



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 357 OF 2016**

**IN THE ESTATE OF THE LATE IRENE WANJIRU KIVUTI (DECEASED)**

**ELLEN NJERI KARUGA.....PETITIONER**

**VERSUS**

**JOEL OICHOE OISEBE..... 1<sup>ST</sup> RESPONDENT**

**S.L.M.H. MUHIA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Petitioner, Ellen Njeri Karuga (hereinafter “Ellen” for ease of reference) is the Personal Representative to the estate of Irene Wanjiku Kivuti (Deceased) by virtue of being the sole beneficiary to the estate. Her Letters of Administration were confirmed vide a Certificate of Grant dated 29/06/2017.

2. Among the assets of the Deceased identified in the Certificate of Grant is Land Parcel no. Nakuru Municipality LR No. 12792/28 (“Subject Property”). The Subject Property is to devolve in whole share to Ellen.

3. After the Certificate of Grant was issued, Ellen was unable to transfer the Subject to her by transmission. This was because, it turned out that the Subject Property was still in the name of Joel Oichoe Oisebe (hereinafter, “Joel”). The Deceased had purchased the Subject Property from Joel back in 2003. S.L.M.H. Muhia (“Muhia”) served as the advocate for the transaction.

4. When Ellen approached Joel to transfer the Subject Property to her pursuant to the Certificate of Grant, Joel declined. This forced Ellen to bring an Application dated 06/03/2018. The main purpose of the Application was to compel Joel to give a status update on the Subject Property and then transfer it to Ellen. The Application named Joel as the 1<sup>st</sup> Respondent while Muhia was named as the 2<sup>nd</sup> Respondent.

5. Joel strenuously opposed the Application while Muhia did not seem to have any objections to the prayers being granted. Joel’s objections were mainly legal and technical: he objected to the jurisdiction of the Court and argued that the Application was an abuse of the process of the Court.

6. In a Ruling dated 27/11/2018, the Learned A. Ndung’u who heard the Application ruled in favour of Ellen in all material respects. Finding that the Court had jurisdiction and finding no plausible or justifiable reasons for Joel to refuse to execute a Transfer of the Subject Property in favour of Ellen, the Learned Judge ordered as follows:

1) Application dated 06/03/2018 is allowed.

2) Joel Oichoe Oisebe is to execute necessary transfer documents in respect of sale of Nakuru Municipality LR No. 12792/28 within the next 30 days.

3) Mr. Muhia advocate, the advocate acting in the sale transaction to execute the necessary attestation.

4) The administrator of the estate of the Deceased to meet the costs of stamp duty, registration certificate of lease and advocate’s costs.

5) Each party to bear its own costs of this application.

7. Joel is unhappy with that Ruling. He has filed an Application dated 09/01/2019 with three prayers:

- 1) **THAT** for reasons to be recorded, this application be certified as urgent, service be dispensed with in the first instance and the matter be placed before duty court on a priority basis and the matter be given a date in Court.
- 2) **THAT** the honourable court had has on 27<sup>th</sup> November, 2018 ruled in favour of the applicant, application dated 6<sup>th</sup> March, 2018 on account of lack of a dispute. The honourable court be pleased to review, vary and or set aside its ruling and orders issued on 27<sup>th</sup> November, 2018.
- 3) **THAT** the honourable court be pleased to stay the orders until the review is heard and determined (The said orders are annexed thereto as 'A' The certificate of confirmation of grant attached 'B' Sale Agreement attached 'C')

8. On the other hand, frustrated with the failure by Joel to execute the Transfer documents, Ellen has filed an Application of her own dated 05/02/2019. It has a singular substantive prayer:

- 1) That the Deputy Registrar of this Court be authorized to execute all the conveyance documents necessary to effect the transfer and registration of L. R. no. 12792/28 in the name of the Applicant as administrator and beneficiary of the Estate of Irene Wanjiru Kivuti.
- 2) Costs of this Application be provided for.

9. This Ruling is with respect to both Applications – the one by Joel dated 09/01/2019; and the one by Ellen dated 05/02/2019. Of course the two Applications are a mirror image of each other: if Joel's Application succeeds, Ellen's must fail – and vice versa.

10. Joel's Application, in essence, seeks a review of the Court's ruling dated 27/11/2018.

11. By dint of Rule 63 of the Probate and Administration Rules, Order 45 of the Civil Procedure Rules has been imported into succession practice. That is the Order which deals with review. The relevant Rule which delimits the review jurisdiction of the Court is Rule 1. It provides as follows:

*45 Rule 1 (1) Any person considering 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 review of judgement to the court which passed the decree or made the order without unreasonable delay."*

12. Our case law has now clarified that a Court can only review its previous order or decree on one of three grounds:

- 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) On account of some mistake or error apparent on the face of the record; or
- c) For any other *sufficient reason* and whatever the ground there is a requirement that the application has to be made without unreasonable delay.

13. Our case law has similarly clarified that for a review application to be permitted under the "sufficient reason" ground, the proffered reasons must be analogous to the previous two grounds. This was the holding in, for example, **Sadar Mohamed vs Charan Singh and Another [1967] EA 557** where it was held that "*Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).*"

14. In the present case, Joel insists that the review is warranted because the Court committed an error apparent on the face of the record by determining the issue and rendering its ruling of 28/11/2018 when it was both *functus officio* and without jurisdiction.

15. His argument is that the by granting a Certificate of Grant, the Court became *functus officio* and that it was therefore inappropriate for the Court to entertain the dispute between him and Ellen and issue orders thereon. Secondly, he argues that disputes arising after confirmation of grant ought to be strictly dealt with outside of the probate suit and that, this being a dispute on land, jurisdiction lay with the Environment and Land Court.

16. With respect the points taken up by Joel cannot constitute either new matters not known to the parties at the time their application was heard or error apparent on the face of the record. Indeed, what Joel seems to be doing is faulting the Court for making what he believes are reversible errors: finding that it had jurisdiction when it in fact had none. The Court, in its decision dated 28/11/2018, wrestled with the question of jurisdiction and came to a reasoned finding and holding. If Joel is aggrieved by that finding, his recourse is in filing an appeal against that finding. There is, plainly, no error apparent on the face of the record to trigger a review jurisdiction.

17. The argument about the Court being *functus officio* post issuance of a Certificate of Grant of Confirmation of Letters of Administration is, patently, unsustainable. A Probate Court is never truly *functus officio*. It can always entertain any applications necessary for the efficacious administration of the estate of the Deceased both before and after a grant of representation. Indeed, section 47 of the Law of Succession Act explicitly envisages these kinds of applications.

18. In short, there are no “sufficient grounds” to grant the Application for review. Joel’s Application falls far short of the admonition in *Evan Bwire v Andrew Nginda* where the Court remarked as follows: “an application for review will only be allowed on very strong grounds’ particularly if its effect will amount to re-opening the application or case a fresh.”

19. If Joel’s Application must fail, Ellen’s Application must succeed. A Certificate of Grant of Representation already transmits the Subject Property to Ellen. A Ruling of this Court ordered Joel to execute the necessary papers to Transfer the Property. Joel’s Application to have that ruling set aside or reviewed has been dismissed. It follows, therefore, that Ellen is entitled to the benefit of the Subject Property. Since Joel has proved that he is not inclined to execute the necessary documents for the transmission, then the Deputy Registrar of the Court must undertake that task in the interests of justice.

20. The upshot is that the Application dated 09/01/2019 is dismissed with costs while the Application dated 05/02/2019 is allowed.

21. The orders the Court shall give are:

**a) The Deputy Registrar of this Court is hereby authorized to execute all the conveyance documents necessary to effect the transfer and registration of L. R. no. 12792/28 in the name of the Applicant as administrator and beneficiary of the Estate of Irene Wanjiru Kivuti.**

**b) Joel Oichoe Oisebe will pay the costs of both Applications to both Ellen Njeri Karuga and S.L.M.H. Muhia, Advocate.**

22. Orders accordingly.

**Dated and delivered at Nakuru this 5<sup>th</sup> day of March, 2020**

.....

**JOEL NGUGI**

**JUDGE**