



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 547 OF 2009

IN THE MATTER OF THE ESTATE OF THE PAUL M'MARIA (DECEASED)

MARGARET NAANA MBAE1ST PETITIONER

WILLIAM MURIUNGI 2ND PETITIONER

VS

SILAS MUTHENGI.....1ST APPLICANT

ELIUD GITONGA THURANIRA2ND APPLICANT

RULING

1. The Summons dated 19th January 2018 seeks among other orders review or setting aside of orders made on 19th December 2017. The application is expressed to be brought under **Section 47 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules, Article 165 of the Constitution, Order 42 Rule 6 (1) and Order 45 of the Civil Procedure Rules and all other enabling provisions of the law.**

2. The grounds upon which the application is grounded as set out in the application and the supporting affidavit of Eliud Gitonga Thurania sworn on 19th January 2018 are:-

a. The honorable court failed to appreciate that there is a valid court order in Meru CMCC No. 492 of 2004 in which the Suit Land was transferred to the 2nd respondent/applicant and should be addressed since the petitioners have not challenged the order in their application.

b. That the petitioners have threatened to demolish his business premises standing on the Suit Land, and thus, he will suffer irreparable loss and damage not compensable by way of damages since he has been living on the land for over 12 years and has extensively developed the land by constructing permanent business premises.

3. The request for review was opposed vide the replying affidavit of William Muriungi sworn on 12th February 2018. He deposed that the application is an appeal against the ruling of the court. It is merely cloaked and mischievously disguised as an application for review. To them, the application does not talk about discovery of a new matter of evidence of sufficient importance as to alter the order sought to be reviewed. Again they stated that the application does not seek review on account of a mistake or error on the face of the record. The Petitioners deposed that the applicants conspired to file Meru CMCC No. 492 of 2004 where they colluded to record consents to deal with plot No. 18A Mitunguu Market. Nowhere in the applicants' documents or even Meru CMCC No. 492 of 2014 have they shown that a confirmed grant in respect of the deceased's estate was ever used to give them authority to deal with the deceased's estate. Thus, the application is devoid of merit.

ANALYSIS AND DETERMINATION

4. Review is permitted in the law of succession as **Order 45 Rule 1** of the Civil Procedure Rules is one of the orders which apply to cap 160 by dint of rule 63 of the Probate and Administration Rules. The order stipulates that:

“(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.”

[5] This application is founded inter alia on a claim of discovery of new evidence. The law is that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation. Has the applicant offered such strict proof?

[6] The applicant submitted that the discovery of important matter or evidence is that he has constructed permanent houses on the Suit Land and extensively developed the land and has no other place to call home for over 12 years. By any craft of innovation or stretch of imagination, this cannot be a discovery of new and important evidence in terms of the law. In fact sale of the property in issue was dealt with squarely in the ruling of 19th December, 2017. The sale agreements were also tendered in evidence and evaluated intensely. Therefore, nothing new he has discovered which can found a review. In any event, these proceedings are yet to conclude.

[7] It is instructive that he talks of “valid” orders that were used to transfer the Suit Land to him. The ruling of the court delivered on 19th December 2017 is clear on the transaction herein; sale of immovable property of the deceased before confirmation of grant. And the decision was made in the exercise of jurisdiction of a probate court. I do not wish to say more; the less I say about this application the better for the sake of any appeal that he may file on my ruling.

[8] Accordingly, the application has no merit and I dismiss it.

Dated, signed and delivered in open court this 29th day of January, 2019

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F. GIKONYO

JUDGE

In presence of

Ngugi for respondent

Gikonyo holding brief for Kimathi for petitioners

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F. GIKONYO

JUDGE