



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 26 OF 2013

IN THE MATTER OF THE ESTATE OF DOMNIC OMORO

OBOTE ALIAS DOMNICUS OMORO OBOTE(DECEASED)

BETWEEN

VICTOR OTIENO MUDHUNE.....APPLICANT

AND

JAMES OTIENO AMOLO.....RESPONDENT

Introduction

JUDGMENT

1. On 02nd May, 2019, this court made the following orders on this file:

- a) Letters of administration issued on 18th June, 2013 to BARRACK MUDHUNE OWEGI, (hereinafter referred to as Original Petitioner) and the Certificate of Confirmation of Grant was issued in his favour on 19th March, 2014 are hereby revoked
- b) Letters of administration shall issue to JAMES OTIENO AMOLO, the Objector/Applicant
- c) The registration dated 10th April, 2014 of BARRACK MUDHUNE OWEGI, (hereinafter referred to as Original Petitioner) as the registered proprietor of Land Parcel No. EAST GEM/ANYIKO/966 is hereby cancelled and restored to the name of the Deceased DOMNIC OMORO OBOTE alias DOMNICUS OMORO OBOTE
- d) Once ownership of Land Parcel No. EAST GEM/ANYIKO/966 has reverted to DOMNIC OMORO OBOTE alias DOMNICUS OMORO OBOTE, the administrator shall be at liberty to apply for confirmation of the grant after ascertaining and determining all persons and their respective beneficial entitlement to the estate
- e) The Petitioner/Respondent is condemned to pay costs to the Objector/Applicant

Application

2. Victor Otieno Mudhune (*Applicant*) by his application dated 11th October, 2019 filed on even date brought under Rule 49 and 73 of the Probate and Administration Rules, Section 80 of the Civil Procedure Act, Order 45 rule 1 and Order 50 Rule 1 seeks the following orders THAT:

- 1) There be a stay of all consequential proceedings emanating from the Decree/Order issued on 13th May, 2019 more particularly the Summons for Confirmation of Certificate of Grant
- 2) This Honourable Court be pleased to review the Decree/Order issued on 13th May, 2019
- 3) Any other order

4) The costs be in the cause

3. The application is based on grounds among others that there is discovery of new evidence.

4. The application is also supported by an affidavit sworn by the Applicant on 11th October, 2018 in which he reiterates the grounds on the face of the application. Annexed to the affidavit are letters marked VOM1 most of which already form part of the court record and reviewed family tree of one Wangwe marked as VOM 2. He avers that from the family tree, one Omoro-Adundo inherited one of Mudhune's wife Catherine Ogola as a result of which Owegi Mudhune allocated land to Omoro Obote his half- brother and that was the basis for his claim.

5. The application is opposed by way of a replying affidavit sworn by the James Otieno Amolo (*Respondent*) on 01st November, 2019 in which he avers that discovery of new evidence that could not have been availed at the hearing has been demonstrated to warrant the orders sought.

Analysis and Determination

6. I have considered the application in the light of the supporting affidavit and the replying affidavit and annexures thereto. I have also considered the submission filed on behalf of both parties.

7. The issue in question is whether the applicant has satisfied the threshold for grant of an order of review. Order 45 of the Civil Procedure Rules which as follows:

1. (1) 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.

8. 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.”

9. At the hearing, both parties agreed that the family tree contained in the letter dated 22nd August, 2011 addressed to the Chairman Land Tribunal Court, Siaya, which had previously adjudicated on the dispute relating to deceased's land, between the Applicant's father and the Respondent herein was a true reflection of the relationship between the deceased and the parties herein.

10. In my judgment, I held that the said family tree expresses that the parties herein are descendants of one Wangwe who had 3 wives. It also illustrates that the Applicant's father is a sixth degree descendant of WANGWE'S first wife MUNGALA whereas the Deceased is a fifth degree descendant of WANGWE'S second wife WAUDI. I further held that the Respondent who together with the deceased are descendants of WANGWE'S second wife WAUDI, has the nearest degree of consanguinity to the deceased as compared to Applicant's father who is a descendant of WANGWE'S first wife MUNGALA.

11. Evidently, the Applicant's averments are at variance with those of his father (Barrack Mudhune) whose claim over deceased's land was on the basis that the deceased had asked him to take care of the land and not on the basis that the deceased was a half-brother of his father.

12. The Applicant has not explained from whom and when he obtained the alleged new evidence that one Omoro-Adundo inherited one of Mudhune's wife Catherine Ogola as a result of which Owegi Mudhune allocated land to Omoro Obote his half-brother. If this indeed was the basis for the claim, and supposing this information to be true, this so weighty a matter no doubt was within his knowledge and that of his father (Barrack Mudhune) and ought to have been produced at the time of the hearing and not this late in the day.

13. From the totality of the material presented before the court, I find that the Applicant has not demonstrated 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 impugned judgment was passed, or some self-evident error or omission on the face of the record, or any other sufficient reason that would entitle him to an order of review.

14. If the applicant is of the view that the court erred in making the impugned orders, then his remedy lies not in seeking a review of the orders but in filing an appeal.

Disposition

15. From the foregoing analysis, I have come to the conclusion that the notice of motion dated 11th October, 2019 filed on even date is devoid of merit and it is dismissed with costs to the Respondent.

DELIVERED AND SIGNED AT KISUMU THIS 19th DAY OF December 2019

T. W. CHERERE

JUDGE

IN THE PRESENCE OF-

Court Assistants - Amondi/Okodoi

For the Applicant - Ms Owino/ Mr Odhiambo

For the Respondent - Mr Njoga/Mr Odeny