



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

SUCCESSION CAUSE NO 15 OF 2017

IN THE ESTATE OF THE DECEASED OF LETOYA OLE LENJOKI

PETER LOLCHOKI LETOYA.....ADMINISTRATOR/RESPONDENT

VERSUS

VERONICA SEIN LETOYA.....OBJECTOR/APPLICANT

RULING

The case for the objector/applicant

1. Pursuant to the provisions of article 27, 40,45, 48, 50,159 and 165 Of the 2010 Constitution of Kenya, Order 45 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and all other enabling laws, the applicant has applied for the following major orders.

1) Spent

2. The application is supported by 16 grounds that are set out on the face of the chamber summons with the major grounds being the following.

1) an order to adopt the consent dated 8/6/2020 and grant leave to the applicant's advocates, Haki and Amani Advocates to come on record after judgement.

2) an order to grant of stay of execution against the ruling in favour of the petitioner/respondent issued on 27/5/2020 and subsequent orders pending the hearing and determination of this application.

3) an order be granted directed at Chief Magistrate's court and/or any other judicial officer from hearing and/or carrying on any further proceedings in Civil Case No. 164 of 2013, pending the hearing and determination of this application.

4) an order to set aside, vary and/or review the judgement/ruling entered on 27/5/2020 by Justice J. M. Bwonwong'a with the major grounds being the following.

3. The applicant faces imminent eviction from land parcel No. 118, wherein she is living with her family. There is discovery of new and important matter and/or evidence which was not within the objector's/applicant's knowledge and/or could not be produced by her at the hearing of the matter and/or prior to the entering of the said ruling. There is a firm proposition that as a result of the discovery that the ruling and subsequent orders were issued on account of some mistake and/or error apparent on the face of the record and the pleadings which were not covered by the pleadings filed by his former advocate.

4. The applicant's advocate on record failed to bring to the attention of the court crucial evidence and the mistakes and dilatory conduct of the advocates should not be visited upon the applicant.

5. Furthermore, the applicant was unable present the said evidence because her said evidence was not in her possession as she not could trace some key witnesses to swear affidavits, which evidence would have aided the court to arrive at a just decision.

6. The applicant has also stated that she stands to suffer grievous prejudice, irreparable loss and financial embarrassment if the orders sought are not granted.

7. The applicant has deposed to a 22 paragraphs supporting affidavit in support of the application. The major averments are as follows. She has deposed that she faces imminent eviction from land parcel No 118, where she lives with her family. There is discovery of new and

important matter and/or evidence which was not within her knowledge and/or could not be produced by me at trial and/or prior to entering of the ruling. The aforesaid discovery of new evidence includes a letter dated 5/8/2004 purported to have been written by Chief Samuel Leposo Kodonyo of ID NO 11407154, which is fake as the said chief denies having written it. In that letter the applicant and her children were excluded as a wife and her children as beneficiaries of the estate. The said letter was used to fraudulently file a succession cause by misrepresenting material facts as to the real beneficiaries of the estate of the deceased of Letoya Ole Lenjoki. The rest of the averments are a replication of the matters set out on the face of the notice of motion, which I find unnecessary to set out herein.

8. In addition to the foregoing, there is the 19 paragraphs affidavit of the said Chief Samuel Leposo Kodonyo. The major averments are as follows. The predecessor of Chief Samuel Leposo Kodonyo namely John T. Ole Kerore, who is a former chief of Keekonyoike location convened a meeting at his office on 25/3/1999 with the deceased's family and elders following a struggle for inheritance dispute in respect of his estate. Those in attendance were the deceased (Letoya Ole Lenjoki), Peter Olochoki (plaintiff) and Kasuku Kesis, to which he has annexed a copy of the resolutions of the meeting as annex marked SLK 2.

9. During the said meeting the deceased acknowledged his two wives namely the applicant and Rachel Wangari Letoya. The applicant resided at his 10 acres shamba in Nairege Enkare, while Rachel Wangari resided at his about 171/2 acres Kojonga estate. The deceased expressed his desire that his two wives continue to reside in those parcels of land, which desire was unanimously supported by the elders.

10. The chief has deposed that a hand written letter purported to have been written by him dated 5/8/2004 and bearing his office rubber stamp on the right hand corner and below stamped upside down was used by Peter Lolchoki Letoya to seek, "letters of administration." This letter is a forgery and it went against the will of the deceased. the said letter is marked as annex SLK 6.

11. There are other affidavits of Grace Njoki Lesira, John Nelson Tajeu Ole Kerore, Samson Ntikosia Ole Sila, Njawondoi Ole Washua, Esther Wanjiku Gugu and Philomena Wairimo Kahoi, which are not relevant to this review application.

The submissions of the objector/applicant

12. Messrs Haki na Amani, advocates in their submissions cited Order 45 (1) of the 2010 Civil Procedure Rules, which allows the court to review its order or judgement if there is discovery of new important evidence, which was not available at trial. The applicant for such evidence must show that he exercised due diligence and the evidence sought to be adduced was not available. In the instant application the new evidence is that of Chief Samuel Leposo Kodonyo, who has deposed that the petitioner/respondent forged his letter in support of his application to the court to administer the estate of the deceased. Counsel also cited *Jasbir Singh Rai & 3 Others v Tarlochin Singh Rai & 4 Others [2007] e-KLR, Civil Application Nai 307 of 2003, (154/2003 UR)* in which Omolo, JA (as he then was) stated that the courts are manned by human beings who are by nature are fallible and that a decision of the court may be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact, which if it was available the decision might have well have made the decision go the other way. It is for this reason that the law provides for review.

13. Counsel further cited, among other authorities, *Joginder Auto Service Ltd v Mohammed Shaffique & Another [2000] e-KLR, Civil Appeal (application) Nai. 210 of 2000*, in which the Court of Appeal observed that the court may receive new evidence if the applicant demonstrates that the existence of the following three conditions. First, the applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at trial. Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive. Third, the evidence must be apparently credible, although it need not be incontrovertible.

The case for the petitioner/respondent

14. The respondent has deposed to a 41 paragraphs replying affidavit in opposition to the application, whose major and relevant averments are as follows.

15. He has deposed that he has been explained the contents of the affidavit of the applicant and that of Chief Samuel Leposo Kodonyo and the affidavits of her potential witnesses namely Grace Njoki Lesira, John Nelson Tajeu Ole Kerore, Samson Ntikosia Ole Sila, Njawondoi Ole Washua, Esther Wanjiku Gugu and Philomena Wairimo Kahoi. It is his deposition that all these potential witnesses were available and in contact with the objector/applicant at the time her revocation application was being heard. These potential witnesses are either her relatives or persons who were in public administration officers, but she chooses not to call them. These witnesses did not record statements or prepare sworn affidavits, she cannot now claim that her advocate refused to call them or avail them to court. She also cannot claim that the non-calling of these witnesses was the mistake or negligence of her advocate.

16. Furthermore, the respondent has deposed that the documents alluded to by Chief Samuel Leposo Kodonyo are manufactured for purposes of this application. And if they were not manufactured, they were available as at time of filing and hearing of the application for the revocation of the grant, the ruling she now impugns. The respondent has deposed that there was no meeting dated 25/3/1999 referred to by Chief Samuel Leposo Kodonyo, in which resolutions were passed. The copy supplied of the said meeting supplied to his advocate is completely illegible. The advocate of the respondent made a request via e-mail for a clear copy of the meetings and its resolutions, there was no response to the request. The respondent has annexed the request via the said e-mail which is annexed to his affidavit as annex PLOleL1.

17. The respondent has deposed that if ever such a meeting took place and resolutions passed, it would have been the cornerstone of the objector/applicant's application for revocation and its utter absence all those years of litigation bespeaks of much on its provenance. The respondent has also deposed that if there was a record made in 1999, it cannot be new evidence necessitating a review. The alleged record of the meeting is a complete forgery.

THE SUBMISSIONS OF THE PETITIONER/RESPONDENT

18. Messrs P.K. Njuguna, advocates for the respondent cited a number of authorities, among them, *Francis Origo & Another v Jacob Kumali Mungai* in which the Court of Appeal restated the same principles as in *Joginder Auto Service Ltd v Mohammed Shaffique & Another, supra*, except that it added that in the alternative, the applicant must show there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and the applicant must make the application without unreasonable delay.

19. Counsel has submitted that the decision of the court in *Jasbir Singh Rai & 3 Others v Tarlochin Singh Rai & 4 Others, supra*, is distinguishable from the case at hand.

Issues for determination.

20. I have considered the affidavits of the parties. The submissions of their counsel and the authorities they cited. As a result, I find the following to be the issues for determination.

21. Whether the administrator/respondent forged the hand written letter dated 5/8/2004, of chief Samuel Leposo Kodonyo, which was purported to have been written by him.

22. Who bears the costs of this application?

Issue 1

23. It is the affidavit evidence of chief Samuel Leposo Kodonyo, that the hand written letter purported to have been written by him dated 5/8/2004 and bearing his office rubber stamp on the right hand corner and below stamped upside down was used by Peter Lolchoki Letoya to seek, "letters of administration." This letter is a forgery and it went against the will of the deceased. The said letter is marked as annex SLK 6 to his affidavit.

24. In response to the above averment the administrator/respondent has deposed that the documents alluded to by Chief Samuel Leposo Kodonyo are manufactured for purposes of this application. And if they were not manufactured, they were available as at the time of filing and hearing of the application for the revocation of the grant.

25. It is difficult to determine this application without proof that the said letter is a forgery or not.

26. In the circumstances, I am constrained to refer this matter to the Director of Criminal Investigations (DCI) for investigations, because the complaint raises the issue as to whether a criminal offence has been committed or not.

27. The DCI is hereby requested to expedite investigations and forward his findings to this court within a reasonable time preferably not later than six months.

28. The Deputy Registrar of this court is hereby directed to serve this order upon the DCI for his action.

Order signed, dated and delivered at Narok this 27th day of October, 2020 in the presence

J. M. BWONWONG'A.

J U D G E

27/10/2020.