



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.199 OF 2008

IN THE MATTER OF THE ESTATE OF SIMEON MUUTU MUTISYA – DECEASED

JULIUS KALOKI MUUTU

MATTHEW MUTINDA MUUTU

SOLOMON KISOO MUUTU.....APPLICANTS/BENEFICIARIES

VRS

SAMMY MWANZIA MUUTU

HENRY MUTISYA MUUTU.....JOINT ADMINISTRATORS /RESPONDENTS

RULING

BACKGROUND

1. This matter relates to the estate of Simeon Muutu Mutisya who died intestate on the 3rd October 2004. An application for grant of letters of administration intestate was made by Mwanzia Muutu and Henry Mutisya Muutu on 17th April 2008. The grant was issued on 21st January, 2011 and confirmed on 4th April, 2011. The said grant was revoked vide an order given on 12th June, 2013 pursuant to the application by the applicants herein. In addition, the grant was also revoked on 10th July, 2015 under Section 76(d)(i) of the Succession Act by the court on its own motion due to failure to prosecute the matter.

THE APPLICATION

2. The applicants have now approached the court vide application filed on 15th November, 2017 seeking the setting aside of the order dated 10th July, 2015, the reiteration of the revocation dated 13th June, 2013, the revocation of the transfer of DONYO SABUK/ KOMAROCK 1/8268 to the respondents and that the respondents show cause why they should not be cited for contempt. The application, which is dated 3rd November, 2017 and supported by an affidavit sworn by one of the applicants, is expressed to be brought under the provisions of *inter alia*, Rule 44 (1) and section 76 of the Law of Succession Act and to be based on the following grounds:

- a. The respondents obtained the grant clandestinely without reference to the applicants herein.**
- b. That failure to disclose material facts renders the grant issued a nullity in law**
- c. That the grant was revoked on the 13th June, 2013**
- d. That despite the revocation, the respondents transferred to their names and proceeded to subdivide the said property in total disregard of the orders of this Honorable Court.**
- e. That unless the orders sought are granted, the applicants herein shall suffer irreparable harm and injury to their beneficial interests**
- f. That it is in the interests of justice that the orders sought be granted**
- g. That the respondents herein shall suffer no prejudice.**

3. In his affidavits in support of the application, the applicant avers that the grant that was issued to the respondents is yet to be confirmed. He further avers that the grant was later revoked and has attached a copy of the said order dated 13th June, 2013. It is also his contention that the respondents have gone ahead to sell some portions of land as they lack capacity to do so. Specifically, he contends that on 22nd February, 2016, the respondent transferred DONYO SABUK/ KOMAROCK 1/8268 to himself and has attached a copy of the search certificate dated 3rd November, 2017 is annexed and marked JKM3. The applicant avers that this matter was dismissed vide orders dated 10th July, 2015 [and in effect the grant was revoked *in suo moto*], further that the court had earlier revoked the grant vide orders dated 13th June, 2013. He seeks that the orders dated 10th July, 2015 be set aside and the orders dated 13th June, 2013 be reinstated.

4. Finally, it is his averment that court annul the transfer of DONYO SABUK/ KOMAROCK 1/8268 and the respondents be cited for contempt of court.

5. In submissions made on his behalf by his Counsel, Kubai Musyoka & Co Advocates, the applicant argues that the transfer of DONYO SABUK/ KOMAROCK 1/8268 by the respondents was in disregard of the orders of this court and it denies the beneficiaries their beneficial interests in the said property.

THE RESPONSE

6. The application is opposed. The respondent, Sammy Mwanzia Muutu, filed affidavits in reply which he swore on 16th January, 2018 and 23rd February 2018. In his affidavit, the respondent avers that this is one of the several applications to delay the expeditious finalization of this matter.

7. According to the respondent, the applicant has brought this application in bad faith and not with clean hands, for he has occasioned and participated in sale transactions on DONYO SABUK/ KOMAROCK/MATUNGULU/ BLOCK 1/203 that was registered in the names of the deceased. A copy of the sale agreement dated 20th November, 2013 is attached and marked SMM1. The respondent states that the applicant is part and parcel of the acts that he complains of. The respondent has attached copies of sale agreements dated 4th June, 2012 and 25th June, 2015 to demonstrate that the applicants were involved in sale of part of the land they are complaining about.

8. In submissions made on their behalf by their Counsel, Muchangi Nduati & Co Advocates, the respondents argued that the applicants have not followed the procedure for institution of contempt of court proceedings for no leave has been sought. They rely on the case of **Joseph Peter Gichoya Mbogo c/o Stephen Macharia Kimani Adv v Patrick Dennis O' Keeefee & Another (2006) eKLR**

9. According to the respondents, the orders that the applicants rely upon were made ex-parte and none of the orders were served on the respondents personally.

10. It was further submitted on behalf of the respondents that as at the date of transfer of DONYO SABUK/ KOMAROCK 1/8268 which was a subdivision of the main parcel DONYO SABUK/ KOMAROCK 1/2013 there were no encumbrances and the same was not comprised in the assets of the deceased. Learned counsel has attached a copy of the order in HCC 7 of 2012 where the caveat on the said DONYO SABUK/ KOMAROCK 1/8268 was lifted and the court ordered registration of titles for portions of land sold to 3rd parties by the deceased before his demise.

11. Learned Counsel further submitted on behalf of the respondents that the court *in suo moto* had closed this matter vide its orders dated 10th July, 2015 and thus the court has no jurisdiction to make the orders sought if the matter has not been reopened.

ANALYSIS

12. I have considered the application before me and the affidavit in support and opposition thereto as well as the annexures thereto. I have also considered the submissions of the parties as presented by their respective Counsel. I have also read the record of the court and the proceedings prior to the orders now sought to be revoked. The issues to be addressed are firstly, whether this court has jurisdiction to grant the orders sought; secondly, whether the applicant has followed the procedure in application for contempt and who is entitled to costs.

13. I begin by considering the fate of the court in light of a matter that has been dismissed in *suo moto*, without an order to the contrary. The guiding principles to all courts is that where it is found that it lacks jurisdiction to hear and determine the suit, then the suit would be deemed a nullity as per the decision of Nyarangi J A in the case of **OWNERS OF MOTOR VESSEL "LILIAN S" VS CALTEX OIL (K) LTD [1989] KLR 1** that:-

“Jurisdiction is everything without which a court of law has no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction.”

14. The court record shows that the grant of letters of administration intestate dismissed for want of prosecution on 10th July, 2015. There is neither application on record nor order for reinstatement or review or setting aside the said orders, save for the innuendo in the one sentence in the instant application. Counsel for the applicant is aware of the procedure for application for setting aside the orders of court as provided for under the Civil Procedure Act and Rules and ought to have sought the said remedy in a separate application before bringing the instant application; at worst in the lesser evil of lumping up all the remedies in one application, ought to have demonstrated in the supporting affidavit why the court ought to set aside the orders issued on 10th July, 2015. While the applicant has quoted Section 1A and 3A of the Civil Procedure Act, I have not been able to find, either in his affidavit or the submissions made on his behalf, any substantiation of those grounds that warrant the setting aside of the orders issued on 10th July, 2015 since the applicant has not offered any explanation about the delay to prosecute the matter.

15. This being the case, the court orders issued on 10th July, 2015 are in force until set aside. In the case of **Republic v Principal Secretary, Ministry of Defence Ex-Parte George Kariuki Waithaka [2018] eKLR** , Judge Odunga stated that when a Court order is made in a suit the same is valid unless set aside on review or on appeal. In that regard I agree with the respondent's counsel who submitted that the court cannot disturb a matter that has already been put to rest.

16. After making the above observation, it is needless to delve into the issue of contempt of court.

DETERMINATION

17. Having considered the totality of the material before me, I am unable to find any merit in the application. The applicants have not demonstrated that they are entitled to the orders sought. What appears to be the case is that the applicants and the respondents are in a superiority match and unfortunately seek to use the court as the boxing ring which cannot be countenanced. The application is an abuse of the court process.

18. In the circumstances, in view of the matters set out above, I find that the application before me is unmerited, and it is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, Delivered and Signed at Machakos this 18th day of December, 2018.

D.K. KEMEI

JUDGE