In re Estate of Wellington Onyango (Deceased) (Succession Cause 409 of 2007) [2024] KEHC 13468 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13468 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE 409 OF 2007

SC CHIRCHIR, J

OCTOBER 29, 2024

BETWEEN

RUTH ANYANGO NYAOKE ..... PETITIONER

AND

PAMELA VUHENDA AGALO ..... OBJECTOR

RULING

1. What is coming up for determination is the summons dated 21st July 2023. It seeks orders as follows:

    a. That this honourable court be pleased to review the certificate of confirmation of Grant issued on the 29th day of October 2009 by redistributing parcel No. South Kabras/ Shamberere/1279 amongst the various beneficiaries of the Estate.

    b. That costs be provided for.

2. The application is premised on the grounds on the face of it and is supported by the affidavit of the applicant sworn on the same date.

Applicant's case

3. It is the Applicant's case that the petitioner unfairly distributed the property of the Estate and in the process locked out other beneficiaries from benefitting from Land Parcel No. South Kabras/ Shamberere/ 1279 (suit property).

4. She listed the deceased survivors as follows;

    a. Catherine jahenda Lubang'a ----------1st widow

    b. Ruth Anyango Nyaoke---------- 2nd widow

    c. Pamela Vuhenda agalo---------- Daughter

d. Janet Adiema(aka Fatuma Mideva)--------- Daughter

e. James Onyango Obonyo---------- deceased Nephew

f. Peter Majinji Musebe---------- Creditor

5. She proposed the mode of distribution as follows;

a. Catherine Jahenda Lubang'a, Pamela Vuhenda Agalo and Janet Adiema (a.k.a Fatuma Mideva) ---- jointly 4.875 acres

b. Ruth Anyango Nyaoke----------1.625 Acres

c. Millicent Adhiambo Onyango

(widow to James Onyango Obonyo)---------- 1 Acre

d. George Likhanga Musebe

(son to the late Peter Majinji Musebe who purchased 4 acres from the deceased)----------2.5 acres

e. Titus Crispinus Shikanga Amaitsa

(purchaser who brought his share from the later peter Majinji Musebe)---------- 1.5 acres

The respondent's case

2. The Respondent avers that she is the Administrator of the deceased estate and that she distributed the estate according to the certificate of the confirmed grant . She further submits that if the applicant was dissatisfied with the mode of distribution, she should have moved to the court of Appeal.

3. She states that the current application is similar to the summons for revocation of the grant which was heard and dismissed on 23/12/2023; that the issues being raised are similar to the issues raised in the said Application for revocation of grant, and thus the present Application is res judicata.

4. She further states there has been a delay in bringing this Application, as the grant was confirmed 14 years ago.

Respondent's submissions

5. It is the respondent's submissions that it has not been demonstrated that there has been new evidence that has been discovered ; or that there is an error on the face of the record ,or demonstration "of any sufficient reason", within the context of Order 45Rule 1 of the Civil procedure Rules.

6. The Respondent has relied on several decisions which I have perused.

7. The Applicant did not file any submissions.

Determination

8. The provisions of the Civil Procedure Rules on review have been imported into probate practice by Rule 63 of the Probate and Administration Rules.

9. An application for Review, like the present one must meet the requirements set out under Order 45 of the Civil Procedure Rules. Order 45 Rule 1 of the Civil Procedure Rules, provides as follows;

1. 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 from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the 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, or on account of some mistake or error apparent on the face of the record, or for any additional sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

10. There is common ground that a certificate of confirmation of grant was issued on this matter on 29th October 2009. The Applicant , has stated that the respondent distributed the suit property unfairly. However she does not state whether the distribution was contrary to the terms of the certificate of Grant. In response, the respondent states that in the distribution of the property she fully complied with the terms set out in the certificate of confirmation of Grant.

11. The certificate issued on 29th October 2009 provided the mode of distribution of the suit property as follows:

    a. Ruth Anyango Nyaoke--------9 ½ acres

    b. Pamela Otieno----------1 acre

    c. Janet Adiema----------1 acre

12. The Applicant, apart from stating that the property was distributed unfairly , has not gone ahead to point out the particular unfairness. How is this court supposed to know if there was any unfairness when the Applicant has failed to show how the property was otherwise distributed.

13. If her complain is that the distribution was contrary to the terms of the certificate of confirmation , the remedy is not an Application for review . If on the other hand she considers the distribution by the court as being unfair, still her remedy does not lie with review.

14. The distribution was done by this court, and if what the Applicant is saying is that that very distribution was unfair, then her recourse is not a review. She should have moved to the court of Appeal to challenge the distribution by this court.

15. If there is another unfairness , she has not stated nor proved it . The Applicant has moved this court without making any effort to prove her case. This is either a case of severe laziness or an attempt at abusing and misusing the court process.

16. Further, the grant was confirmed in the year 2009. Is it that it has taken the Applicant 14 years to realize that there was unfairness on the distribution?

17. In short, there are no grounds for review.

18. The Application is dismissed, with no order as to costs

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF OCTOBER 2024.

S. CHIRCHIR.

JUDGE.

In the presence of:

Godwin – Court Assistant