



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 246 OF 2013

IN THE MATTER OF THE ESTATE OF WANJIRA MWANIKI MAGONDU.....(DECEASED)

SHADRACK KINYUA MWANIKI MAGONDU.....PETITIONER

VERSUS

JOHN MWANGI KINYUA.....1ST PROTESTOR

ROSE WAGICHUGU KINYUA.....2ND PROTESTOR

RULING

1. The application pending before me is the one dated 27/6/2017 and seeks orders that the court be pleased to stay execution of the order issued on 28/2/2017 pending the hearing and determination of prayer No. 3 which seeks review and setting aside of the order.
2. The application is based on the ground that there is an error apparent on the fact of the record. That there are sufficient reasons to warrant a review of the said order.
3. The application is supported by the affidavit of Rose Wagichugu Kinyua and John Mwangi Kinyua who depones that their protest was dismissed on 29/10/15 and the respondent applied for their eviction. That upon being served they wanted to file a response but the person who was assisting them filed a plaint in Kerugoya C.M.CC 174/2016. That they did not file a response to the application seeking to evict them and they did so out of ignorance. The application was heard ex-parte and the respondent failed to disclose material facts to the court. That is land Parcel No. Mwerua/Mukure/857 had not been transmitted to him and as such he could not deal with it. That the applicants and other family members live and depend on the said parcel of land and they have extensively developed it. That the applicant needed to have the land transmitted to him then file a suit for their eviction. That it is in the interest of justice that the application be allowed.
4. The applicant has given a long list of family members who reside and cultivate on the land and finally stated they have emotional attachment to the land.
5. The respondent opposed the application and filed a replying affidavit and deposes that the application is full of falsehoods. That the applicants filed a protest and were heard on merit and the protests were dismissed. That there is no discovery of a new matter of evidence to warrant the court to review its orders nor is there any mistake or error apparent on the face of the record. That the application is an abuse of court process and ought to be dismissed with costs.
6. The parties filed submissions which I have considered. The application under which the impugned order was issued was dated 31/8/2016 and was seeking an order of eviction of the citees. It also sought an order that the O.C.S Kerugoya Police Station to provide security during eviction. This application was served on the applicants a fact which is not denied. Indeed the applicant depones at Para -5- of the applicants affidavit sworn on 27/6/17 admit that they were served but did not file a response out of ignorance and the application was heard ex-parte. Ignorance is not a defence. The court allowed the application as prayed.
7. The applicant submits that matters which she has deponed in her lengthy affidavit were not brought to courts attention. I find that the matters were not new in view of Para 11 & 12 of the Replying Affidavit where it was deponed that the applicants concealed material facts that they had disposed him and overtaken his rights. It is therefore not a new matter that they were on the land. That is more so because he filed the application to evict them.
8. The applicant invokes **Article 159 (2)(d) of the Constitution** to urge the court disregard procedural technicalities and hear the applicants. Failure to file a Replying Affidavit and to attend when properly served is not a procedural technicality. That is stretching the provision too far. I also note that the applicant had proceeded in this matter unrepresented and the allegation they were unrepresented and were misled is not convincing. The applicants are shirking the goal posts as their application is based on alleged error on the face of the record and yet they are derailing the court by raising other issues all over.

9. On the issue that the eviction order could only be filed after transmission, the applicant is holding on straws. There is a conclusive and valid Judgment of this court which has not been challenged. A Judgment can be executed even the same day that it has been pronounced as long as there is no order for stay of the Judgment. So whether the respondent decides to execute before or after transmission cannot be faulted. He moved the court and he was not opposed. **Section 47 of the Law of Succession Act** gives this court powers to entertain application and issue such orders. It is the court with jurisdiction to grant final orders. **Section 47** provides:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient”

This is further reinforced under **Rule 73 of the Probate and Administration Rules** which provides:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.”

10. The preamble to the Law of Succession Act provides that it's the law that governs intestate and testate succession and for purpose connected therewith and incidental thereto.

11. For the applicant to argue that the respondent need to move to Environment & Land Court is like saying that this court cannot execute its order it amounts to prolonging its litigation contrary to the trite law that litigation must come to an end. This court has jurisdiction to execute its orders as provided in the above provisions. It is not toothless. The dispute here is governed by the Law of Succession Act and does not fall under **Article 162 (2) (b) of the Constitution**. This dispute is a succession matter. It touches on land as the estate of the deceased was only the land parcel in dispute. It is not a land dispute envisaged under **Article 162 (2)(b) of the Constitution**. It is a fishing expedition for the applicant to invoke **Section 28 of the Land Registration Act and Section 12(3) and (4) of the Matrimonial Property Act**. These were matters which were addressed in the Judgment of this court. The applicant was seeking review of a specific order. The applicant has desperately digressed to matters which were not in issue in this application.

Order 45 Rule 1(a) &(b) Civil Procedure Rules provides:-

“(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.”

12. I find that the applicant has not brought the application within the ambit of **Order 45 Rule -1-**. I find that the application lacks merits and is dismissed.

Dated at Kerugoya this 27th day of February 2020.

L. W. GITARI

JUDGE