



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

P&A CASE NO. 323 OF 1999

IN THE ESTATE OF TIMOTHY MULEI KITONGA (DECEASED)

PHILIP KITONGA MULEI

JOHN MUTINDA MULEI.....ADMINSTRATORS/RESPONDENTS

CAROL MWENDE MULEI

VERSUS

JUSTUS MUSYOKI MANGUI.....APPLICNT/OBJECTOR

RULING

1. The Objector/Applicant herein has filed an Application dated 12/5/2017 seeking the following prayers namely:-

(i) (spent)

(ii) That the court do review and set aside the order made on 20/3/2017 dismissing the Application dated 27/10/2016.

(iii) That the court do reinstate the Application dated 27/10/2016 for hearing and determination on merit.

(iv) Costs of the Application be provided for.

2. The Application is supported by the grounds on the face thereof and on the affidavit of the Applicant sworn on even date.

3. The Applicant's case is that he had purchased parcel Number **Machakos Town Block 3/624** from Charles Muli Mulei who is a beneficiary of the estate therein vide a sale agreement dated 25/7/2011 on the strength of a confirmed grant issued on 4/12/2008 by Justice Isaac Lenaola. It was further the Applicant's case that the Administrators later sought rectification of grant secretly which was granted on 3/2/2012 in which the property that had been purchased by Applicant was taken over by a different beneficiary and this forced the Applicant to file the Application dated 27/10/2016 which was dismissed on 20/3/2017 on grounds that the purchase was illegal for lack of confirmed grant. The Applicant maintains that there was an error because already there was a confirmed grant at the time of purchase and which did not come to the attention of the court as a copy of the same had not been annexed to the said Application. It was the Applicant's case that had the court perused the court file, it could have seen the confirmed grant. It is the Applicant's view that the administrators had used the rectified grant to defraud him and that once the Application is reinstated the Applicant shall seek leave to file further affidavit showing that the grant sought to be revoked is the rectified one dated 3/2/2012 but not the earlier one dated 4/12/2008. Finally, it was the Applicant's case that Application for review has merit and should be allowed as there will be no prejudice occasioned to the Respondents.

4. The Respondents did not file any response to the Applicant's Application aforesaid and it would thus appear that the Application is unopposed.

5. I have considered the Applicant's Application as well as the Affidavit and annexures in support thereof. The issue for determination is whether or not the Applicant has furnished sufficient reasons to warrant an order of review of the orders made on the 20/03/2017.

To start with, it is noted that Applicant's Application is premised under Section 47 of the Law of Succession Act and more particularly Order 45 Rule 1 and 2 of the Civil Procedure Rules. The said Order 45 Rule 1 of the Civil Procedure Rules provides as follows:

Any person considering himself aggrieved-

(a) by a decree or order from which an 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 reasons, desires to obtain a review of the decree or order may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.”

The order of dismissal was made on the 20/3/2017 and the present Application lodged after about 33 days. I find the said period was not that inordinate and I find it to be reasonable in the circumstances. Hence the Application for review was filed without unreasonable delay.

The next crucial issue is whether the Applicant has given sufficient reasons to warrant an order for review. The Applicant vide the grounds and affidavit in support of the Application has clearly shown that at the time the court dealt with his application dated 27/10/2016, there was indeed a confirmed grant as well as a rectified certificate of confirmation of grant. I have perused the record and note that a grant in this matter had been confirmed and issued on 4/12/2008 and which was later rectified on the 3/2/2012. The Applicant had indeed entered into a sale agreement over one of the properties that had been distributed to one of the beneficiaries namely Charles Muli Mulei and the property was **Machakos Town Block 3/624**. The sale agreement is dated 25/7/2011 long after the grant had been confirmed on 4/12/2008. It seems the Administrators later sought to have the grant rectified and in the process had the Applicant's property redistributed to another beneficiary and this was done without the knowledge of the Applicant. Indeed the Administrators were under obligation to ensure that any changes and or rectification of the grant affecting the shares of the beneficiaries was communicated to the Applicant herein or any other interested parties so as to enable them make representation. At the time of the rectification in the year 2012, the Applicant had already purchased the property from the beneficiary on the strength of the confirmed grant. It would appear to me that the Administrators together with the concerned beneficiary were working in cahoots behind the Applicant with a view to dislodging his legitimate interest on the land he had lawfully purchased. This can be explained by the fact that the Administrators and the concerned beneficiary deliberately failed to respond to the Applicant's Application dated 27/10/2016 seeking for revocation of the confirmed grant issued on 4/12/2008 and rectified on 3/2/2012. I find that had the court been made aware of the existence of the said confirmed grant, then it would not have dismissed the Applicant's Application dated 27/10/2016. This is so because the Law of Succession Act protects the sanctity of any sale or transfer of property belonging to a deceased person either by an administrator or beneficiary on the strength of a confirmed grant unless there is evidence of fraud or misrepresentation. see Section 93 of the Law of Succession Act. The Applicant has clearly shown that there has been discovery of new and important matter of evidence which after exercise of due diligence was not within his knowledge at the time the order of dismissal was made.

This court being a court of equity cannot shut out the Applicant from being given an opportunity to ventilate his case against the administrators and the concerned beneficiary. I find the Applicant stands to suffer greater harm if the dismissed Application is not reinstated. The Respondents will not suffer any prejudice if the Application is reinstated as they shall have the opportunity to respond thereto and the court would then determine it on the merits. I also note that the Applicants Application dated 12/05/2017 has not been opposed by the Respondents.

6. In the result, it is the finding of this Court that the Applicant's Application dated 12/05/2017 has merit. The same is allowed as prayed in terms of **prayers 2 and 3** thereof. The Applicant is now directed to set down his Application dated 27/10/2016 for hearing on priority basis. I make no order as to costs.

Orders accordingly.

Dated and delivered at Machakos this 23rd day of **October**, 2018.

D.K. KEMEI

JUDGE