the decision, which is deemed inordinate. On the reason for delay, it was pointed out that after Ms. Muleshe Advocate, the firm of Nandwa and Company came on record and it is difficult to accept that both Counsel did not explain to the Applicant the effect of the court decision.



Analysis and Determination:

13. It is clear that the remedy sought by the Applicant is that for review. To this court, even in a succession matter, where one seeks review, she must fit herself within the three parameters¹ set by section 80 and Order 45.
14. In this matter, the ground proffered is error by the Judge in giving out shares to the persons not heirs to the deceased contrary to the *law of Succession Act*.
15. The law as enunciated by the Court of Appeal in *National Bank Ltd. v Ndungu Njau* is trite that an incorrect application or exposition, of the law avails to a litigant the right to appeal but not review². If therefore the position be that the Judge erred in law in misapplying the law on who was to get a share in the estate, the Applicant's remedy lies in appeal and not review.
16. That is enough ground to dispose of the matter without addressing the question about the time taken before the application was made. It is however the position of the court that a period of six years before the application was brought is inordinate and unacceptable for an application for review.
17. While the court appreciates the remote possibility, that both Ms. Muleshe and Mr. Nandwa could have failed to explain to the Applicant the tenure and ramification of the order by Sitati J, that is a basis to seek remedy from the Counsel and not to come back to court by way of review.
18. Lastly, the Applicant makes her claim as a widow to a son to the deceased. That deceased's son stands in equality with the Respondent. No reason has been given why one who claims on behalf of the son must get three times the share of his sister, the Respondent. The court shudders to infer that the Applicant takes the view that sons have better rights over daughters.
19. That is a thinking and view that has been overtaken by the developments in law touching on equality of the gender. It is just but an acceptable and cannot be the basis of review.
20. In conclusion, the court finds no merit on the Notice of Motion dated 7.11.2022 which is hereby dismissed with costs of Kshs. 5,000 to be paid by the Applicant within thirty (30) days from today. If there shall be failure to pay the said costs, the Respondent shall be at liberty to execute.
21. Even though the matter is within the family, the court disapproves the conduct of the Applicant of seeking and having this matter unduly delayed in court.
22. Let the Certificate of Confirmation of grant do issue forthwith for the administrator to transmit the estate within ninety (90) days from today. In issuing that Certificate, let the share due to Mr. Abwoba be allocated to Nashon Abwoba.
23. Mention on 17/10/2024 to report on progress made.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF MAY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Applicant in person

¹ The existent of an error apparent in the face of the record; the discovery of new an important matter of evidence which could not have been availed, due diligence withstanding and any other sufficient reason.

² [1997] eKLR



Mr. Nyikuli for the Respondent

Court Assistant: Polycap

