



**In re Estate of Julius Maina Kamau (Deceased) (Succession Cause
198 of 1989) [2024] KEHC 11245 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 198 OF 1989
SM MOHOCHI, J
SEPTEMBER 26, 2024**

IN THE MATTER OF THE ESTATE OF THE LATE JULIUS MAINA KAMAU (DECEASED)

BETWEEN

**STEPHEN KAMAU MAINA 1ST APPLICANT
VERONICA MUTHONI MAINA 2ND APPLICANT
JOHN KANJA MAINA 3RD APPLICANT
GRACE WANJIKU MAINA 4TH APPLICANT**

AND

MARY AKAI LUTERE RESPONDENT

AND

JOHNSTONE KAMAU MWANGI INTERESTED PARTY

RULING

Introduction

1. Julius Maina Kamau died intestate on 7th July, 1989. Letters of Administration were issued to Mary Akai Lutere and Samuel Kamau Maina on 15th January, 1990 and subsequently confirmed on 20th January, 1993. A Certificate of Confirmation of Grant was issued on 17th February, 1993.
2. The deceased left behind two parcels of land namely Land Refence Number Nakuru/Bahati/1546 and Land Refence Number Nakuru/Bahati/1570.
3. The Grant issued in respect to this estate and the ownership, sale and primarily the occupation of Land Refence Number Nakuru/Bahati/1546 by the Interested Party is the subject of these proceedings.



4. The Applicants moved Court vide Summons dated 26th January 2021 under Sections 47 and 76 of the Law of Succession Act, Rules 49, 63 and 73 of the Probate and Administration Rules and Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules seeking: -
 - a. Spent
 - b. Spent
 - c. That the Honourable Court be pleased to review, vary and/or set aside the orders of confirmation made in this matter on 20th January, 1993 and the subsequent Certificate of Confirmation of Grant dated/or issued on 17th February, 1993;
 - d. That in the alternative to (c) above, this Honourable Court be pleased to revoke the Grant made herein on 15th January, 1990 and Confirmed on 20th January, 1993;
 - e. That this Honourable Court be pleased to annul and/or invalidate all and/or any transactions carried out in respect to Land Refence Number Nakuru/Bahati/1546 pursuant to the orders of confirmation of Grant of 20th January 1993 and the subsequent Certificate of Confirmation of Grant dated/or issued on 17th February, 1993; and
 - f. That costs of this Application be in the cause.
5. The Application was supported by grounds on its face and the sworn Affidavit of Veronica Muthoni Maina of even date. It was their case that from the 1st House the mode of distribution of Land Refence Number Nakuru/Bahati/1546 was made absolutely to the Respondent and made no reference to the Applicants who were then minors at the time of death. That the Respondent only had a life interest which terminated upon remarrying.
6. That Land Refence Number Nakuru/Bahati/1570 was distributed in 3 equal shares to Samuel Kamau Maina, Josephat Wanjama Maina and Joseph Kangethe Maina from the 1st house leaving out Pricilla Muthoni Maina and Eunice Njeri Maina who were minors.
7. Interested Party in his Replying Affidavit sworn 24th February, 2021 opposed the Application on the grounds inter alia that he bought a plot from the Respondent as administrator to be exercised from Land Refence Number Nakuru/Bahati/1546. He has been in occupation of the land and the Respondent's refusal to transfer led to the filing of Nakuru CMCC No 34 of 2014 and Nakuru ELC Case No 14 of 2019 which were both in his favour. That the instant application was meant to deny him his judgement. That the Applicants being grown adults have come to Court late in the day and that there are still 11 plots remaining with him having purchased only 1/8 of it.
8. The Respondent in her Replying Affidavit sworn on 18th May, 2021 stated that she has no contest against the Application but contended they were misled by the advocates in leading to the Confirmation of Grant that disinherited the Applicants. That the issue is between her and the Interested Party and that the Interested Party was aware all along that the Applicants opposed the sale and further that the Applicants are only asserting their rights.
9. The matter proceeded viva voce.

Applicant's Case

10. PW1, Veronica Muthoni Maina daughter to the deceased relied on her affidavit in support of her application dated 26th January, 2021 and produced Exh1-5. She wished to share LR Bahati/



Bahati Block 1/1546 equally. She added that following the demise of the deceased, her mother, the Respondent remarried one John Ngumi Kamau in 1992 and out of that union, they had 4 children.

11. In cross examination she maintained she wanted the suit property to revert back to its original state so that the Applicants can also have a share. She confirmed that Grant was issued to her mother and her step brother Samuel Maina from a different mother. That Samuel Maina was not involved in this case since he had his own land and is deceased.
12. It was her testimony that the property was to be held in trust by the Administrators. She denied knowledge of the sale to the Interest Party but was aware that the Interested Party had sued the Respondent. She confirmed that the Interest Party has constricted and lives next to their home but denied that her mother sold the land to educate them since they each had an education account with each account having Kshs. 20,000.
13. That her problem was that having the Interested Party in that land reduces their share. She also stated that she was not aware that her mother was ordered by Court to transfer the portion of land to the Interested Party or that her brother Kanja (3rd Applicant) testified in the case. That there was a document that indicated that land was left to them. That there is not intention to disobey Court Orders with respect to the Interested Party.

Administrator/Respondent's Case

14. Mary Akai Lutere adopted her Replying Affidavit sworn on 18th May, 2021. She admitted that the land in question belonged to the deceased and wished that the Applicants get their land. That no family member had been assigned a portion.
15. In cross examination by the Interested Party's counsel, she confirmed she was sued for selling the property of which was in agreement. She also confirmed that she was sued in the Chief Magistrates Court and ordered to transfer the property. She filed an appeal but was not aware that the appeal. She was also not aware whether the Appeal to the Court of Appeal was heard. She stated that she heard John Kanja testify that he wants the land back in Chief Magistrates Court Case. She however denied conniving with the Applicants.
16. In cross examination by the Applicant's counsel, it was her testimony that her children were not involved in the suit by the Interested Party and that the Applicants never got anything else from the deceased as the Grant had no share for them. She stated that she thought the land was hers. She confirmed she remarried and had other children.
17. In re-examination she sought to have the other case disregarded as her children were not involved and prayed that the Court grants them the land.

Interested Party's Case

18. Johnson Kamau Mwangi adopted his Replying Affidavit sworn on 24th February, 2021 and stated that the Respondent sold him land on 22nd September, 2003 from Bahati/Bahati/Block 1/1546 50X100 measuring 0.8094. That he paid the purchase price of Kshs. 85,000 and developed his home from December, 2003 and has been in possession since.
19. He stated that he sued the Respondent for her refusal to transfer the portion. Judgment in his favour was delivered on 22nd April, 2015 and a Decree issued as well produced as Exh1-2 respectively. It was his evidence that the Respondent never transferred the land but filed Appeal No 14 of 2018. That judgment was delivered on 3rd March, 2020 in his favour. The Respondent thereafter filed a Notice of Appeal on 16th March, 2020 but the appeal has never proceeded.



20. He confirmed that the 3rd Applicant was a witness in the Chief Magistrates Court and testified on 4th February, 2025 while aware that he had purchased the land and only prays that he gets his title deed which he has waited for, for 20 years.
21. In Cross examination, he denied being a relative of the deceased and did not dispute the Applicants were children of the deceased. He confirmed that there was no compliance order made against the 3rd Applicant. He also confirmed that the Court ordered that in the alternative he be compensated at market rates. He was not aware why the order was made since the value of the property was never established neither did he provide the value.
22. In cross examination by the Respondent, he stated that the Respondent sold him and his mother-in-law land but only refunded the mother-in-law and not in good faith. He recalled the children refusing to sell but added that the Respondent told him that he would not be refunded because he had already constructed. He denied any relationship with the Respondent and stated that her aim was to evict him.
23. In re-exam he clarified that the title was in the Respondent's name and there had been no need to involve the Applicants
24. Parties were directed to file written submissions. The Applicant's submissions are not on record

Administrator/Respondent's Submissions

25. The Respondent in the submissions filed on 29th August, 2024 submitted that there was no contest between her and the Applicants and the only issue to be determined by Court was whether prayers (c) and (e) ought to be granted. That the Court has no reason to decline the application there being no challenge from her as an administrator.
26. It was further submitted that the Interested Party has no locus on how the estate of the deceased ought to be distributed. That the Interested Party has focused on the litigation between himself and the Respondent which the Applicants were not party to and therefore the decision does not have an effect on them.
27. It was argued that the Trial Court in giving him an alternative for compensation envisaged a situation where the transfer would not have been possible. That the Court in ELC No 14 of 2019 was merely enforcing a contract between then and the contract has no effect on the Applicants who were third parties to it.

Interested Party's Submissions

28. The Interested Party in the submissions dated 25th April, 2024 submitted that this Court lacked jurisdiction to determine the matter as the issue at hand was ownership of land through sale agreement dated 22nd September, 2003. Reliance was placed in *Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* [1989] and the Court of Appeal decision in *Phoenix of E.A. Assurance Company Limited v S. M Thiga t/a Newspaper Service* [2019] eKLR.
29. Secondly it was submitted that the suit land does not form part of free property of the deceased. That the title is registered in the name of the Respondent and the issue of succession is meant to confuse the Court. That the dispute was determined as a land matter not as a succession matter.

Analysis and Determination

30. I wish to mention from the onset that litigation that reactivates a grant of letters of administration confirmed twenty-eight years earlier inviting the Court to revoke the grant and commence a fresh



probate is not only a strange motion but a motion that would trigger this Court to subject the same to deeper scrutiny.

31. Another strange development is the support of this motion by the Respondent admitting her transgressions while attributing the same to mis-advice by counsel.
32. The third dimension of this matter is an interested party with no relation to the deceased, who was an innocent purchaser since 22nd September 2003, a fact not denied, who has been in actual possession and has been involved in litigation against the respondent for the last fourteen (14) years since 28th Jul 2010 when he filed to secure his acquired interest and who is the lone voice opposing the Application.
33. The Applicants argue that, by the time the grant was made and confirmed they were minors and the mode of distribution of Land Refence Number Nakuru/Bahati/1546 was made absolutely to the Respondent.
34. The Applicants argues thus that their mother disinherited them and the Respondent in a rather bizarre twist admits the same arguing that her children have been pressurizing her, since she was remarried and that she wanted the situation remedied.
35. The law requires that the properties be distributed within six (6) months after the confirmation of the grant. *In Re Estate of Gitere Kabura (deceased)* [2020] eKLR the Court stated that;

“the primary mandate of the probate Court is distribution of the estate and once an order is made distributing the estate, the Administrators must comply or the Court would be compelled to remove them as Administrators. The Court further stated that administrators have a duty to the beneficiaries to ensure distribution of the estate within the stipulated time”.

36. Order 45 of the *Civil Procedure Rules* is one of the rules imported to the Law of Succession. This is provided for under Rule 63 of the *Probate and Administration Rules*. Order 45 of the *Civil Procedure Rules* deals with review.
37. For this Court to exercise its jurisdiction under the said Order and grant a review, there must be:
 - i. Discovery of new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made.
 - ii. Mistake or error apparent on the face of the record.
 - iii. Any other sufficient reason which may make the Court to review its order.
38. This Court is unpersuaded if at all, that their discovery of new and important matter of evidence which, after exercise of due diligence, was not within his knowledge of the Applicants in
39. The other consideration is that an application for review must be filed without unreasonable delay. In the case of *Francis Origo & another v Joseph Kimani Mungala* (2005) eKLR the Court of Appeal stated:

“And most importantly, the applicant must make the application for review without unreasonable delay”



40. The order which the applicant seeks to review was issued on 20th January 1993. The Applicants moved this Court on 26th January 2021. The Applicants seek review of an order which was made over Twenty-eighteen (28) years ago. The Application can only be an afterthought and actuated by other motives.
41. This Court finds that if the Applicant were minors on 20th January 1993 No consent was necessary or required from them and to argue 28 years later of not consenting to the sale of a 50x100 portion from Land Refence Number Nakuru/Bahati/1546 to the interested party in 2003 is ingenious at best.
42. It is apparent and clear that, there was delay in filing the application. The delay was unreasonable and has not been explained. The application has not been brought as required of application for review.
43. I find that the Applicants have not satisfied any of the grounds which are required to be established in order for the application for review to succeed. The prayers must fail.
44. The Applicants have not proved any grounds to warrant the setting aside of the grant.
45. To allow the review as sought by the Applicant supported by the Respondent shall reopen the entire succession prejudicing the 1st House and all its beneficiaries who appear not involved with instant dispute.
46. This Court sadly notes the instant Application is a decoy to reopen a determined issue where the Respondent sold land to the interested party then thereafter attempted to renege on the contract. In view this instant summons to constitute an abuse of the process of the law warranting attracting adverse costs orders.
47. I thus find the summons dated 26th January 2021 to be without merit and accordingly dismiss the same.
48. Costs are awarded to the Interested Party.

It is So Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 26TH DAY OF SEPTEMBER 2024.

MOHOCHI S.M

JUDGE

