



**REPUBLIC OF KENYA**

**IN THE HIGHCOURT OF KENYA**

**AT MERU**

**SUCCESSION CASE NO. 463 OF 2011**

**IN THE MATTER OF THE ESTATE OF NAAMAN M'MWARANIA – (DECEASED)**

**ELIZABETH NAAMAN.....PETITIONER**

**VERSUS**

**DAVID M. M'MWARANIA...RESPONDENT/APPLICANT**

**AND**

**LILIAN GAKIL.....INTERESTED PARTY**

**RULING**

1. Before court is a Summons dated 26<sup>th</sup> February 2019 expressed to be brought under ***Rule 43, 63 and 73 of the Probate and Administration Rules and Order 45 of the Civil Procedure Rules***. The applicants seek an order for rectification of the grant and the review of this court's judgment delivered on 12<sup>th</sup> February, 2019.
2. The grounds upon which the Summons was grounded are set out in the application and the Supporting Affidavit of the Petitioner sworn on 26<sup>th</sup> February, 2019. That the Honourable court be pleased to review its Judgment/orders on distribution as there was a mistake or error apparent on the face of the record.
3. That ELIZABETH NAAMAN is now old and the share of JOHN MBURUGU should go to him but to hold in his trust for himself and that of minor JM.
4. The said application is supported by an affidavit sworn by the applicant on 26<sup>th</sup> February 2019 where she deposes; (1) that her name ELIZABETH NAAMAN but in the distribution orders the court referred to her as ELIZABETH KINATOIRE; (2) the name of STELLA MUKONENE one of the beneficiaries should read STELLA MWARANIA. The deponent filed the identification cards for both as proof of identity.
5. The deponent further averred that during distribution the court allocated to her LAND REFERENCE NO. NTIMA/NTAKIRA/1137 which was never part of the Estate of the deceased. She states that her late husband (the deceased) was claiming the said land through a court case at the Lands Disputed Tribunal but lost the case.

6. Her explanation is that the land was mentioned in these proceedings to show that a dispute existed which made the deceased to sell part of his land to his son. But, the court mistakenly thought that it was recovered and also distributed it in these proceedings.

7. In support of her application the applicant averred that her home is on Land Reference No Kiiru/Ruiri/3507 which she had developed and it was only fair that she is allocated the 2 acres on the said land to cover her homestead and have somewhere to cultivate and grow crops and further that since she has no source of income she should be given Plot No 374/KULAMAWE ISIOLO as Mburugu will simply get his share of land. In addition, that since she has been using the most of the land she seeks to have the beneficiaries have their own shares to develop.

8. Finally, that the deponent avers that the court in its Judgment inadvertently left out one beneficiary by the name LEAH GACHERI who is a daughter to the deceased and has been on records all through. They filed written submissions in support of their application which is not opposed.

### **ANALYSIS AND DETERMINATION**

9. The issue for determination is whether an order for review in this case is merited.

10. This court draws jurisdiction to review its decisions from section 80 of the Civil Procedure Act which stipulates as follows:

#### **Section 80. Review**

**Any person who considers himself aggrieved—**

- a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
- b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

11. Further, Order 45 of the CPR provides for the grounds of review of decision or judgement, to wit:

- a) Discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or**
- b) On account of a mistake or error apparent on the face of the record; or**
- c) For other sufficient reasons; and**
- d) The application must have been made without undue delay.**

12. This application for review is hinged on the ground of error apparent on the face of record and that there's sufficient reasons to cause a review. Such error should be one which is readily discernible without much or copious explanations.

13. I am satisfied that the Petitioner has demonstrated to the Court that the judgment containing a schedule of distribution of the assets of the deceased **NAAMAN M'MWARANIA** has apparent errors in that the names of some of the beneficiaries listed do not match the names contained in the National Identity Cards of the said beneficiaries which makes it impossible to claim for their entitlements.

14. For the above reasons, and as no prejudice will be occasioned to any of the beneficiaries of the estate, or to the estate of the deceased, the grant will be rectified to reflect the correct and official names of the beneficiaries listed in the Schedule of Distribution of the estate. Accordingly, under the Summons for Rectification of grant dated 26.2.2019, I order as follows:

a. The beneficiary referred to as ELIZABETH KINAITORE shall be renamed as ELIZABETH NAAMAN, holder of Id/No.0183428;

b. The beneficiary referred to as STELLA MUKONENE shall be renamed STELLA MWARANIA holder of Id/No.13867359;

15. In addition, the application seeks to have one of the beneficiary of the deceased advertently left out to be included as such and be provided for in the estate. A perusal of the court record shows that Leah Gacheri was indeed a beneficiary as listed in the chief's letter and the pleadings herein. There was an inadvertent omission of the name of Leah Gacheri. But, provision for her cannot be done without distorting the distribution of the estate. This will require careful consideration and hearing of parties. For this reason, I should think that the grant should not be implemented pending resolution of this aspect of the case.

16. L.R No Ntima/Ntakira/1137 was given to the Applicant. She now states that it is not estate property, thus, was erroneously included in the distribution list. As she is the one who was getting the land under the grant, I order it be removed from the distribution list.

17. However, the claim by her that PLOT 374 KULAMAWE ISIOLO should be redistributed and given to the applicant will mean complete reversal of my orders thereto. The plot is held by her in trust for John Mburugu and James Mutembei(minor). That kind of reversal of decision is not a matter for review but appeal. Her argument that she does not have a means of income and should therefore be given that plot may be a legitimate belief. But, I have always lamented that widows should start coming under matrimonial property rights in order to get their rights to property ascertained before distribution. This way, such suffering widows undergo will be a thing of the past. But, in this case, distribution has already been done.

18. Finally, that applicant argues that she has her home built on LAND REFERENCE NO KIIRUA/RUIRI/3507 which she has developed and that it would be fair if she's allocated 2 acres on the said land to cover her homestead and to give her a place to cultivate and grow crops. This again throws me back to my lamentations why widows do not seek ascertainment of patrimonial property rights before distribution of the estate so that they get their right and enjoyment of their matrimonial assets. Be that as it may, her claim may not be carried through the process of review.

19. In the upshot, I only allow the prayers I have specifically stated.

**Dated and signed at Narok this 14<sup>th</sup> day of December, 2020**

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**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered at Meru this 16<sup>th</sup> day of December 2020**

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**T. W. CHERERE**

**JUDGE**



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