



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC.APPLICATION NO. 134 OF 2014

CONSOLIDATED WITH KISII HCC SUCCESSION NO. 201 OF 2001

IN THE MATTER OF THE ESTATE OF NYANGAGA OKUNGU- DECEASED

AND

IN THE MATTER OF REVIEW/ VARIATION OF ORDERS ISSUED ON 17/12/2020

AND

IN THE MATTER OF CANCELLATION OF SUB-DIVISIONS OF L.R. NO. KAMAGAMBO/KABUORO/7643 AND 7644, RESPECTIVELY

AND

IN THE MATTER OF: RECTIFICATION OF THE REGISTER OF L.R.NO. KAMAGAMBO/KABUORO/256

BETWEEN

BENSON OLUCHO OTIENO.....PETITIONER/ RESPONDENT

VERSUS

SAMUEL OKOTH MAYOGA.....OBJECTOR/APPLICANT

RULING

1. On the 29th January 2021 the petitioner/respondent filed an application dated the 22/1/2021. The application is titled Summons for Review of Orders. It is brought under Rules 49,59,63 & 73 of the Probate and Administration Rules, Section 47 & 48 of the Law of Succession Act, Chapter 160, Articles 10(2), 20 (1), 27 (1) & (2), 47, 48, 50 (1) & 165 of the Constitution, 2010 and all enabling provisions of the law.

2. The application is supported by grounds on the face of the application and a supporting affidavit of the applicant Samwel Okoth Mayoga the petitioner. This affidavit gives background of the petition, the ruling on the objection that was raised by the objector /respondent. The applicant seeks a review on the said ruling and claims that pursuant to the said ruling dated the 17th December 2020 the Court ordered and/ or directed cancellation of L.R. NO'S KAMAGAMBO/KABUORO/7643 and 7644 respectively. That the Court also ordered rectification of the register in respect of L.R.NO. KAMAGAMBO/KABUORO/256 (Parcel number 256). That this court in its ruling failed and/or erred in failing to address the other resultant sub-divisions that emanated from the original parcel of land. That failure to include part of the resultant sub-divisions of the original parcel of land will mitigate and/or negative the complete administration and distribution of the estate. That was an error and/ or mistake apparent on the face of the Ruling/ decision of the Court. That unless the Error and/or mistake is remedied the objector/applicant and the other legitimate beneficiaries of the Estate of the deceased will suffer grave injustice and prejudice.

3. The application was opposed. Benson Oluoch Otiemo filed a replying affidavit dated the 23rd February 2021. Benson's response is that land parcel Kamagambo/Kabuoro/256 was subdivided into 2 parcels of wit parcels numbers 5441 and 5442. That parcel number 5441 was later subdivided into Kamagambo/Kabuoro/763, 7644 and 7645 and that parcel number 7644 was transferred and registered in his names and land parcel number 5442 was purchased by James Waore Muya from Benson Otiemo which was later sub-divided by purchaser James into land parcels Kamagambo/Kabuoro/9023 and 9024. That Robert Ouko Mayoga occupies land parcel 7644 and that the applicants father had sold his portions of land parcel number 7644 and that the applicant has encroached into his land. That the court order that the Kisii land registrar is directed to cancel the registration of the title number Kamagambo/Kabuoro/7643 and 7644 in his names and it reverts to the original title being land parcel Kamagambo/ Kabuoro/256 was an error of omission and the court cannot correct the error and give an order that this order be complied by the land registrar Migori County as the suit is situated in Migori.

ANAYLSIS AND DETERMINATON

4. I have considered the parties rival affidavits, the oral submissions and the principles that guide me on when can order can be reviewed. In the application that was the subject of the Ruling dated 17th December 2020, the applicant sought to have the grant that had been issued to the petitioner revoked. The applicant also sought to have all dealings and/or transactions entered into by the petitioner/ respondent pursuant to, as a result of and/or consequent to the grant particularly as concerns land parcel No. Kamagambo/Kabuoro/256 including the sub-divisions and disposal of any parcel of thereof nullified.

5. In its Ruling dated the 17th December 2020 this court revoked the grants for reasons stated in the Ruling and ordered that, ***“The Kisii County Land Registrar do cancel the registration of the title for Land Parcel No. Kamagambo/Kabuoro/7643. 7644 in the names of Benson Oluoch Otieno and shall revert it to the original title being land parcel L.R. No. Kamagambo / Kabuoro in the names of the deceased Nyanganga Okungu.*** There is no dispute that the estate of the deceased comprises of one property parcel number 256. It's also not in dispute that the respondent upon obtaining the grant subdivided the said parcel of land to parcels numbers 7643 and 7644. The respondent that there was a further subdivision that resulted from the sub-divisions as admitted by the respondent in his replying affidavit. The order sought n the application dated the 24th June 2014 sought to have all dealings and/or transactions entered into by the petitioner/ respondent pursuant to, as a result of and/or consequent to the grant particularly as concerns land parcel No. Kamagambo/Kabuoro/256 including the sub-divisions and disposal of any parcel of thereof nullified. I do agree with the applicant that the order given on the 17th December 2020 left out the resultant parcels. In my view that was a mistake that I can correct in this ruling. It was an omission on the part of the court as the order sought was very clear.

6. The applicant has also drawn it to the court's attention that the said parcel of land is within Migori and that the mandate to act on the order given lies squarely within the mandate of the Land Registrar Migori County.

7. I note that the respondent has not filed an appeal on the Ruling dated 17th December 2020. In my view he cannot now argue that the Court erred in its Ruling. I find that the application is merited and I grant the following orders:

i. The Land Registrar Migori County is directed to cancel the registration of Title Land Registration No. Kamagambo/Kabuoro/7643 & 7644 in the name of Benson Oluoch Otieno, L.R. No Kamagambo/Kabuoro/7645, LR No. Kamagambo/Kabuoro 9023 & L.R No. Kamagambo/Kabuoro 9024 respectively as part of the estate of the deceased.

ii. The administrators shall comply with the court's order of 17th December 2020 to file the application for confirmation of grant. 60 days have lapsed I extend the period by a further 45 days. Mention date to be taken after 45 days or on the date this ruling is read to the parties.

iii. Costs shall be in the cause

Dated, Signed and Delivered at KISII this 16th day of April 2021.

R.E. OUGO

JUDGE

In the presence of:

Mr. Kipngetich For the Applicant

Respondent Absent

Ms Rael Court Assistant