



In re Estate of Patrick George Musyoki (Deceased) (Succession Cause 407 of 2019) [2022] KEHC 13708 (KLR) (Family) (30 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 407 OF 2019

M THANDE, J

SEPTEMBER 30, 2022

**IN THE MATTER OF THE ESTATE OF ESTATE
OF PATRICK GEORGE MUSYOKI (DECEASED)**

LISSA WANGU GATUNGO

AIKA NYANGARA GATUNGO.....APPLICANTS

VERSUS

STANWIL LIMITED.....RESPONDENT

RULING

1. The application before Court is dated 19.11.21 in which the applicants seek the following orders;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That this honourable court be pleased to review, vary and/or set aside its ruling of October 1, 2021.
 - e. That there be a stay of eviction of the applicants from apartment No 1 in “Stanwil Apartments” erected on land registration No 4580/11 pending the hearing and determination of the succession cause herein.
 - f. That there be a stay of sale of and/or transfer of Apartment No 1 in “Stanwil Apartments” erected on land registration No 4580/11 pending the hearing and determination of the succession cause herein.
 - g. That the costs of the application be provided for.



2. The brief background of this case is that the matter herein relates to the estate of George Musyoki who died on March 5, 2019. A grant of letters of administration in respect of the estate was on June 3, 2020 issued to Dominic Masila Muthama (Dominic). Thereafter 2 applications dated November 16, 2020 and December 21, 2020 were filed by Dominic and the applicants respectively. Both applications sought stay of sale and transfer by the respondent, of LR No 4580/11, which they claimed belonged to the estate of the deceased. The applicants herein also sought orders restraining their eviction from Apartment No 1 on LR No 4580/11 (the apartment), in which they stated they lived with their father, the deceased. In its ruling of 1.10.21, the court found that the apartment did not form part of the estate of the deceased, it having not been demonstrated that the respondent had granted a lease in respect thereof, to the deceased.
3. The applicants now seek review of the orders of 1.10.21 on the basis that they have now discovered new and important evidence demonstrating that the respondent granted a lease of the apartment to the deceased. This evidence was not available after exercising due diligence at the time of filing the application dated December 21, 2020. The applicants stated that they found a bundle of documents belonging to their deceased father, including the registered lease in respect of the apartment, transfer from Laurie Rourke to the deceased dated 27.8.89 and share certificate No 20 in the name of the deceased and copy of sale agreement. The applicants further stated that they found correspondence indicating that the directors of the respondent offered Kshs 25,000,000/= to the deceased for the apartment, which he declined. The applicants accused the said directors of seeking to take advantage of the demise of the deceased to sell the whole property yet leases in respect of each apartment thereon had been registered. The applicants therefore urged the court to grant the orders sought as the applicants have no other home and further to redress the injustice visited upon them by the respondent.
4. The application is opposed by the respondent vide a replying affidavit sworn by Mohamed Aslam Khan, a director and shareholder. He stated that LR No 4580/11, the sale of which the applicants seek to stop belongs to the respondent. He further asserted that the lease exhibited by the applicants expired in 2002 and that the same was never renewed. He further stated that the issue of ownership was determined in the ruling of 1.10.21. He urged that the the applicants who are strangers and should not interfere with respondent's decisions in respect of the property. The respondent further stated that the new information upon which the application is grounded was all along available at the Lands Registry. Accordingly, the present application "is a misguided attempt at having a second bite at the apple by any means necessary" and should be dismissed with costs.
5. I have given due consideration to the application and rival affidavits, submissions and authorities cited. The issues for determination are:
 - i. Whether the applicants have met the threshold for review.
 - ii. Whether the court should grant a review of its orders of 1.10.21.
6. The jurisdiction of this court to review of orders is set out in order 45 of the *Civil Procedure Rules* 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 other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

7. By dint of rule 63 of the *Probate and Administration Rules*, order 45 of the *Civil Rules* is applicable herein being a succession matter. Rule 63(1) provides:

Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely order 5, rule 2 to 34 and orders 11, 16, 19, 26, 40, 45 and 50 (cap 21, Sub Leg), together with the High Court (Practice and Procedure) Rules (cap 8, Sub Leg.), shall apply so far as relevant to proceedings under these Rules.

8. In its ruling of 1.10.21 the court found that the apartment did not form part of the estate of the deceased. The court arrived at this conclusion after the applicants failed to demonstrate that a lease in respect of the apartment had been granted to the deceased. The applicants have anchored their claim on the discovery of new and important matter, to wit the lease and other documents showing that the apartment belonged to the deceased. I have no reason to doubt their claim of discovery of the new evidence.
9. I have looked at the documents exhibited by both parties. The lease in respect of the apartment indicates that it was first issued by the respondent to one Dorothy Zoe Goodwyn and registered on 21.6.60. Thereafter the apartment was transferred to Edna Pauline Wright on 24.11.96 and later on 14.8.81, to John Francis Rourke and Winifred Laurie Rourke. On 27.6.89 the apartment was transferred to the deceased pursuant to a transfer dated 22.6.89. There is no other entry on the lease to show that any other transaction was made thereon.
10. The respondent contended that the only way to prove ownership of the Apartment is by an official search. He relied on the case of *Lengare ole Ngape v Mpaale Damo & another* [2021] eKLR to support his argument.
11. While this is true, the law also provides that a certificate of title is also proof of ownership as indicated in section 26 of the *Land Registration Act* as follows:
1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
12. The respondent exhibited a copy of its title for LR No 4580/11 and an official search which show that the property belongs to the respondent. This is not disputed. The dispute relates to the ownership of the apartment.
13. As indicated herein, the initial lease in respect of the apartment granted by the respondent, was registered on 21.6.60 and the same was transferred to the deceased on 27.6.89. In his replying affidavit



sworn on 8.2.21 in response to the application dated 21.12.2020, Mohamed Aslam Khan did aver that the respondent's advocate kept the applicants through their advocates, well appraised of "every step made in the sale of property". He also confirmed that the applicants were residing in the apartment at the time of the demise of the deceased. If indeed the lease in respect of the apartment expired 20 years ago in 2002 as asserted by the respondent, on what basis did the deceased remain in possession of the apartment? Indeed, on what basis have the applicants continued to occupy the apartment rent free, following the demise of the deceased on 5.3.19? All these factors taken together, lead to the conclusion that on a balance of probabilities that the apartment belonged to the deceased and forms part of his estate.

14. The court notes that the exhibited Grant No 114472 in respect of the property indicates that a new lease term of the property was granted to the respondent from 1.4.2002. The question that then begs is, what became of the lease in respect of the apartment and of any other apartment that had been issued. This question and the legal implications of the expired lease of the apartment, are matters not for this succession court, but for the Environment and Land Court which is clothed with the requisite jurisdiction under article 162(2) of the Constitution of Kenya, 2010 which provides:

- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
 - (a) ...
 - (b) the environment and the use and occupation of, and title to, land.

15. In the result and in view of the foregoing, the court finds that the application dated 19.11.21 is merited and makes the following orders:

- i. The ruling of 1.10.21 is hereby varied on terms that apartment No 1 in Stanwil Apartments erected on LR No 4580/11 forms part of the estate of the deceased.
- ii. The eviction of the applicants from Apartment No 1 in Stanwil Apartments erected on Land Registration No 4580/11 is hereby stayed pending the hearing and determination of the succession cause herein.
- iii. The sale of apartment No 1 in Stanwil Apartments erected on Land Registration No 4580/11 is hereby stayed pending the hearing and determination of the succession cause herein.
- iv. The respondent shall bear the costs of this application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF SEPTEMBER 2022

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M. THANDE

JUDGE

In the presence of: -

.....for the Applicants

.....for the Respondent

.....for the Administrator

.....Court Assistant

