REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

SUCCESSION CAUSE NO. 26 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE JACOB NAPWOLI NAKITARE – DECEASED

WILLIAM JUMA NAKITARE.....APPLICANT/1ST PETITIONER

VERSUS

FRED WEKESA NAKITARE ....RESPONDENT/2ND PETITIONER

RULING

On 5th May 2021, this court rendered its Judgment in respect of the dispute the parties herein had regarding the distribution of the properties that comprised the estate of Jacob Napwoli Nakitare – deceased to the beneficiaries. It is apparent that the 1st Petitioner, William Juma Nakitare was aggrieved by this decision of the court.

On 7th June 2021, he filed an application before this court pursuant to **Rule 63 (1)** and **73** of the **Probate and Administration Rules** and **Order 45 Rule 1** of the **Civil Procedure Rules** seeking orders of review and the setting aside of the judgment of this court. The grounds in support of the application are stated on the face of the application. In essence the applicant seeks to upset the decision of this court on, inter alia, the grounds that: the acreage appearing in the judgment did not reflect the reality on the ground; some portions of the parcel of land had been sold to third parties; the distribution of the properties that comprise the estate of the deceased was unfair to some of the beneficiaries: that there were errors apparent on the face of the record which should be rectified. The Application is supported by the annexed affidavit of William Juma Nakitare.

The Applicant is opposed. The 2nd Petitioner, who is the Respondent, swore a replying affidavit in opposition the application. He deponed that that the Applicant was shifting goal posts after the court had rendered its judgment. The information contained in the application was not new and was contained in the surveyor's report presented to the court prior to the hearing of the case. He averred that the issues in dispute are issues suitable for an appeal but not application for review. The Respondent was apprehensive that the application for review by the applicant was in furtherance of his scheme to delay the just conclusion and determination of the dispute which had remained pending in court for a period of over ten (10) years. In the premises therefore, he urged the court to dismiss the application.

The parties to the application agreed by consent to file written submission in support of their respect opposing positions. This court has carefully considered the said submissions in light of the pleadings filed in court and the previous proceedings undertaken by the court. It was clear to the court that what the applicant is referring to as "errors" is actually information which he could have placed before the court when he adduced viva voce evidence before it. The applicant was aware that there were "purchasers" on the ground but did not bring this fact to the attention of the court. From the Respondent's response, it was clear that the concealment of the existence of the "purchasers" was deliberate on the part of the Applicant because he knew that such disclosure would have been detrimental to his case. In any event, this court agrees with the Respondent that since it was the Applicant who sold the said portion

of land to the “purchasers”, such portions, will, of necessity, be excised from the portion of land that t Applicant he will inherit.

Further it was clear to the court that the entire thrust of the Applicant’s application is to challenge the decision of the court on the basis of its reasoning. The applicant is at liberty to do so. Infact it is his constitutional right to disagree with the decision of the court. He must do in an appeal and NOT in an application for review. This court formed the view that what the Applicant is actually seeking is a second opinion from the court. This court lacks jurisdiction to relook at its decision. The Applicant’s remedy lies in an appeal and not in an application for review.

As was held by the Court of Appeal in **Pancras T. Swai V Kenya Breweries Ltd [2005] eKLR:**

“It seems clear to us that the appellant, in basing his review application on the failure by the court to apply the law correctly faulted the decision on a point of law. That was a good ground of appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on the ground that the decision was erroneous in law, either because the Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *functus officio* and have no appellate jurisdiction.”

The above decision is apt and addresses on all fours what the applicant is attempting to do in this application.

The application lacks merit and is hereby dismissed with costs to the Respondent.

DATED AT KITALE THIS 16TH DAY OF DECEMBER, 2021

L. KIMARU

JUDGE