REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

(FAMILY DIVISION)

SUCCESSION CAUSE NO 1506 OF 1997

IN THE MATTER OF THE ESTATE OF GEORGE RAGUI KARANJA (DECEASED)

LINCOLN KIMWAKI RAGUI...1ST APPLICANT

GEORGE RAGUI KARANJA...2ND APPLICANT

VERSUS

KOIGI WA WAMWERE...1ST RESPONDENT

NELLY WANJIKU KURIA...2ND RESPONDENT

R U L I N G

1. The ruling relates to yet another application dated the 30th of November, 2018 in this long-time protracted matter in the Estate of **George Ragui Karanja,** which matter has been in court since the 23rd of July, 1997.

2. The deceased herein died on the 15th August, 1996 leaving behind his widow, 3 sons and 7 daughters.

3. At confirmation the deceased estate (which is in no terms small), was principally shared between his widow, sons and unmarried daughters. The Certificate of Confirmation of the grant was issued on the 27th of May, 1999.

4. All appeared well until the demise of the widow Grace Waithira Ragui who died on the 15th of January, 2012, as indeed on the 17th of March, 2016 an application was filed by some of the heirs and/or their representatives namely **Koigi Wa Wamwere, & Nelly Wanjiku Kuria** and supported by **Emily Wairimu Ngugi, Frashiah Wangari Ragui, Jane Nduta Koigi, Edwin Muchene Ragui, Pauline Nduta Muthee & Racheal Wambui Ragui** seeking for substitution of the administrators; Grace Waithira Ragui and Edward Karanja Ragui who were both deceased and, relevant to the matter subject of this ruling a review of the Certificate of Confirmation and redistribution of the assets yet to be transferred and for equal re-distribution among all the children of the deceased.

The said application was objected to by the current applicants **Lincoln Kimwaki Ragui** and **George Ragui Kamau.**

5. Following the said application Musyoka J rendered a ruling on 3rd of May, 2017 where he stated inter alia:

"Review of the confirmation orders could be a little more controversial. I note that the respondents do not support the proposed review. The proposed review would result in distribution that is equitable to all. The law of Succession Act, Cap 160, Laws of Kenya does not discriminate against daughters, whether married or not. I am satisfied that the proposed

review is merited. No one would be disadvantaged or prejudiced by the proposed review, and the same has the support of majority of the beneficiaries/survivors. The division on the ground should take into account the <u>situation on the ground, in terms of occupation, possession and developments</u>." (emphasis provided)

6. The current application before this court seeks to review, modify and/or set aside the orders of Musyoka J. quoted above, authorising redistribution of the deceased estate so as to redistribute only that part of the estate that had been given to the widow Grace Waithira Ragui and for the court to make provision for a grave yard.

7. The application is predicated on grounds that redistribution as ordered by Musyoka J shall occasion great hardship to beneficiaries who had adjusted their lives and developed property based on the strength of the grant that had been issued on 27th May 1999; that redistribution will enrich others more; there is need to set aside a burial site since several members have been buried at a designated site; the court in its ruling failed to take into account the fact that development on the ground could exceed allocation upon re-distribution; and the re-distribution was tantamount to overturning the order of a court of equal jurisdiction after 18 years.

8. In their supporting affidavit the applicants urge that in re-distribution some beneficiaries are likely to benefit from improvements legally done by others based on the earlier grant and propose that since the deceased widow's portion remains undistributed the court considers that portion for redistribution as opposed to the entire estate.

9. The application was objected to vide an affidavit sworn **Koigi Wa Wamwere and Nelly Wanjiku Kuria** on the 8th of January, 2019. The respondents contend that the application is incompetent as the supporting affidavit is vague; the application is an attempt to re-open issues already ventilated upon, as the issues and facts being relied upon were previously adjudicated on, yet there is no new evidence that has been discovered to necessitate a review. Further most of the family land is undeveloped; the 2nd applicant occupies about ¼ acre where their family house is and further the decision of Musyoka J was never appeal against.

Further, the 2nd applicant made it difficult for the initial administrators to subdivide the property and appears to do so now hence this application.

10. The parameters for reviewing an order or ruling made by a court are well settled.

Order 45 rule 1 of the Civil Procedure Act provides as follows;

1(i) 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 which no appeal is hereby allowed, and who from the <u>discovery</u> <u>of new and important matter or evidence which, after the exercise of due diligence,</u> was not within his knowledge or could not be produced by him at the time when the decree was passed, or order made, or an account of some mistakes or <u>error apparent</u> on the face of the record, or for any <u>sufficient reason</u>, desires to obtain a review of the decree or order, may apply for a review of judgment to the court that passed the decree or made the order <u>without unreasonable delay</u>. (emphasis added)

On the other hand, Section 73 of the Probate and Administration rules state as follows:

"Nothing in these Rules shall limit or otherwise affect the inherent power of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of court process."

11. In arriving at a decision the court has considered the above distinct sections of the law and in order for the court to arrive at a justifiable decision that will hopefully bring this matter to rest.

12. In urging the application, the two notable points canvassed by the applicants are that; the order by Musyoka J is not implementable as some beneficiaries have occupied and developed the portions as allocated to them vide the 1999 confirmed grant and that others are likely to benefit unfairly.

13. The above two reasons are certainly not new, as a matter of fact they were raised and canvased before Musyoka J and the judge succinctly addressed the likely hardship to be occasioned by a review. Musyoka J in his own words observed that re-distribution "was controversial" but the proposition put to him would result in equitable distribution without discriminating against daughters married or not. The judge was satisfied that review was merited. And the Judge being cognisant of the fact that there were occupations and developments done on the properties forming the estate, directed that equal distribution (or redistribution) to the ten children of the deceased should take into account **occupation, possession and developments.**

14. The same issue was again brought up and Musyoka J in his ruling of 26th November 2017 went further to clarify the issues to be considered at distribution.

15. The court also observed that the grave side (mausoleum) appears to be owned by one family and is under lock and key. It was apparent to the court at the visit that some family members saw the graves for the 1st time at the visit as the same is not accessible. The site therefore does not belong to the larger family.

16. The court takes not of the fact that the developments being referred to were extensively referred to by the applicants in their affidavit of 14th April, 2016 and in particular paragraphs 6,7,8,9,10,11, & 12.

17. The will was equally discussed by both parties and must have been considered by Musyoka J in arriving at his ruling. It is my view therefore that it is not an issue for consideration now.

18. Based on the above analysis this court has formed the view that the application falls short of the known parameters that would allow the court to review, vary or modify the existing orders.

19. Some of the grounds attacking the ruling of Musyoka J cannot fall under the purview of review, as this court cannot sit to in judgement of a ruling of a court of concurrent jurisdiction in any event. The right place would be the Court of Appeal.

20. The court has observed the hard stand taken by both sides. Court orders must of necessity be obeyed and as consideration is made to court orders, parties who are family and fins themselves in tricky situations, ought to be magnanimous, certainly selfless, equitable and kind. Clearly none of the two sides are willing to accommodate the other so as to settle this long outstanding issue.

21. Equitable is not necessarily equal 100%. Secondly in the current scenario sacrifices have got to be made by either side so as to be fair and just to all the children of the deceased and/or their off springs.

22. Parties must realise that we have moved away from the 1999 Grant, there is a second confirmed grant and they have to work around it as a matter of necessity unless other orders to the contrary are made.

23. This court visited the properties in question and yes there are developments, crops, a grave yard & some portions leased out etc. The court also observed that some sections/portions may be more valuable than others and in achieving equity parties may have to consider;

i. The terrain of the entire estate as a key factor.

ii. Actual developments /occupation and not necessarily earlier demarcation or mere fencing.

iii. Compensation by one party to another if need be in order to arrive at equitable distribution.

24. For the reasons aforementioned the application stands dismissed with costs.

25. And in order to move this matter forward the court directs the two sides to each file their proposed mode of re-distribution backed by their surveyor's report and based on the two rulings of Musyoka J dated 5th May, 2017 and 20th November, 2017.

26. Mention for further directions be fixed within 15 days of the date hereof.

Dated and **Delivered** in **Nairobi** on this **25th day of JUNE, 2020.**

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ALI-ARONI

JUDGE

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