



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 500 OF 1997

IN THE MATTER OF THE ESTATE OF THE LATE

KIBOWEN KOMEN (DECEASED)

MICHAEL BOWEN KOMEN.....APPLICANT/BENEDICIARY

VERSUS

PETER KOMEN.....BENEFICIARY/RESPONDENT

SOTE KOMEN.....2ND RESPONDENT

WILLIAM KIPROP KOMEN.....3RD RESPONDENT

RACHEL CHEPNGENO KOMEN.....4TH RESPONDENT

MOHAMMED KOMEN.....5TH RESPONDENT

AND

JACKSON C. CHELIMO1ST INTERESTED PARTY

DAVID CHEPKONGA2ND INTERESTED PARTY

RULING

1. This ruling is in respect of the amended chamber summons dated 6th January, 2016 in which Michael Bowen Komen (applicant) seeks orders;

1. THAT the application filed herewith be certified urgent and be heard in the first instance.

2. Spent.

3. THAT this Honourable Court be pleased to cancel and/or annul the transfer of the suit property namely ZONE 58 KABARNET MUNICIPALITY to one PETER KOMEN and the subsequent sub lease of the suit property to JACKSON CHELIMO CHESANG AND DAVID CHEPKONGA KANDIE.

4. THAT this Honourable Court be pleased to set aside and/or review the judgment of this Honourable Court delivered on 30th July, 2010 in so far as it ordered the distribution of all that parcel of land known as ZONE 58 KABARNET MUNICIPALITY, now known as KABARNET MUNICIPALITY/494 to one PETER KOMEN.

5. THAT costs of this application be provided for.

2. The applicant has based the application on the following grounds;

1. THAT this Honourable Court made a judgment that all that parcel of land known as ZONE 58 KABARNET MUNICIPALITY now KABARNET MUNICIPALITY/494 be distributed to one PETER KOMEN.
2. THAT the learned Judge made a finding that the suit property ZONE 58 KABARNET MUNICIPALITY formed part of the free estate of the deceased despite the fact that the deceased had already instructed the Municipal Council of Kabarnet to transfer the said property to Michael Bowen Kibowen the applicant herein.
3. THAT the said distribution was ordered despite the fact that the said property did not form part of the estate of the deceased as the deceased had already gifted the land during his life time to MICHAEL BOWEN KOMEN, the applicant herein.
4. THAT the learned judge ordered the distribution of the property to the 1st Applicant herein even though she was aware that the property did not form part of the estate of the deceased as evidenced had been tabled before her of all the properties that had already been gifted by the deceased and the suit property was amongst the properties.
5. THAT the said distribution of the suit property was done contrary to the law as the parcel of land did not form part of the estate of the deceased and which had the net effect of denying the applicant herein his legally acquired property, the decision being an error apparent on the face of the record.
6. THAT PETER KOMEN the 1st respondent herein occasioned the transfer of the suit property to himself without the authority of the administrators.
7. THAT the administrators of the estate have not yet signed the requisite document to pave way for the distribution of the estate.
8. THAT the 1st respondent herein is in the process of alienating and/or selling the suit property and if he is not stopped then the applicant herein will suffer irreparable loss and harm.
9. THAT the 1st respondent PETER KOMEN has now sub leased the parcel of land to the interested parties herein and they have plans of demolishing the structures therein.
10. THAT there has been no inordinate delay in bringing this application as the family members/beneficiaries had been engaged in negotiations on agreeing on distribution of assets as had been gifted to them by the deceased before his demise.
11. THAT it is in the interest of justice that this application be allowed.

3. In addition he has sworn a supporting affidavit.

4. The gist of the application as gleaned from the body thereof, the supporting grounds and affidavit is that property known as Zone 58 Kabarnet Municipality was not available for distribution as ordered by court since the deceased had already instructed the Municipal Council of Kabarnet to transfer the said property to the applicant herein.

5. It is the applicant's case that the deceased had before his death bequeathed the property to him. He annexes minutes of Municipal Council meeting giving the approval.

6. The application is opposed and on record are the replying affidavits of Peter Komen (the 1st respondent) and David Chepkonga (2nd interested party).

7. On his part the 1st respondent avers that the application before court is bad in law. He maintains the property belonged to the deceased.

8. The 2nd interested party avers that the 1st respondent showed them a judgment awarding him the property. The records at the Kabarnet Municipal Council showed that the property belonged to the deceased. There was no appeal against the decision by court to award the 1st respondent the property.

9. Based on the judgment, certificate of confirmation of grant, and the interested parties' due diligence, they decided to purchase the property.

10. The application was canvassed by way of written submissions.

11. For determination is whether the applicant has met the necessary threshold in law required to sufficiently move the court to review its orders.

12. At all times an application for review must be distinguished from the exercise of the appellate jurisdiction of court.

13. This court has powers to review its own orders as per the provisions of **Rules 63(1)** of the **Probate and Administration Rules**. That rule provides;

“S. 63. (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in

any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5 rule 2 to 34 and Orders 11,16, 19, 26, 40, 45 and 50 together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.

14. The threshold to be achieved in an application for review under **Order 45** of the **Civil Procedure Act** requires a party to establish that;
- a) There is 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 when the decree was passed or the order made.
 - b) There exists a mistake or error apparent on the face of the record.
 - c) There exists any other sufficient.
 - d) That the application is made without undue delay.
15. The mainstay of the current application is that the property known as Zone 58 Kabarnet Municipality did not belong to the deceased at the time of his death and thus was not free property of the deceased available for distribution.
16. In its determination, the court made a finding that the said property, among others, belonged to the deceased and proceeded to distribute the same to Peter Komen.
17. In essence, the applicant did not agree with the decision of the court. The question then is, whether, aggrieved by the decision of the court, the available avenue for redress was an application for review or an appeal.
18. The applicant chose the route of a review application and it was incumbent on him to demonstrate that he has achieved the threshold for a review.
19. I have carefully looked at the application, the supporting grounds and affidavit as well as the applicant's submissions.
20. There is no indication at all in the entire body of the application of;
- a) There being 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 when the decree was passed or the order made.
 - b) Mistake or error apparent on the face of the record.
 - c) Any other sufficient to warrant review of orders of court.
21. The applicant fails to show that the evidence he is relying on in support that the property did not belong to the deceased is newly discovered and was not within his knowledge even after the exercise of due diligence.
22. The Court of Appeal when addressing the issue of discovery of new evidence as ground for allowing a review application had the occasion to pronounce itself in **ROSA KAIZA vs. ANGELO MPANJU KAIZA [2009] eKLR** where the court quoting from a commentary by **Mulla** on similar provision of the **Indian Civil Procedure Code 15th Edition at page 2726** stated;
- “Application on this ground must be treated with great caution and as required by Rule 4 (2) (b) the court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”**
23. It follows therefore that the current application for review is an attempt to introduce new evidence but which evidence was (if at all it existed) within the knowledge and reach of the applicant when the judgment was made.
24. With the result that the application herein fails to achieve the necessary threshold to warrant the orders sought. The same is dismissed and I make the following orders;
- 1. The application dated 6th January, 2016 is dismissed.**
 - 2. Each party to bear its own costs.**

Dated and Signed at Nakuru this 30th day of July, 2019.

A. K. NDUNG'U

JUDGE