



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

FAMILY DIVISION

SUCCESSION CAUSE NO. 759 OF 1994

IN THE MATTER OF THE ESTATE OF OSORE DARAJA SULEIMAN DECEASED

BETWEEN

MWANAISHA MOKOYA.....OBJECTOR (DECEASED)

AND

SHABAN MUSUMBA HAJI.....APPLICANT

VERSUS

KASSIM O. DARAJA.....RESPONDENTS/PETITIONERS

AND

JULIUS LIKAMASIA.....INTERESTED PARTY

RULING NO. 3 ON REVISION.

Introduction

1. By the Notice of motion dated 16/01/2018 , which application is brought under order 45(1) and (2) of the Civil Procedure Rules 2010, Article 159 of the Constitution of Kenya 2010 and all other enabling provisions of the law the applicant herein Shaban Musumba Haji is seeking ORDERS:-

- a) Spent
- b) That the Honourable Court be pleased to review set aside and/or substitute its orders made in the ruling delivered on 19/09/2017 and 13/07/2017.
- c) That pending the hearing and determination of this application the Honourable court be pleased to place a restriction on **LP KAKAMEGA/LUGARI/898** and all titles from the subdivision thereof if any.
- d) That the costs of the application be borne by the interested party.

2. The application is supported by the grounds which appear on its face, the main ground being that there is an error apparent on the face of the record and further that the interested party Julius Lukamasia has illegally registered himself as the proprietor of the suit land and at the same time has commenced the process of removing a caution lodged on the suit premises with the sole purpose of secretly selling the property so as to defeat the course of justice.

3. The application is also supported by the applicant's affidavit sworn on 16/01/2018. At paragraph 5 of the said affidavit, the applicant depones that he registered a caution on the said land during the pendency of these proceedings but that by a notice dated 05/01/2018 from the land Registrar Kakamega, the interested party wants the caution removed. The deponent also avers that there is a dichotomy between the rulings of this court dated 28/07/2016 and 13/07/2017 hence this application.

Response to the Application

4. The replying affidavit by the interested party was dated 13/02/2018 though it is indicated it was filed on 12/02/2018. The interested Party contends that the application is res judicata, the matter having already been heard and determined. He prays that the application be dismissed.

Submissions

5. The application was canvassed orally in court. Counsel for the applicant submitted that the error on record occurred when by the rulings dated 13/07/2017 and 19/09/2017, the court contradicted its earlier Judgment dated 28/07/2016 which judgment clearly affirmed the confirmation of the grant in favour of the respondents. It was also submitted that the interested party would suffer no prejudice since by the judgment of 28/07/2016, his protest was dismissed.

6. The interested party wholly adopted his replying affidavit as his response to the application.

Analysis and Determination

7. I have now carefully considered the noted application, the submissions and all the previous rulings and Judgment in this matter. The only issue that arises for determination is whether the applicant has met the conditions for review of the rulings of 13/07/2017 and 19/09/2017.

8. Order 45 of the Civil Procedure Rules, 2010 and in particular Rule 1(1) and 1(2) thereof provide as follows:-

“Rule 1(1) - Any person considering himself aggrieved-

(a) by a decree or order from which on 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 the Judgment to the court which passed the decree or made the order without unreasonable delay.”

9. From the record I note that there is clearly an error apparent on the face of the record. I will proceed to show how the error arose. By the ruling of Chitembwe J dated 07/02/2013 the learned Judge stated that *“ Though the interested party could have a valid claim over the deceased’s estate I do find that he used an illegal process to obtain title to part of the estate . The adage that the end justifies the means could not apply when the means used are illegal.”* Having said the above Justice Chitembwe allowed the application dated 15/08/2012 in terms of prayers (b)(c) and (d):-

(b) That the applicant be substituted with Mwanaisha Mukoya Daraja (now deceased) as the administrator, and that the interested party herein Julius Lukamasia be enjoined as a party in these proceedings.

(c) That pending the hearing and determination of this application interparties the court be pleased to temporarily restrain the interested party from evicting and/or in any way dealing with **L.P Kakamega /Lugari/898** and any other parcels of land resultant of the subdivision.

(d). that preservatory orders be issued preserving the estate in these proceedings until further orders of this court are made.

10. In the same ruling of 07/02/2013, Chitembwe J said that *“the respondent, if in occupation, shall continue to occupy part of plot number 898 Lugari . A fresh grant to be issued to the applicant who shall thereafter make an application to have the grant confirmed. The application for confirmation of the grant to be served upon the respondents Kassim Daraja and Abdalla Daraja or any of their beneficiaries.”*

11. On 27/02/2013, afresh grant, from P &A 41 was issued to Shaban Musumba Haji in compliance with the ruling by Chitembwe J made on 07/02/2013. Subsequently, the applicant filed the summons dated 23/06/2015 for confirmation of grant. The summons was filed on 02/07/2015. Before the summons could be heard, the interested party filed a protest. That protest was the subject of this court’s Judgment dated 28/07/2016. Part of the Judgment read as follows:-

“ 10. In conclusion therefore the court will not interfere with the Petitioners’ proposal on the mode of distribution of the deceased’s estate. The court finds that the interested party has no claims whatsoever against the estate of the deceased and his protest is dismissed with costs. The confirmation is allowed as presented”.

12. Subsequent to the said judgment the applicant filed a Notice of Motion, as directed by the court on 08/09/2016 seeking among other orders , cancellation of all titles resultant out of the subdivision of **LP Kakamega/Lugari/898** so that it would revert to as original title in the name of the deceased to facilitate distribution. For reasons given in the body of the ruling (which in my view were misplaced), the application was dismissed. Upon dismissal of that application, the applicant made an oral application seeking review of the orders made on 13/07/2017. The application for review was declined, again for reasons which on further perusal of the record were misplaced. The ruling on the application for review was delivered on 19/09/2017. Thereafter, the applicant filed the instant application.

Conclusion

On a careful analysis of the record, I am satisfied that there was an error apparent on the face of the record of this court’s rulings delivered on

28/07/2017 and 19/09/2017. That being the case, I now make the following order:-

- 1). The ruling dated 13/07/2017 is reviewed to the extent that the order dismissing the application dated 12/10/2016 be and is hereby set aside and in its stead, an order do and is hereby issued allowing the said application in terms of prayer (c) thereof .
- 2). The ruling dated 19/09/2017 is reviewed to the extent that the finding that there was no error apparent on the face of this court's ruling dated 13/07/2017 be and is hereby set aside and in its place an order do and is hereby issued in terms of (1) above.
- 3). Each party shall bear its own costs

Orders accordingly.

Ruling delivered, dated and signed in open court on this 22nd day of March, 2018.

R.N. SITATI

JUDGE

In the presence of

...Mr. Shivega for Ondieki.....for Applicant

...M/S Kiveu - absent.....for Respondent

.....Polycap.....Court Assistant.