REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 788 OF 2013

IN THE MATTER OF THE ESTATE OF PETER MATALANDALWA YAMBASA ALIAS PETERO MADARANDALWA YAMBASA (DECEASED

RULING

1. I am tasked with determining an application dated 19th March 2018. It seeks review of orders that had been made on 17th July 2017 and 30th August 2017, by having them set aside. The said application is brought at the instance of Ernest Kembu Yambasa, who I shall refer hereafter as the applicant.

2. The grounds upon which the application is founded are set out on its face and in the facts deposed in the affidavit of Ernest Kembu Yambasa. The court had ordered on 17th July 2017 that an application, that was on record, dated 15th October 2013, be dismissed with costs for want of prosecution. The costs were thereafter assessed by the Deputy Registrar at Kshs. 51, 545.00, on 30th August 2017. It is argued that the said orders were made in error. It was pointed out that the application dated 15th October 2013 had been disposed of on 5th November 2013, and the final orders served on the respondent. It is argued that by procuring the orders of 17th July 2017 and 30th August 2017 in the face of the events of 5th November 2013 the respondent had stolen a match over the applicant, and had exercised fraud, by concealing material facts from the court, deliberately misleading the court and procuring the acquiescence of counsel who was not on record in the matter and who had no express instructions from the applicant. It is submitted that there had been no service of the application which led to the orders impugned. It is averred that an appeal was never proffered against the said orders as their existence only came to light after the applicant filed his summons for confirmation of his grant on 17th July 2019. It is urged that the orders by the court on review should result in the record of the court being straightened out.

3. The applicant has attached to his affidavit several documents. There is a copy of an order signed by the Deputy Registrar on 10th April 2018, which purported to capture the order made by the court on 17th July 2017. According to that order, the applicant herein was restrained from interfering with a property described as North/Maragoli/Kegondi/2393, and it dismissed the application dated 15th October 2013 for want of prosecution. There is also a copy of the a certificate of costs dated 30th August 2017 and signed by the Deputy Registrar on 18th April 2018, indicating that costs had been assessed at Kshs. 51, 545.00. There is another order signed by the Deputy Registrar on 15th November 2013, which purported to capture the order of the Judge of 5th November 2013, which had revoked a grant that had been made in Vihiga SRMCSC No. 34 of 2011, and revoked issuance of a title deed in favour of the respondent herein over North Maragaoli/Kegondi/2393, and directed that the registration of the subject property be reverted to the deceased. There is also an affidavit of service, sworn on 19th December 2013, reflecting that an order dated 18th November 2013 had been served on the respondent herein on 2nd December 2013. There is also copy of a grant of letters of administration issued out of this cause on 16th October 2014 in favour of the applicant herein.

4. I have scrupulously ploughed through the papers in the folder before me, and I have not encountered evidence on whether the application dated 19th March 2018 was ever served on those affected by it. I have equally not found any reply, be it by way of grounds of opposition or replying affidavit, by anyone. There is a replying affidavit, sworn by the applicant herein on 3rd December 2018, and filed herein on 17th July 2018, but it is not clear from its contents to which application it is responding to. In any event, it cannot be a reply to the application dated 19th March 2018 as the applicant cannot logically reply to his own application.

5. The application was urged on 18th July 2019. Mr. Shivega, holding brief for Mr. Shifwoka for the applicant, submitted that there was an error on the face of the record. He urged me that the fact that the application was not opposed emphasized the fundamentality of the error. Mr. Chitwa argued that the orders of 17th July 2017 were by consent and that the correct procedure had to be followed to undo the consent. Mr. Shivega submitted that the advocate who handled the matter for the applicant on 17th July 2017 had no instructions to consent.

6. The record before me reflects that on 17th July 2017 the court was informed that the application that was up for hearing in the matter was dated 21st August 2017. It was said to have had been served and was unopposed. The advocate for the applicant in that application asked the

court to allow it in terms of prayer (iii). The advocate who was present in court for the respondent indicated that she needed ten minutes to enable her make a reply to her colleague's plea that the application be allowed as prayed. The file was placed aside for ten minutes. When the court re-convened later, the advocate for the respondent indicated that she did not have any objection to the application dated 21st August 2015. Whereupon the court allowed the said application as prayed. The record of 30th August 2017 reflects that the Deputy Registrar delivered a short ruling on a bill of costs dated 17th July 2017, which had been heard on 17th August 2017. According to the ruling, the costs had been assessed at Kshs. 51, 545.00.

7. Since the orders of 17th July 2017 were pegged on the application dated 21st August 2015, it would be prudent to look at that application. The same had been filed on 7th September 2015, and it sought two principal prayers at (ii) and (iii). Prayer (ii) was for an order to restrain the applicant herein from interfering with North Maragoli/Kegondi/2393, while prayer (iii) was for dismissal of the application dated 15th October 2013 for want of prosecution. It was brought at the instance of Felix Ukunda Selete. A hearing notice for that application was raised, dated 12th April 2017, and was served on the firm of Messrs. EK Owinyi & Co, Advocates by registered post. There is an affidavit of service on record sworn 14th July 2017 and filed on even date. When the matter was placed before the Judge on 17th July 2017, the application was not opposed, for no reply had been filed. It is not clear which party the firm of Messrs. EK Owinyi & Co, Advocates represented, for a notice of change of advocates had been filed on 10th September 2014 by the firm of Messrs. Nyikuli Shifwoka & Company Advocates, dated 9th September 2014. So as at the time the said application was being filed the firm of Messrs. EK Owinyi & Co, Advocates was no longer on record, and the firm properly on record was Messrs. Nyikuli Shifwoka & Company Advocates. There is, therefore, credence in the argument by the applicant that the said application had not been served on him and he was unaware of it and the orders it provoked until he filed his confirmation application. It is also not clear from the record from which law firm Ms. Atieno, who attended court on 17th July 2017 as appearing for the applicant herein, came from.

8. It has been submitted that the application dated 21st August 2015 sought to dismiss, dated 15th October 2013, was no longer pending as at 7th September 2015, when the said application was being filed, for it had been disposed of on 5th November 2013. I have very carefully scoured through the record before me, but I have been unable to find the application dated 15th October 2013, and I cannot say with certainty the orders that had been sought in that application, if at all it existed. What I have seen are copies of an order that the Deputy Registrar signed on 15th November 2013, which reflect that the said application had been placed before Chitembwe J on 5th November 2013, and whose purport I have recited in paragraph 3 here above. There is also copy of an order, attached to an affidavit that Felix Ukunda Selete swore on 21st August 2015, in support of the application dated 21st August 2015, that the Deputy Registrar signed on 24th October 2015, reflecting an order that Dulu J made on 24th October 2015 when an application dated 15th October 2015 was placed before him *ex parte*.

9. The handwritten notes by the Judges suggest that such an application did in fact exist. It was initially placed before Dulu J. on 24th October 2013, under certificate of urgency, and directions were given on its disposal. Mr. Shifwoka visited the court registry on 25th October 2013, to obtain a date for the hearing of the said application, and he was given the 5th November 2013. On 5th November 2013, the matter was listed before Chitembwe J, and the court recorded the following order:

> "The application dated 15th October 2013 is granted as prayed. The certificate of confirmation of grant issued by the Vihiga court in Succession Cause No. 34/2011 is hereby revoked and any titles issued in pursuance of that grant are hereby revoked. The estate to revert to the deceased. The file No. Succession Cause 34/2011 – Vihiga to be brought to this court and consolidated with this file."

10. Clearly, according to the court record, the application dated 15th October 2013 was placed before the judge on 5th November 2013 and was disposed of. It was prosecuted on 5th November 2013 and final orders made. I have not seen any minute in the record to the effect that the orders of 5th November 2013 were ever set aside nor subsequent directions given to effect that the application dated 15th October 2013 was to be heard *inter partes* after 5th November 2013, so as to say that the same was still pending after that date. It would mean, therefore, that the said application was no longer pending as at 7th September 2015 when the application seeking its dismissal for want of prosecution was being lodged in court. The application dated 15th October 2013 was not available for dismissal on 17th July 2017 when the matter was placed before Sitati J. The orders made on 17th July 2017 were in vain. It matters not that they were made by consent. Clearly, there is an error on the face of the record. All the other orders that are purported to draw their legitimacy from it, including the orders of 30th August 2017, were equally in vain.

11. One final thing. It would appear to me that the application dated 21st August 2015 was drawn by an advocate who had not bothered to peruse the court record before making their move on behalf of their clients. To ensure that precious judicial time is not needlessly spent in instances such as the instant one, and to also ensure that parties are not exposed to needless anxiety, it would be prudent for advocates to always peruse court records before they file applications such as that dated 21st August 2015. Advocates are supposed to facilitate court proceedings, not to obfuscate them, as has happened here.

12. The following are my final orders:

a. That I find merit in the application dated 19th March 2018, and I grant it in its entirety;

b. That, as no opposing papers were filed against it, I shall make no orders on costs;

c. That, as there is a pending application for confirmation of grant, dated 31st December 2018, I direct that anyone with any objections to it file their affidavits of protest in the next fourteen (14) days of date hereof;

d That I shall allocate a date for mention of the matter at the delivery of this ruling to confirm filing of protests and to give directions on the disposal of the confirmation application; and

e. That, should any person be aggrieved by the orders that I have made in this ruling, there is leave of twenty-eight (28) for such party to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 31st DAY OF October 2019

W. MUSYOKA

JUDGE