



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION CAUSE NO. 662 OF 2001**

IN THE MATTER OF THE ESTATE OF **THE LATE MICHAEL ANGANA Alias MIKAL ABIRI**

**BENSON AMBOKO OKUKU** (*Sued as personal representative of*

**NOAH OKUKU ETSIMILE (DECEASED)**.....**PLAINTIFF/RESPONDENT**

**VERSUS**

**MORRIS ISAAC ODUKHO AMBOKO**.....**DEFENDANT/APPLICANT**

**RULING**

This application dated 10<sup>th</sup> May 2021 was brought by **MORRIS ISAAC ODUKHO AMBOKO**. The application seeks the following reliefs;

(a) *Review of the Orders issued on 25<sup>th</sup> March 2013, pursuant to which the Land Registrar Siaya was ordered to transfer L.R. NO.*

*NORTH GEM/MARENYO/349 to NOAH OKUKU ETSIMILE.*

(b) *A finding that the transfer of the said title, from MIKAL ABIRI to NOAH OKUKU ETSIMILE was lawful.*

(c) *Revocation of the title in the name of Noah Okuku Etsimile, so that the suit property reverts to the name of the deceased, MIKAL ABIRI.*

(d) *After the revocation, the beneficiaries be directed to take out Letters of Administration for the Estate of MIKAL ABIRI.*

1. It was the case of the Applicant that the suit property had been transferred to Noah Okuku Etsimile irregularly, unlawfully and unprocedurally. His reason for that contention was that the property of a deceased person cannot be transferred to another person except through a summons for confirmation of grant.

2. As the transfer to Noah Okuku Etsimile was not done pursuant to a succession cause, within which the Court determined the mode of distribution, the Applicant submitted that the transfer in issue ought to be reversed.

3. In his submissions, the Applicant pointed out that the alleged unlawful transfer had the effect of changing ownership;

*“..... from the deceased Mikal Abiri (my father) to Noah Okuku Etsimile (my brother) (deceased), and now to the son of Noah Okuku Etsimile (Benson Amboko Okuku) .....”*

4. Following the death of Noah Okuku Etsimile, his son Benson Amboko Okuku took out letters of administration for the estate of his late father. Consequently, the Respondent in these proceedings is now Benson Amboko Okuku.

5. The Applicant told the Court that the Respondent had filed a case at the Maseno Law Courts, through which he was seeking orders to evict the Applicant. Apparently, the case at Maseno Law Courts was premised upon the title which is currently vested in the Respondent.

6. As the possibility of his eviction was almost becoming a reality, the Applicant moved this Court to revoke the title upon which the eviction proceedings is founded.

7. Pursuant to **Order 45 Rule 1** of the **Civil Procedure Rules** an application for review of an order or a decree may be made when;

*(a) there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made; or*

*(b) there is some mistake or error apparent on the face of the record; or*

*(c) there is any other sufficient reason.*

8. Secondly, the rule enjoins the Applicant to lodge his application without unreasonable delay.

9. The Applicant herein has asserted that there was an error apparent on the record. The alleged error was the Court's decision to award land, belonging to a deceased person, to another person, in the absence of a grant of letters of administration.

10. He further submitted that the error on record was the failure to follow the known procedures of distributing the estate of a deceased person.

11. In **NATIONAL BANK OF KENYA LIMITED Vs NDUNGU NJAU, CIVIL APPEAL NO. 211 OF 1996**, the Court of Appeal held thus;

*“Misconstruing a statute or other provision of law cannot be a ground for review. The learned Judge made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent.*

*If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree, that the learned Judge would be sitting in appeal on his own judgment, which is not permissible in law.*

*An issue which has been hotly contested as in this case cannot be reviewed by the same court which adjudicated upon it.”*

12. In my understanding, the Applicant is faulting the learned Judge for failing to follow the correct legal procedures, and arriving at a wrong conclusion.

13. In **PANCRAS T. SWAI Vs KENYA BREWERIES LIMITED, CIVIL APPEAL NO. 275 OF 2010**, the Court of Appeal held as follows;

*“..... It seems clear to us that the appellant is basing his review application on the failure by the Court to apply the law correctly, faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review.*

*If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made, under the guise of review when such courts are functus officio and have no appellate jurisdiction.”*

14. I appreciate that pursuant to **Section 45 (1)** of the **Law of**

**Succession Act**, the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized by law, to do so.

15. Indeed, if a person deals with the property of a deceased in the absence of lawful authority, he is deemed to have committed a criminal offence.

16. In this case, the Court granted orders, and it was the said orders that the Respondent was taking steps to actualize. In the circumstances, I hold the considered view that that which has been sanctioned by a Court of law cannot be deemed to be a criminal offence.

17. I find that there is no error apparent on the face of the record.

18. Secondly, I find that the application was brought after an unexplained period of delay. The Applicant was guilty of inordinate delay. He failed to explain why he had waited for 8 years before bringing the application.

19. The application is therefore dismissed, with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT KISUMU**

**THIS 22ND DAY OF NOVEMBER 2021**

**FRED A. OCHIENG**

**JUDGE**