



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO 58 OF 2010

IN THE MATTER OF THE ESTATE OF PETER ODHIAMBO CHABA (DECEASED)

AND

IN THE MATTER OF THE ESTATE OF BODY ELIAS OKUMU OLUOCH (DECEASED)

AND

IN THE MATTER OF APPLICATION FOR REVIEW

BETWEEN

JARED ASUDI OKUMU.....APPLICANT

AND

GIDEON OKUMU.....RESPONDENT

RULING

INTRODUCTION

1. In his Summons for Review of Grant dated 14th December 2020 and filed on 21st December 2020, the Applicant sought for orders that the Certificate of Confirmation of Grant issued on 18th June 2014 be reviewed only in terms of the portion of the property KSM/Border/4095 by replacing Gedion Owino Okumu with Body Elias Okumu Oluoch (hereinafter referred to as “the deceased”).
2. He also prayed that this court revokes the subdivision of the parcel of land KSM/Border/5364 into KSM/Border/5588-5600 and order the Land Registrar Nyando to enter the deceased’s name, Body Elias Okumu Oluoch, as the owner of the parcel of land KSM/Border/5364 pending succession.
3. He further sought for orders to restrain the Respondent, his representatives, agents and/or servants from interfering with his occupation of their deceased father’s matrimonial home and that an order do issue to the OCS Awasi Police Station to enforce the said order.
4. He swore an affidavit in support of the said Summons on 14th December 2020. He averred that he was a son to the deceased who died on 13th February 2003. He added that the deceased left behind two (2) dependants, the Respondent herein and himself.
5. He contended that at the time of his death, the deceased had purchased plot at Border II No 1558 from Peter Odhiambo Chaba (deceased) and paid the purchase price in full. He pointed out that the said plot sat on new parcel no KSM/Border/4095.
6. He stated that the children of Peter Odhiambo Chaba initiated succession proceedings culminating in the appointment of Samson Odhiambo Chaba as the Administrator, leaving him and the Respondent who was his brother out thus ignoring their interests. He explained that the Respondent herein applied for revocation of the Grant that was issued to the said Samson Odhiambo Chaba and in the process, fraudulently failed to disclose to the court that he was also a beneficiary of the estate.
7. He was emphatic that the court was misled and confirmed the Grant by apportioning the deceased’s share to the Respondent only pursuant to the consent recorded by the parties.

8. He asserted that the land ought to have been registered in his deceased father's name pending succession of his estate.
9. He pointed out that pursuant to the orders of the court, the property KSM/Border/4095 was partitioned and what ought to have been the deceased's portion was assigned parcel number KSM/Border/5364 and registered in the Respondent's name. He further stated that the Respondent later subdivided into parcels KSM/Border/5588-5600 which were also registered in his name.
10. It was his contention that the said properties were part of the deceased's estate and ought to be administered and distributed accordingly. He added that the glaring defects and errors could be cured through a review of the Certificate of Confirmation of Grant.
11. He invoked Rule 63 of the Probate and Administration Rules, 2010 which makes reference to Order 45 of the Civil Procedure Rules, 2010 that provides for review and Rule 73 of the Probate and Administration Rules which gives the court the inherent powers to do justice.
12. He further averred that when he asked the Respondent to transfer to him his share, he declined and chased him away with a panga, a matter that he reported at Awasi Police Station under OB number 17/01/03/2020. He added that the Area Chief attempted to resolve the issue but the Respondent declined to appear before him which is what prompted the Area Chief to write to this court hoping he would be assisted.
13. In opposition to the present Summons of Review of Grant, on 19th November 2021, the Respondent filed a Replying Affidavit that he swore on even date. He averred that the court herein was *functus officio* and could not revisit issues that were settled by consent of the Petitioner and the Objector herein. He added that by consent, on 25th July 2021, the Objector and the Petitioner herein brought this matter to rest. He pointed out that as per the said consent, KSM/Border/1558 was subdivided to Roselyne Aketch Odhiambo, Gideon Owino Okumu and Samson Owino Okumu at 0.2Ha, 3.65Ha and 9.15Ha respectively.
14. He asserted that the consent was adopted by court on the same day and the Certificate of Confirmation issued on 6th December 2012. He was categorical that a survey was undertaken and all beneficiaries took possession of their parcels and developed. He stated that over twenty (20) families would be prejudiced if the orders sought herein were granted.
15. He also averred that the Applicant was convincing (**sic**) the local administrators to frustrate him. He argued that it was in the interest of justice that this matter be left to rest and the estate be left as it was distributed.
16. The Applicant's Written Submissions were dated 14th December 2021 and filed on 13th December 2021 (**sic**) while those of the Respondent were dated 14th December 2021 and filed on 15th December 2021.
17. This Ruling is based on the said Written Submissions which parties relied on in their entirety.

LEGAL ANALYSIS

18. The Applicant submitted that the distribution of the land directly to the Respondent was an error on the face of the record. He contended that the Respondent was not the buyer of the land but the deceased who left dependants behind. He was emphatic that the Respondent misled the court with the consent and failed to disclose that he also had a stake in their father's estate.
19. He pointed out that this error was curable through a review of the Certificate of Confirmation of Grant dated 18th June 2014 by substituting the name of the Respondent with that of the deceased who was the buyer of the land. He reiterated that this court had power to review the said Certificate of Confirmation as aforesaid.
20. He placed reliance on the case of **Re: Estate of Charles Kibe Karanja (deceased) [2015] eKLR** in which Musyoka J held that a certificate of confirmation of grant was an order of the court and that the same was reviewable where there were errors on distribution, upon discovery of new property or for any sufficient reason.
21. He explained further that court orders could be challenged either through appeal or through review and added that in succession matters there were many reliefs that could be sought even after the grant has been confirmed which included revocation and nullification of a grant.
22. He pointed out that he had no issue with the rest of the distribution and that was why he sought to review the Certificate of Confirmation of Grant only to the extent of 3.65Ha which was distributed to the Respondent and not the late Body Elias Okumu.
23. He was categorical that he was not a party to the consent which favoured the Respondent as an individual and not the estate of the late Body Elias Okumu to his detriment.
24. He submitted that this court had jurisdiction to relook into its orders and to review it in the interest of justice and added that the court could not be *functus officio*, lock its door, turn a deaf ear and refuse to correct its mistake.
25. He was emphatic that the Respondent did not have capacity to sell the portions as succession of the estate of Body Elias Okumu Oluoch had not been done. He blamed the court for not enquiring whether there were proceedings in respect of the estate of Body Elias Okumu Oluoch.
26. He cited Section 82 (b) (ii) of the Law of Succession Act which prohibits sale of property before confirmation of grant. In this regard, he argued that the sale agreements the Respondent had annexed were therefore made contra statute and were unenforceable. He added that in any case the Respondent had not produced the same in court and the photos were inadmissible as they had not been authenticated by a

certificate of electronic evidence as required by section 106B of the Evidence Act. He added that the written notes by buyers were hearsay as none swore an affidavit deposing to these facts.

27. On his part, the Respondent submitted that the Applicant was a stranger to these proceedings and did not seek leave of court before making his application. He added that the Applicant has concealed important facts that were privy to him and which concerned the estate under reference. It was his contention that the Applicant participated as a witness in all the contracts that relate to the disposal of the parcel to third parties and benefitted from the proceeds and that he was coming to court to frustrate the rights of third parties.

28. He reiterated that the estate of the deceased was distributed by consent of the Petitioner and the Objector and the matter closed on 25th July 2012 vide consent dated 9th March 2012 and rectified vide the application of 12th May 2014 which was allowed on 13th June 2014.

29. He was emphatic that the court was *functus officio* and that having rendered a final decision regarding the distribution of issues submitted, then lacked any power to re-examine that decision. In this regard, he placed reliance on the case of **Machakos High Court Succession No. 323 of 1999 Estate of Timothy Mulei Kitonga** (eKLR citation not given) where the court stated that if the status of the land had since changed, then the Objector had the right to pursue the seller in the Environment and Land Court where he could claim ownership of the land.

30. He pointed out that the status of the deceased estate had greatly changed and subdivisions made on the parcel to benefit the new seller and owner who had acquired rights by way of sale and transmission. He added that new numbers had been created and the process of transfer was at an advanced stage and asking the court to review the same would be akin to starting the Succession afresh.

31. He was emphatic that the Applicant's application was unwarranted, incompetent, an abuse of the due court process and should not be entertained. He stated that he had proven the status of the impugned parcel and that any interference would open a Pandora box of conflicts that would be complex.

32. He urged the court to dismiss the Applicant's application and order the restriction placed on the parcel by Chief's letter dated 30th January 2020 be removed and he be allowed to give the other interested parties their parcels of land as per the Consent to subdivide dated 29th June 2018.

33. Errors on a certificate of confirmation of grant are errors on the face of the record which can be redressed through a review application filed under Rule 63 of the Probate and Administration Rules, which imports the provisions in the Civil Procedure Rules, 2010 on review.

34. Order 45 (1) (a) and (b) of the Civil Procedure Rules, 2010 provides for the right of review of orders. Order 45 of the Civil Procedure Rules provides that in an application for review, an applicant must demonstrate:-

a. that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him at the time when the decree was passed; or

b. that there has been some mistake or error apparent on the face of the record; or

c. that there is any other sufficient reason.

35. Notably, an error ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long-drawn out process of reasoning on points where there may conceivably be two (2) opinions can hardly be said to be an error apparent on the face of the record as was held in the case of **Paul Mwaniki vs National Hospital Insurance Fund Board of Management [2020] eKLR**.

36. Notably, the Respondent herein did not deny that the Applicant was his brother. Though he argued that the Applicant was a stranger to the proceedings herein he did not adduce evidence to rebut the Applicant's evidence that he was his brother and that at the time of filing his objection proceedings he concealed the fact that the Applicant was his brother and that Body Elias Okumu Oluoch (deceased) had left behind two (2) dependants and not one (1).

37. It was immaterial that the court relied on a consent between the Petitioner and the Objector to reach its verdict. It was also immaterial that the status of the deceased estate had greatly changed and subdivisions made on the parcel to benefit the new seller and owner who had acquired rights by way of sale and transmission and that new numbers had been created and the process of transfer was at an advanced stage.

38. It was evident that the court was misled into distributing the portion belonging to Body Elias Okumu Oluoch to the Respondent directly without it going through a succession cause as required by law. The Applicant herein was not privy to the consent that led to the issuance of the Certificate of Confirmation of Grant herein and therefore the Respondent's argument that there was a consent order in place that could not be done away with and that this court was *functus officio* could not outweigh the Applicant's claim of being disinherited of his deceased's father estate.

39. A reading of the impugned Certificate confirms that indeed the aforesaid land parcel belonging to the Body Elias Okumu Oluoch (deceased)'s estate was granted to the Respondent only. The court failed to inquire on whether the Respondent was the only dependant and/or if other dependants had consented to the same being distributed to him solely.

40. Notably, the Applicant only sought orders of review with regard to land parcel KSM/Border/4095 belonging to his deceased father, which had been partitioned to read No Ksm/Border/5364 and registered in the name of the Respondent who in turn subdivided into twelve (12) portions of Ksm/Border/5588-5600.

41. Accordingly, having critically analysed the parties' affidavit evidence and their respective Written Submissions, this court was satisfied that there was an error apparent on the face of the court record which required to be rectified and that there was merit in the present application seeking review of the Certificate of Confirmation of Grant that was issued on 18th June 2014.

42. The Respondent's preposition that the matter was within the realm of the Environment and Land Court as title had changed hands did not negate the fact that rectification of a grant could be done in the Cause herein. There was fraud and concealment of the facts to the court necessitating the court to invoke its powers under Rules 63 and 73 of the Probate & Administration Rules and Order 45 of the Civil Procedure Rules to remedy a position that had disinherited the Applicant herein and other dependants of the estate of Body Elias Okumu Oluoch.

43. The Applicant did not lead any evidence that he was occupying the deceased father's matrimonial home and in any event, that was not a matter that could be determined under the present proceedings which were in respect of the Estate of Peter Odhiambo Chaba. This court was therefore not persuaded that it should grant any injunctive orders as he had sought in his present Summons for Review of Grant. Accordingly, the order that the OCS Awasi Station enforce the injunctive order had therefore been rendered moot.

DISPOSITION

44. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Summons for Review of Grant dated 14th December 2020 and filed on 21st December 2020 was merited and the same be and is hereby allowed in terms of Prayers No (2), (3) and (4). The Respondent will bear the Applicant's costs of this application.

45. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL 2022

J. KAMAU

JUDGE