

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 202 OF 1990

IN THE MATTER OF THE ESTATE OF CHEGE KIRUMBA (DECEASED)

RULING

1. On 7th November 2017, the parties hereto caused the instant matter to be fixed for mention before me for directions on 30th January 2018. I had on 29th September 2017 directed the Deputy Registrar to call for the court file in Nairobi CMCCC No. 1795 of 1995 for my perusal as the orders made in that matter have a bearing on the proceedings that are pending determination herein.
2. The record before me indicates that the Deputy Registrar wrote to the Nairobi Chief Magistrate's Court on 5th October 2017 and 23rd January 2018 calling for the court file in Nairobi CMCCC No. 1795 of 1995. The lower court's file has not been availed to date and no explanation has been proffered, yet a copy of a ruling delivered in that matter on 10th January 2018 has been placed on record herein indicating that the lower court file is still active.
3. It transpired that the matter in Nairobi CMCCC No. 1795 of 1995 had been dismissed for non-prosecution and the ruling of 18th January 2018 declined its reinstatement. The mention of 30th January 2018 was to persuade me to rule on the application dated 4th May 2017 to review my orders 25th November 2016 in view of the ruling in Nairobi CMCCC No. 1795 of 1995 of 18th January 2018. That would have meant that I forgo the need to peruse the original record in Nairobi CMCCC No. 1795 of 1995. I acceded to that request and fixed the application dated 4th May 2017 for ruling.
4. I note that Daniel Wakigo has, in his reply to the review application, attached typed copies of the proceedings in Nairobi CMCCC No. 1795 of 1995. I have perused through them. The matter proceeded on 5th January 1996, when Daniel Wakigo gave evidence. Judgment was delivered on 23rd January 1996 in his favour. The said judgment was reviewed on 6th June 1996 on an application by Daniel Wakigo dated 29th March 1996. It would appear that an application was filed for setting aside of the judgment. The record refers to an application dated 16th June 1996 and another dated 20th June 1996. The application dated 16th June 1996 was allowed by consent on 2nd December 1996. The record is silent on the fate of the application dated 20th June 1996. It is not clear whether such application exists or not, and it is not clear whether which of the two sought setting aside of the judgment. It is not clear what the application dated 16th June 1996 was about. Copies of the pleadings and the applications have not been exhibited, and the court can only have clarity on these matters if it had the original file in Nairobi CMCCC No. 1795 of 1995.
5. I must state though that what I presuppose from the typed proceedings is that the parties consented to the setting aside of the judgment of 23rd January 1996 as reviewed on 6th June 1996, for both sides appear from the record to be seeking to have their witnesses heard on divers dates. Daniel Wakigo himself concedes in his reply to the instant application that there was such setting aside but he was misled to believe that the judgment was still intact.
6. If it is indeed true that the judgment dated 23rd January 1996 was set aside by the consent order of 2nd December 1996, then if any transfers had been done in favour of Daniel Wakigo on the basis of that judgment the same ought to be reversed. Indeed, they ought to have been reversed immediately after the recording of the said consent.
7. I am persuaded that the orders made on 25th November 2016 ought to be reviewed in terms of prayers (a) and (b) of the application dated 4th May 2017.
8. The applicants also seek orders against Daniel Wakigo and the Public Trustee relating to intermeddling and contempt of court. It is clear to me that Daniel Wakigo and the Public Trustee were party to Nairobi CMCCC No. 1795 of 1995. They had access to information on the goings on in that matter, including the setting aside of the judgment of 23rd January 1996. Yet when this court was faced with the applications the subject of the ruling of 25th November 2016 both of them chose not to bring to the attention of the court the fact that the said judgment had been set aside, instead they misled the court into believing that the judgment was still enforceable and that it was on the basis of it that the assets were transferred to the name of Daniel Wakigo. The transfers were done after the setting aside of the judgment. The conduct of Daniel Wakigo and the Public Trustee is clearly deplorable. It exposes both of them as dishonest and devious persons who would not shy from withholding information from the court for their own benefit.
9. Can it be said that the two of them intermeddled with estate property? At that time the Public Trustee held the grant of letters of administration intestate over the estate. The property vested in her as such and she could deal with it as the owner would have. This is the purport of section 79 of the Law of Succession Act, Cap 160, Laws of Kenya. That being the case, the Public Trustee had authority to handle the property at the time, and cannot therefore be said to have violated section 45 of the Act. Daniel Wakigo claims to have purchased the property from the deceased and to have held a judgment in his favour which allowed him to cause the same to be subdivided and transferred to his name. He was represented by counsel in both proceedings and it is not clear to me the extent to which he might have been misled by those advising him. He was not just an intruder but a person who had laid stake to a portion of the estate, and went to the extent of filing suit against the estate in pursuit of that stake. That did not give him authority to take possession, and I have not been told that he took possession. What I read is that he caused subdivisions, but apparently founded on some legal process that was faulty and upon which he relied on advice.

I would give him benefit of the doubt.

10. Should the two be cited for contempt of court? The law on this is quite clear. Civil contempt is quasi-criminal. Before a person is cited there must be due process. The applicants herein ought to follow the process allowed in law so that the two can deal with the issues specifically rather than through an application for review.

11. In the end, I shall allow the application herein dated 4th May 2017 in the terms of prayers (a) and (b) thereof.

DATED, SIGNED and DELIVERED at NAIROBI this 14TH DAY OF JUNE, 2018.

W. MUSYOKA

JUDGE