REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 661 OF 2013

IN THE MATTER OF THE ESTATE OF IDDI MAKOKHA MWIMA alias MAKOKHA MWIMA (DECEASED)

RULING

1. The application for determination is dated 14th August 2020. It is brought at the instance of Ali Makokha Wangatia and Flora Were Auma, who I shall refer to as the applicants, against Ismail Mwima Makokha, who I shall refer hereto as the administrator. It seeks a variety of orders: stay of the ruling delivered on costs dated 8th June 2020; the setting aside of the bill of costs dated 8th June 2020, the taxation proceedings and the ruling; review of the ruling dated 29th May 2020 and costs.

2. The grounds on the face of the application are: that the court had certified the summons by the applicants dated 22nd October 2019 as urgent; that the Judge, before whom it was placed, expressed an opinion that the High Court had no jurisdiction to deal with prayer 2 of the summons dated 22nd October 2019, and had directed that the parties file written submissions on prayer 3 of the said summons, which sought revocation; the grant had been confirmed in 2014, and revocation was sought on grounds that it was obtained through concealment of material facts; the ruling of 29th May 2020 was erroneous to the extent that the court was of view that the applicants were prosecuting a confirmation application rather than the revocation application.; that, if the court is convinced that the there was an error, then the said orders ought to be set aside.

3. The affidavit in support of the application was sworn by the advocate for the applicants, Kundu Nigel Wesutsa. The averments made in the affidavit are a regurgitation of the grounds set out on the face of the application. The advocate avers that as a consequence of the alleged error by the court, in the ruling of 29th May 2020, the administrator caused a bill to be taxed against the applicants, which the administrator intended to execute.

4. The administrator replied to the application vide a replying affidavit on 31st August 2020, sworn on even date. He avers that the confirmation orders of 2014 were not obtained through concealment of material facts. He concedes that the ruling of 9th July 2020 erroneously referred to the summons in question as one for confirmation of grant, instead of a revocation application, and that that did not invalidate the entire ruling. He argues that the error by the court was capable of rectification under section 100 of the Civil Procedure Act, Cap 21, Laws of Kenya. He submits that the instant application had not been brought in good faith, was an abuse of the process and the orders sought were undeserved.

5. The application, dated 14th August 2020, was placed before me, under certificate of urgency, on 18th August 2020, when I directed that the same be served, and thereafter mentioned for directions. I also granted temporary relief pending directions on disposal. When the matter came up on 30th September 2020, the applicants said they would file written submissions, while the administrator stated that he would rely entirely on his replying affidavit. In the end, both sides filed written submissions. The administrator filed his submissions on 9th October 2020, of even date; while the applicants filed their on 17th November 2020, dated 11th November 2020.

6. The genesis of the dispute, presented by the said application, is the earlier application dated 22nd October 2019, which had sought stay of proceedings in three land matters that were pending before the Magistrates courts at Kakamega and Mumias, and revocation of the grant made on 27th November 2014, on grounds that the same had been obtained on the basis of the making of false statements and concealment of material facts.

7. The reply to the application of 22nd October 2019 took the form of a notice of preliminary objection, dated 6th November 2019, filed in court on 7th November 2019, where the administrator raised several issues: that the applicants were not beneficiaries of the estate of the deceased and could not bring an application for revocation; that they ought to have raised an objection under section 67(1) of the Law of Succession Act, Cap 160, Laws of Kenya; that the proceedings of the Land Disputes Tribunal were a nullity; that the application offended section 55(1) of the Law of Succession Act and that the proceedings at the Tribunal preceded grant of representation in this cause; the application was statute barred; the land proceedings at the Magistrates courts had been concluded and the applicants ought to have appealed against the verdicts; and the applicants were not party to one of the land suits and they had no locus to seek stay of the decree in that suit.

8. When the application dated 22nd October 2019 was placed before me on 13th November 2019, I directed that the preliminary objection be disposed of first. There was compliance to those directions, for the administrator filed his written submissions on 6th February 2020, dated 29th January 2020; while the applicants' application was filed on 13th February 2020, dated 10th February 2020. The matter was placed before Njagi J, on 13th February 2020, who reserved it for ruling on 27th May 2020. The ruling was delivered on 29th May 2020. In the ruling, the court was clear, at paragraph 1, that the applicants were seeking, in their application dated 22nd October 2019, revocation of the grant made on 27th November 2014, and stay of proceedings in the land suits before the Magistrates courts. Njagi J was clear in his mind that the application before him was the application for revocation of grant, which application was dated 22nd October 2019, and he was very clear on the orders that were sought in that application, and the issues for consideration with respect to the orders sought. The applicants case, in the summons dated 22nd October 2019, turned principally around the said land suits, and Njagi J analyzed these cases in paragraphs 2 and 3 of the ruling. In paragpgh 4, Njagi J concluded that the High Court had no jurisdiction over land matters, and that the applicants were better off before the Environment and Land Court. At paragraph 5, Njagi J considered the merits of the preliminary objection, and concluded that

whether the proceedings before the Land Disputes Tribunal were a nullity or the matter was time barred, were issues that the applicants ought to place before the appropriate appellate court, the Environment and Land Court. It is in paragraph 6 that the Judge made reference to summons for confirmation of grant, but he eventually held that the application dated 22nd October 2019, which sought revocation of grant and stay of proceedings in the land suits, lacked merit and dismissed it with costs. The effect of it was that the preliminary objection was upheld.

9. Review of the orders of a probate court, made under the Law of Succession Act and the Probate and Administration Rules is through Rule 63 of the Probate and Administration Rules. The Law of Succession Act has not made provision for review of orders made under the provisions of the Act. So review is introduced by Rule 63, which has adopted a number of the processes set out in the Civil Procedure Rules, which include the provisions relating to review of court orders and decrees. A probate court, therefore, gets to exercise the power to review its orders through Rule 63.

10. Review under the Civil Procedure Rules envisages three situations for which the court can exercise discretion. Firstly, there is an error apparent on the face of the record. Secondly, there has been discovery of new and important matter that goes to the core of the case, which the party applying for review would not have placed before the court as at the date of the order sought to be reviewed, as the material was not available. Finally, it would be in cases where there is some other sufficient reason.

11. The applicants plead that there is an error apparent on the face of the record. They argue that the reference in paragraph 6 of the ruling, dated 29th May 2020, to summons for confirmation of g rant, meant that, the court was mistaken as to the application it was determining, so that Njagi J determined the wrong application, believing that he was handling a confirmation application rather than a revocation application. I do not think that the Judge was mistaken at all about what was for determination before him. The application before him was that dated 22nd October 2019, and he does refer to it by that date in paragraphs 1 and 7 of the ruling. In the recitals in paragraph 1, it is clear that Njagi J was considering whether to revoke the grant and to grant stay of proceedings in the land suits before the magistrates, which were the principal prayers in the application of 22nd October 2019. Secondly, going by the directions of 13th November 2019, Njagi J was clear in his mind that he was dealing with a preliminary objection. He dealt with it, specifically in paragraphs 3, 4 and 5 of the ruling. The preliminary objection was raised as a response to the application dated 22nd October 2019. It has not been demonstrated that there was preliminary objection to the summons for confirmation founded on similar grounds. The issues that Njagi J considered were those that the applicants and the administrator raised in the summons dated 22nd October 2019 and the preliminary objection dated 6th November 2019. It has not been demonstrated that the Judge considered the issues in raised in the confirmation application as opposed to the two pleadings that I have referred to above. The reference to summons for confirmation for grant was nothing more than a mere slip, and I agree with the administrator that the same is of the type for rectification under section 100 of the Civil Procedure Act, administratively, without the necessity of review proceedings. I also agree that the said error does not go to the core of the matter, and, therefore, it does not affect the final orders.

12. In any case, the revocation orders sought in the application dated 22nd October 2019 were in respect of a non-existent grant, made on 27th November 2014. Prayer 3 of the said application is specific that that that was the grant that was sought to be revoked. Yet, no such grant exists. Letters of administration intestate were made in this matter on 31st January 2014 and a grant was issued, dated 18th February 2014. There is nothing on record to suggest that the grant of 31st January 2014 was ever revoked, and fresh one made on 27th November 2014, which could then be available for revocation by the application dated 22nd October 2019. Even without the issues around distribution, the said application was fatally defective.

13. In view of everything that I have said so far, it should be clear that there is no merit in the application dated 14th August 2020. It is for dismissal, and I hereby dismiss it. The interim order, made on 18th August 2020, is hereby discharged. The administrator shall have the costs. Any party aggrieved by the dismissal has leave of twenty-eight (28) days to move the Court of Appeal appropriately. It is so ordered

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF MAY, 2021

W. MUSYOKA

JUDGE