



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 452 OF 2008

IN THE MATTER OF THE ESTATE OF DANSON PAUL MBOLE – DECEASED

BENEDICTA NDUNGE MBOLE.....PETITIONER/RESPONDENT

VERSUS

CHRISTOPHER MUSYOKA MUSAU.....OBJECTOR/APPLICANT

RULING OF THE COURT

The application

1. By Chamber Summons application dated **9th May, 2016** and filed herein on **10th May, 2011** pursuant to **Section 47** of the **Law of Succession Act and Rules 44, 63 and 73** of the **Probate and Administration Rules**, the Objector pray for an Order that this Court's Ruling dated **16th April, 2015** be reviewed to the extent that this court makes a conclusive finding on the Objector's protest herein without referring the matter to the Petitioner/Respondent, and that the costs of this application be provided for.

2. The application is supported by the Objector's affidavit sworn on 9th May, 2016. The Objector's case is that by an application (*Notice of Motion*) dated 21st May, 2009, the Petitioner/Respondent sought to have the Grant of Letters of Administration Intestate issued to her on 13th October, 2008 confirmed. The Objector filed an affidavit of Protest against the Confirmation of Grant. The Protest was heard and on 16th April, 2015 the court delivered its Ruling. The Petitioner/Respondent filed a Notice of Appeal, but never filed any appeal. In the said ruling, the Objector/Applicant alleges that the court made the following proper finding, *inter alia* that the subject land, **Machakos Town Block 1/303** is registered in the name of the deceased, and that on a balance of probability, the applicant had demonstrated that a sale agreement was made between himself and the deceased on the aforesaid land (**No. Machakos Town Block 1/303**) where upon the agreed purchase price of Kshs. 50,000 was paid by the applicant to the deceased; that the sale agreement was not disputed, and was admitted in evidence by consent; that the deceased had handed over the original certificate of Lease on the aforesaid land to the applicant, a copy whereof was admitted in evidence by consent; that consent to transfer the said land to applicant was given vide a letter dated 29th May, 1991 (*by the Municipal Council of Machakos*); that the transfer was not effected, and that the applicant consequently lodged a caution against the said land title on 2nd December, 1991 declaring a purchaser's interest; that the applicant filed a civil suit against the deceased, but which had not been heard as at the time of the deceased's demise, that the petitioner failed to pursue the aforesaid cause of action that survived the deceased under **section 82(a) of the Law of Succession Act**, and that it is more than one (1) year since the deceased's demise, and that the applicant had established a good claim over the aforesaid property.

3. The Objector believes that there is an error apparent on the face of the record, this court, having made the above candid findings based on the evidence on record, failed to make a conclusive finding on the Protest herein. The applicant's case is that the protest herein was filed because the petitioner/respondent was not willing to transfer the aforesaid property to the applicant, and she cannot, therefore, be expected to be the one to consider and make a decision in the protest herein. Since a full hearing was conducted on the protest, it is only fair and in the interest of justice that this court makes a conclusive and binding finding thereon. It was submitted that this court, by directions in its said Ruling that the matter be mentioned in six (6) months for further orders, clearly appreciates that it is yet to make conclusive orders on the protest herein. The applicant is therefore asking this court to review its said Ruling to the extent that it makes conclusive and binding orders on the protest, based on the evidence on record and the findings made by this Court thereon.

The Response

4. The application is opposed by the Respondent/Petitioner vide a Replying Affidavit sworn on 3rd October, 2016. The Respondent's case is that the "*Chamber Summons*" application is neither dated nor signed. The same is frivolous, vexatious and an abuse of court process. The respondent's case is that the said application violates provisions of the Advocate's act as it is not signed and not dated and should be struck out. Further, the applicant does not meet threshold required for a review of a court's ruling. In any event, the respondent's case is that there is no error apparent on the record of the court thus nothing to review, neither has the applicant proved that he has any new evidence.

5. The respondent's case is that the court under paragraph 15 of its ruling dated 16th April, 2015 stated that the issue raised by the Objector/Applicant can only be determined by a civil court and the applicant should thus have moved a civil court but not to file the present application. Further, the respondent stated that the Objector had filed a suit against the deceased but withdrew it. The case was Machakos HCCC NO. 160 of 1999. Again the Objector sued the deceased in Machakos HCCC No. 115 of 2003 over the same subject matter and the deceased categorically denied having sold the land. The respondent stated that the deceased died on the 30th October, 2007 and he petitioned for the Letters of Administration on 23rd July, 2008 yet the Objector did not cite the applicant to be enjoined as a party in the civil proceedings. Further, the Objector did not bother to follow the procedures required to enjoin estate of a deceased Defendant because he knew that the allegations were based on falsehood. The respondent's case is that the court referred the matter to him for consideration and after considering the same, he prays that both the application and protest be dismissed with costs as the same are not substantiated and are made in bad faith and the Objector/Applicant be advised to move the Civil Court so that proper evidence through civil process can be taken to enable the estate prove that no land was sold to the Objector.

Submissions

6. Parties made oral submissions in court which I have considered together with the application. Mrs. Nzei, counsel for the Objector/Applicant submitted that the court made a ruling but did not make a conclusive finding on the Protest, but instead returned the matter to the Petitioner to determine and to come to court after six(6) months. **Mrs. Nzei** submitted that under **rule 63(1)** of the **Probate and Administration Rules** this court has the power to review the said ruling.

7. On his part **Mr. Nthiwa** counsel for the Petitioner/Respondent submitted that this court vide the aforesaid ruling made it clear that issues of ownership of the said land was to be pursued in a Civil Court. Counsel submitted that this court is not the Civil Court which the judge had in mind.

Determination

I have considered the application. In my view the issues for determination are these;

- i. Whether there is an error apparent on the face of the record of the ruling delivered by this court on 16th April, 2015.*

ii. *Whether this court is the court the judge in above ruling had in mind.*

iii. *Whether the Grant should be confirmed.*

9. On the first issue, as to whether there is an error on the face of the record, this court sees none. It is always difficult for a judge who had not rendered a decision required to be reviewed, to render a ruling on an application for review, because being a human being, the judge cannot purport to clearly know what was in the mind of the judge making the ruling to be reviewed. However, in this matter, I see a judge who upon evaluating the evidence before her, finds that the Protester has a case, yet, the determination of that case does not lie with her, but lies with another court. The judge, desiring to do what is just, pleads with the Petitioner's sense of justice. In effect, the judge directs the Petitioner to reconsider the issue in light of the evidence before her court. The judge was always conscious of her limitation concerning a matter that was in another court, and that is why she pleaded with the Petitioner. If she had her way, she could have made an express and absolute finding. So, it is the finding of this court that the directions by the judge were not made in error, but were consciously and deliberately made. The directions that the matter was to be mentioned in six (6) months time did not mean that the judge would then, make a conclusive finding and allow the Protest. The mention would first enable the judge to know whether the Petitioner had reconsidered the issue. In other words, the judge was pleading with the Petitioner to do justice to the Objector. However, the judge was at all time aware of her legal limitations. It is the finding of this court that there was no error on the face of the record which can be corrected by this court through a review process in this application.

10. The second issue is whether this court is the court the judge had in mind. The judge clearly stated that the issue of ownership of the suit property would be determined in a civil court. However, **Mrs. Nzei** submitted that the suit in the said Civil Court having abated, this court should then determine the issue of ownership based on the evidence on the Protest application. In my view, this would not be proper. The rules of evidence required to prove ownership of land can be quite laborious, and land issues are so seriously contested that this court cannot purport to resolve them through an application of Protest. Even Justice Mutende was clearly aware of this fact. That notwithstanding, the attention of this court has been drawn to paragraphs 5 and 6 of the Replying Affidavit of the Petitioner in which she states that the Objectors had filed two suits being Machakos HCCC No. 160 of 1996 and Machakos CMCC NO. 115 of 2003 in respect of the ownership of the disputed property. With regard to HCCC. No. 160 of 1999 the Petitioner attached "BN3" being a notice of withdrawal of the said suit by the Objector/Applicant. That suit was withdrawn with costs to the defendant (deceased herein). Those costs assessed at Shs. 52,865 were never paid by the Objector, who in 2003 filed the suit No. 115 of 2003 on the same subject matter. The Petitioner annexed "BN4" being a copy of a defence filed by the deceased denying the claim.

11. The above shows clearly that the issue of ownership of the suit property is so seriously contested. So, in my view, the ownership of the suit property must be determined in an appropriate and suitable legal forum with the authority to make appropriate adjudication.

12. This leads me to issue number three as to whether the Grant herein should be confirmed. In this regard, I still agree with Hon. Lady Justice Mutende that the Objector has established a claim which must be determined first before the Grant herein can be confirmed and distributed. But, because the suit in the civil court has abated the Objector must have the forum to ventilate his claim. In this regard, it is the view of this court that the Grant can be confirmed, subject to the suit plot being vested in the Petitioner, to hold in trust pending the determination of the ownership of the suit property. In that regard therefore, the Objector would be at liberty granted by this court to institute fresh proceedings against the Petitioner for the ownership of the suit property.

13. In the upshot, I disallow the application and make further orders as follows:

a. The Grant herein may be confirmed.

b. Property Machakos Town Block 1/303 be distributed to the Petitioner who SHALL hold the same in trust pending the outcome of a Civil Suit to be filed to determine the ownership thereof.

c. The Objector is hereby given the liberty to institute legal proceedings for the determination of ownership of L.R. No. Machakos Town Block 1/303 notwithstanding the existence of any legal technicalities including time bar or such issues. The suit shall be against the petitioner who shall be holding the above property in trust for the person whom the court shall find owns the property.

d. Costs herein shall be in the cause.

Orders accordingly.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 23RD DAY OF FEBRUARY, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Mutuku – for Mrs. Nzei for Applicant

Mumbi – for Nthiwa for Petitioner