



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO.1021 OF 2014

IN THE MATTER OF THE ESTATE OF OMACH SIMBA ALIAS ERASTO OMACH SIMBA (DECEASED)

BETWEEN

WILLIS ONEKO OPIATA.....APPLICANT

AND

FREDRICK OMONDI WERE.....RESPONDENT

RULING

Introduction

1. By a notice of motion dated 13.6.18 brought under Order 22 rule 5, order 31 rule 1, Order 42 rule 6 and 63, Order 43 rule 1 and 3, Order 45 rules 2 to 5 of the Civil Procedure Act Cap 21 Laws of Kenya, the Applicant prays for orders that

- 1. Applicant be granted leave to appeal the judgment delivered on 29th November, 2018 out of time**
- 2. The judgment be set aside and the objection application be heard afresh given the discovery of new evidence and errors and omissions on the face of the judgment**
- 3. The annexed notice of appeal and the memorandum of appeal be deemed as duly filed and served**
- 4. Costs be provided for**

2. The application is supported by the affidavit sworn by the Applicant on 24th June, 2019. The Applicant raises the following issues:

- i. He requests that the chief registrar of persons be requested to furnish the court with documents that were used by the Appellant, his father and grandfather to acquire their identity cards.**
- ii. Faults the court for issuing an order for revocation of the grant which was not sought for in the application dated 11th May, 2016**
- iii. He objects to the court's finding that the Respondent is a member of deceased's family**
- iv. His name is missing from the list of the children of his mother Pamela Risper Adhiambo**
- v. The chief's letter dated 09.06.14 disinherited deceased's wife Pamela Adhiambo**
- vi. That the Respondent is son of Asere Wera and not Asere Rao as found by the court**
- vii. That deceased did not have a wife by the name Risper**

3. The application is opposed on the basis of an affidavit sworn by the Respondent on 17th July, 2019. He avers that the Applicant's grievances are issues that should be raised on appeal and not by way of review.

4. I have considered the application in the light of the affidavits and the proceedings on record.

5. Order 45 Rule 1 (1) of the Civil Procedure Rules states:

Any person considering himself aggrieved (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.

6. In the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR**, the Court of Appeal stated with regard to review: -

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

7. The applicant's request that the chief registrar of persons be required to furnish the court with documents that were used by the Respondent, his father and grandfather to acquire their identity cards is rejected on two grounds. Firstly, that was not an issue for determination before the court. Secondly, if the applicant was of the view that such information was relevant to his case, he ought to have raised it at the trial and having so failed, I find that it is not a new and important matter or evidence that could not have been produced at the trial.

8. The application before the court was for annulment of the certificate of confirmation of grant issued to the Applicant on 11.05.16. The court issued an order for revocation of that grant. Revocation and annulment mean cancellation and the court's order has the same effect as an order for annulment of the grant.

9. The applicant has a right of appeal if he is aggrieved by the court's finding that the Respondent is a member of deceased's family.

10. I have considered paragraph 5 of the judgment from which the Applicant claims that his name is missing from the list of the children of Pamela Risper Adhiambo. The paragraph contains a summary of the evidence by the Respondent and not the finding of the court. Its therefore not an issue that can be reviewed.

11. The chief's letter dated 09.06.14 which the Applicant claims disinherited deceased's wife Pamela Adhiambo was filed by the Applicant and not by the chief. It listed Risper and not Pamela as a wife of the deceased. If the Applicant is aggrieved by this court's finding that it was imprudent for him to deny the authenticity of the chief's letter he filed in court upon which the grant was confirmed and from which he is a beneficiary, his remedy lies with an appeal and not a review.

12. The Respondent referred to Asere as Asere Rao whereas the Applicant referred to him to Asere Wera. This court has no jurisdiction to review its finding that the Respondent is son of Asere.

13. In the court's judgment delivered on 29.11.18, the Applicant and the Respondent were appointed joint administrators of deceased's estate. The court directed them to apply for confirmation of the grant in accordance with the provisions of the law after ascertaining and determining all persons and their respective beneficial entitlement to the deceased's estate. The administrators are yet to apply for confirmation of the grant and the Applicant's allegation that Pamela Adhiambo has been disinherited is therefore premature.

14. In the end, the notice of motion dated 13.6.18 succeeds only on one issue. THAT:

a. Time to file the Appeal is hereby extended for 14 days from today's date

b. The costs of this application shall abide the outcome of the appeal

DATED, DELIVERED AND SIGNED THIS 24th DAY OF October 2019.

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Applicant - Present in Person

For the respondent - Mr Olel/Mr Odongo