



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**SUCCESSION CAUSE NO. 142 OF 2013**

**IN THE MATTER OF ESTATE OF MARY WANJIKU NJUGUNA (DECEASED)**

**MARY NJOKI MWANIKI.....APPLICANT**

**VERSUS**

**LUCY SHARON NDUTA.....RESPONDENT/ADMINISTRATOR**

**RULING**

1. The applicant herein filed the instant application and wherein she seeks setting aside and/or review of the orders made on the amended confirmation of grant dated 27.07.2017 and that the orders made on the confirmation of the grant dated 3.0.2017 remain in force. She also prays for the costs of the application.
2. The application is premised on the grounds on its face and further, on the affidavit supporting the same. The applicant's case is that she entered into a sale agreement with the respondent for purchase of 0.8Ha out of LR Mbeti/ Kiamuringa/xxx and that she was given possession of the said portion. That the respondent further proceeded to file succession cause for the estate of the deceased herein and that the applicant was amongst the beneficiaries thereof. Further that, however, the respondent secretly and fraudulently filed another application for rectification of grant and misled the court that the applicant was dead and which application was heard in her absence and allowed and her names substituted with that of Francis Muchangi Mwaniki. She thus prays for the review of the orders of 27.07.2017 in the interest of fairness and justice.
3. The application is opposed by way of a replying affidavit sworn by the respondent on 27.02.2020 and wherein she deposed that she entered into a sale agreement with the applicant herein on 8.10.2016 for the sale of part of the suit land herein (approximately 0.2Ha) and in good faith the respondent included the applicant in the cause herein. That the applicant however failed to perform her part of bargain despite several demand letters and which breach made the respondent apply for summons for rectification of grant. She further deposed that the applicant must have colluded with another person to introduce a handwritten clause and the respondent did not in any way act to the detriment of the applicant's interests and the orders of 27.07.2017 was properly and legally obtained through due process of the court.
4. The applicant filed a further affidavit and wherein she deposed that she never breached the agreement between them as deposed by the respondent and further that the application for amendment of the grant was heard and allowed ex-parte and after the respondent gave false and misleading information about the applicant so as the court to believe that she could not be found. Further that the respondent herein filed for amendment of the grant and gave out her share to a third party without notice to the applicant and without refunding the purchase price earlier paid and which action was ill-conceived and fraudulent and the court ought not to entertain the same.
5. The application was canvassed by way of written submissions. The applicant reiterated her position that the application for amendment of the certificate of confirmation of grant was brought without her knowledge and yet she is a beneficiary of the estate as a purchaser.
6. The respondent submitted that although the application herein is premised on Order 45 of the Civil Procedure Rules 2010, the same was brought after unreasonable delay having been brought eight hundred and sixty one (861) days after the orders were made) and which delay has not been explained.
7. I have considered the application herein, the response thereto and the further affidavit filed. I have further considered the rival submissions filed herein.
8. At the onset, I note that the applicant seeks review of the orders made on 27.07.2017 and relies on the provisions of Order 45 and which order is applicable to proceedings under the Law of Succession Act pursuant to the provisions of Rule 63 of the Probate and Administration Rules.

9. The application of Order 45 of the Civil Procedure Rules in succession proceedings was considered in **John Mundia Njoroge & 9 Others –vs- Cecilia Muthoni Njoroge & Another [2016] eKLR** where the court stated as follows: -

***“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.”***

10. Under Order 45, an application may be brought by any person who considers himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or 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.

11. As such, an applicant to be successful in pursuit of review orders, must demonstrate to the court that, either: -

***i. There has been 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***

***ii. That there has been some mistake or error apparent on the face of the record; or***

***iii. That there is any other sufficient reason.***

12. The applicant does not allege error on the face of the record, or discovery of new matter or evidence. However, she deposed that the orders were obtained ex-parte and she was not served with the application.

13. I have perused the court record and I noted that the respondent herein filed an application dated 24.02.2017 wherein she sought rectification of the certificate of the confirmation of grant issued on 2.11.2014 so as to include two beneficiaries whom she deposed had been left out during the confirmation of the grant and one of the said beneficiaries is the applicant herein. She was to get 0.20 Ha. At the hearing of the said application (on 3.04.2017), the respondent herein informed the court that she had sold part of the suit land herein to the said new beneficiaries. The application was allowed and an amended certificate of confirmation of grant issued.

14. Fast forward, the respondent herein filed an application dated 13.06.2017 and wherein she sought amendment of the certificate of confirmation of grant amended on 3.06.2017 so as to add the names of Francis Muchangi Mwaniki to replace the applicant herein. I note that the application is amended by a pen and wherein it was stated “to add the name of Francis Muchangi Mwaniki to replace Mary Njoki Mwaniki now deceased.” However, in the supporting affidavit, the issue of the applicant herein is not mentioned. The respondent only deposed that the applicant’s share should go to the said Francis Muchangi Mwaniki” and there are no reasons given why that should be done.

15. When the said application came up for hearing on 27.07.2017, the record indicates that the only person who was present was the applicant (respondent herein). As such, it is clear that the applicant herein was not present at the hearing of the said application. The affidavit in support of the said application indicated that all the parties concerned were agreeable to the mode of distribution. However, she did not attach any consent to the said application. There is no evidence that the applicant herein was made aware of the application to amend the certificate of confirmation of grant. Her presence was necessary since the application had the impact of disinheriting her of her entitlement which the respondent had earlier informed the court was pursuant to purchase.

16. I note that the respondent herein deposed to the fact that there was delay in bringing the application. However, it is my view that, that alone cannot be an excuse for denial of the orders sought herein. Section 7 of the Law of Succession Act bestows this court with jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders as may be expedient. Further Rule 73 of the Probate and Administration Rules 1980 extends the inherent powers of this court to making such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is in the interest of justice that the orders of 7.07.2017 be set aside.

17. Further, I note that the respondent in her replying affidavit deposed that the applicant did not honour the contract she entered into with the respondent despite various notices and demands. However, and as I have already noted, the respondent in her earlier application introduced the applicant herein as a beneficiary by the virtue of her being a purchaser of 0.2 Ha of the suit land. It is therefore not clear how the respondent could thereafter claim and say that the applicant had not cleared the purchase price. Even assuming that is the case, the respondent ought to have filed for rescission of the contract or sue for breach of the said contract. Going behind the back of the applicant and giving her share to another person without her knowledge cannot be entertained by this court.

18. The applicant has satisfied the court of the existence of sufficient cause to warrant the review of the said orders. The proceedings before a probate court being more of civil in nature, it is expected that the mover of the court should serve the other parties to the suit and who may be affected by any adverse orders which the court may issue. As such, the application dated 4.12.2019 is allowed in terms of prayer number 2. Further, the orders made on the amended certificate of confirmation of grant dated 27.07.2017 are set aside and/or reviewed and the orders made on 3.04.2017 should remain.

19. The respondent to bear the costs of the application.

20. It is so ordered.

**Delivered, dated and signed at Embu this 30<sup>th</sup> day of June, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent/Administrator