



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 9 OF 2018

IN THE MATTER OF THE ESTATE OF SARAH MAITHA BENARD (DECEASED)

DOROTHY KANYUA MIRITI.....PETITIONER

-VERSUS-

MARGARET KAMBURA.....OBJECTOR

RULING

1. Grant of Letters of administration with will annexed was issued to the petitioner herein on 12th November 2018. On 8/10/2019 the objector filed an application seeking for two orders, namely; (1) removal of Isiolo Township Block 1/269 from the estate property; and (2) the petitioner to deposit rent and account for all income derived from Plot No. Kibirichia/1740 commencing October 2019.
2. In a Ruling dated 2/12/2019 this court held that the suit premises in Isiolo/Township Block 1/269 had been transferred after the demise of the deceased- an act of possible intermeddling with the estate of the deceased. The request to exclude the said property from the estate was therefore dismissed. The court, however, directed the petitioner to file an accurate account of the rental income from Isiolo Township Block 1/269.
3. Subsequently, the objector filed the application dated 4th February 2020 seeking for: (1) review and/or setting aside of the Ruling dated 2/12/2019 and (2) revocation and or annulment of the grant of letters of administration issued to the petitioner herein dated 28th September 2018.
4. In support of the application, the objector averred that she has new and compelling evidence i.e. vide a letter dated 20/1/2020 the Chief Lands and Physical Planning Isiolo County confirmed that Isiolo / Block Township/ Block 1/296 was entered into the county register as per minute 46/91 of 18th September 1991 wherein she was registered as the lessor.
5. That in its determination this court referred to the date the certificate of lease was issued instead of the particulars of the lease which indicates that the lease was registered in the name of the objector from 1/7/2000. That she is the rightful registered owner of the suit premises pursuant to the letter of allotment issued on 28th June 2000.
6. That there is an apparent mistake in the Ruling as she had applied to have accounts of Plot No, Kibirichia/1740 and not Isiolo/ Township 1/269. That the pleadings relied on by the petitioner i.e **Isiolo Cmcc No. 6 of 2015 Sarah Maitha versus Margaret Kambura Mutegi** was never pursued and/or prosecuted. Lastly that no action has been taken by the petitioner from 28th September 2018 when she was issued with the grant of letters of administration.
7. The petitioner opposed the application vide Replying affidavit dated 17th February 2020. She averred that the applicant ought to have conducted due diligence and obtained contents of the letter dated 20th January 2020 and minutes dated 28th October 2019. That she also had correspondence dated 8th October 2019 but has not provided sufficient reasons why she did not produce them.
8. She decried that the objector who is also her sister is not the owner of the plot in Isiolo Township/ Block 1/269 and that she was fraudulently registered as the owner after the demise of the deceased. That the deceased had also sought to evict her in Isiolo Cmcc No. 6 of 2015 where she also admitted that the deceased was the owner of the suit premises. That the deceased had vide her will bequeathed the aforesaid plot to Anchor Self-help Group to which all the beneficiaries herein are members. That she has also filed the statement of account for Plot No. Kibirichia/1740. Lastly that the objector had filed an objection to the making of the grant which was slated for hearing on 24th March 2020 hence impeding the confirmation of the grant.
9. By leave of the Court and in brief rejoinder, the applicant vide Supplementary affidavit dated reiterated that she is the registered owner of Isiolo Township Block 1/296. It was her averment that the plot was granted to her by the Isiolo County Council and not the deceased as averred by the petitioner. She took issue with the ownership of the aforesaid suit property and propounded that the objector had not produced

evidence to prove ownership of the land. That the evidentiary and probative value of the case in Isiolo Cmcc No. 6 of 2015 at this stage of the proceedings has not been ascertained and cannot therefore be adopted.

Submissions

10. On 18/2/2020 the court directed the parties to canvass the application through written submissions. The objector submitted that she is the registered owner of the suit premises. That the proceeding in Isiolo Cmcc No. 6 of 2015 at this stage have no probative value and if there was any dispute as to ownership, such should be dealt with at the Environment and Land Court. That the mistake apparent on the face of the record and the new evidence is a proper cause to review the court's ruling. She relied on the following cited authorities; **In Re Estate of Tumbo Lavu (Deceased) [2019] eklr, Phillip Keipto Chemwolo & Another v Augustine Kubende [1968] eklr, In re estate of Solomon Mwangi Waweru (Deceased) 2019 eklr, Succession Cause No. 664 of 2012 In the Matter of the Estate of M' Muchiri M'Nabea.**

11. The petitioner in her submissions reiterated that the suit premises was fraudulently registered in the name of the objector and that she has also filed the rental income for Plot No. Kibiricha/1740.

Analysis and Determination

12. The application is a twinning of requests for (1) review; and/or (2) revocation and or annulment of the grant of letters of administration issued to the petitioner herein dated 28th September 2018. Is there merit on these requests?

Review

13. **Order 45 of the Civil Procedure Rules** on review is one of the rules imported into succession causes and practice by **Rule 63 of the Probate and Administration Rules**. The application for review is therefore competent and is premised on the correct provisions.

14. The hurdle is whether the application meets legal threshold set out in **Order 45 Rule 1 of the Civil Procedure Rules, 2010** 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."

15. Two grounds have been stated, to wit: (1) that there is a **mistake apparent on the face of the record; and (2) there has been discovery of new and important evidence.**

Mistake apparent on the record

16. The mistake noted is that the court directed the petitioner to file accounts on rental income derived from Isiolo Township Block 1/269 instead of Plot No. Kibirichia/1740. In the application dated 8th October 2019, the objector sought accounts in respect of Plot No. Kibirichia/1740 and not Isiolo Township Block 1/269. With hindsight, there was an inadvertent error on that aspect of the ruling. The ruling shall be amended accordingly to reflect the prayers sought.

17. Be that as it may, I do note that the petitioner filed accounts in respect of plot No. Kibirichia/1740. By that action, amends was made and no prejudice accrued to any party. Nonetheless, for completeness and clarity of record, the ruling will be reviewed to reflect true state of orders issued.

Of discovery of new and important evidence

18. The applicant alleges discovery of new and important matter or evidence. The documents that the objector says she has discovered is a letter of allotment issued on 28th June 2000; Minutes dated 28th October 1991; and Correspondence from Isiolo County Government dated 20th January 2020. I must first point out that in the initial application, the applicant only attached the lease certificate issued on 4th March 2019 which made the court make a finding that the certificate was issued after the demise of the deceased, thus, an act of possible intermeddling with the estate property.

19. The foregoing notwithstanding, the test that there has been discovery of new and important evidence or matter is that the matter or evidence so discovered, after the exercise of due diligence, was not within his knowledge or could not be produced at the time of the decree or order.

20. Going by the dates, the letter of allotment and the minutes were obviously available prior to the filing of the application. The applicant has not attempted to show that despite due diligence she could not obtain these documents at the time of the order herein. In such applications, one is expected to showeth frantic efforts made to obtain the documents but was thwarted by some insurmountable difficulties. I do not think the explanation that the argument on ownership was not propounded at the time, profits this ground of review. Needless to state that a party ought to bring to court all documentation that supports his/her case; an obligation arising from the burden of proof encapsulated

in **Section 107 of the Evidence Act.**

Is there any sufficient reason?

21. The foregoing notwithstanding, the overriding objective of the court and the Constitution demands of courts to strive to serve substantive justice to the parties. It has thence been provided in order 45 of the CPR that review may be granted if there is sufficient reason to do so. I do note that both parties have made considerable arguments on whether or not the suit land is estate property. The applicant has proposed that the ownership of the suit premises ought to be argued in the Environment and Land Court. I expected her to exhibit some litigation between her and the administrator of this estate in ELC on this property. The only proceedings which were brought to the attention of the court were CMCC NO 6 OF 2015 in which the deceased had sought the objector's eviction from the suit land.

22. Despite that omission, it is clear that ownership of this property is still unsettled. Although the petitioner has argued that this is estate property, issues on allotment and registration of the property are still obscure. There is a substantial issue on ownership of the property which I believe should be settled once and for all by a competent court. This is a probate and administration court with specific jurisdiction of distributing the estate of the deceased. Matters herein are a kind of a squirm and go beyond determination of estate property; and the court may not be particularly equipped with relevant jurisdiction to determine such convoluted land ownership dispute. In fact, rule 41 of the Probate and Administration Rules envisaged such difficult scenarios and provided for such matters to be determined in separate and appropriate proceedings.

23. This case reminds me what Justice Hoffman in the English case of **FILMS ROVER INTERNATIONAL (1986) 3 All. ER 772** at page 780-781 stated:-

“A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”....”

24. And, in light thereof, I am convinced that there is a sufficient reason for review of my ruling herein which was based on a single document provided at the time. The obscurity I have noted in the ownership of the plot in question should be resolved by ELC for the sake of justice itself. The course I have chosen will not occasion any prejudice to the estate or the applicant as a decree of the appropriate court will resolve the issue and determine the rights of parties thereto. Nonetheless, I do not intend to give the applicant a blanket cover to temporize on the conclusion of this case. Accordingly, I order that the applicant shall file proceedings in ELC within the next 21 days and report to the court on the matter on 16th September 2020. Should she fail to do so, the original ruling shall revert as the order of the court. Meanwhile, and subject to the foregoing, the ruling in question is reviewed to the effect that I exclude Isiolo Township Block 1/269 from distribution as estate property in these proceedings. The plot in issue is hereby set aside to await determination of the ownership thereof. I have avoided to analyse the documents herein to avert prejudice to any party.

25. Be that as it may, I do not find any reason to revoke the grant of letters of administration issued to the petitioner. Revocation was an extreme request which is not envisaged in the procedure provided in Rule 41 of the Probate and Administration Rules. This was the correct procedure the applicant ought to have invoked rather than seek for revocation of grant.

26. The administrator should now seek distribution of the other assets which have no issues to avoid further delay. I note that the petitioner stated that the said plot had been transferred to a self-help group for the benefit of all beneficiaries. Should they succeed, distribution of the plot should be easy. It is so ordered.

Dated, signed and delivered at Meru this 29th day of July 2020

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F. GIKONYO

JUDGE