



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.186 OF 2004

IN THE MATTER OF THE ESTATE OF

FRANCIS KAMALIKI MUSEMBEDECEASED

BETWEEN

PRISCILLA VUGUTSA KAMALIKIPETITIONER/RESPONDENT

AND

MARY RUNYANYI OCHIENG.....APPLICANT

R U L I N G

The Application

1. The Application before me is the Notice of Motion dated 28/04/2014 filed pursuant to the provisions of Sections 1A, 1B, 3, 3A and 63(e) of the Civil procedure Act, Order 40 Rule 4 and Order 51 Rule 1 of the CPR, Article 159 (2) (a) (b) and (d) of the Constitution of Kenya 2010, and all other enabling provisions of the Law. By the said application, the applicant prays for

ORDERS:-

1. Spent
 2. THAT this Honourable Court be pleased to stay execution of the ruling made on 26th February 2014 and the subsequent Court order made by this Honourable Court on the 11th March 2014 in application dated 5th December 2011 pending the hearing and determination [of] this application inter partes.
 3. THAT this Honourable Court be pleased to reinstate the applicant's application dated 9th December 2010 for want of Prosecution and the applicant herein be allowed to be heard.
 4. THAT this Honourable Court be pleased to set aside ruling made on 26th February 2014 and the subsequent order dated 11th March 2014 and all consequential proceedings therefrom pending the hearing and determination of the objection proceedings herein.
 5. THAT the costs be in the course (sic)
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2. The application is premised on 11 grounds which are set out on the face of the application and is also premised on the supporting affidavit sworn by the applicant on 28/04/2014. The applicant alleges that she is the widow of the deceased herein having got married to the deceased under Luhya customary law in 1992 and that she has always stayed on L.P. No.Bondeni/Kinyoro/361 both before and after the demise of the deceased. That she is now threatened with eviction from

the only place she has known as her home consequent upon the Respondent's failure to disclose all the beneficiaries of the deceased's estate when the Petition for Grant of Letters of Administration intestate was filed. She prays for the orders so that she may also have her voice heard in this succession cause.

Background

3. When the parties appeared before me on 26/01/2015, they informed the Court that they had agreed to canvass the application by way of written submissions. Mr. Mukele appeared for the Petitioner/Respondent while Miss Wilunda held brief for Mr. Kidiavai for the Objector/applicant. The submissions were to be filed and exchanged between the parties within 42 days of the date of the order. The applicant was also granted leave to file and serve a reply to the Respondent's submissions within 14 days of service. The matter was set down for mention on 04/05/2015 for taking a ruling date.
4. For reasons that are not clear from the record, this matter did not come before me again until 02/11/2015 when it was confirmed that the parties had indeed filed and exchanged their written submissions. I have carefully read through both sets of submissions.

Background

5. According to the papers filed herein, the deceased died on 05/08/2003 at age 55. He was a resident of Kinyoro sub location, Trans Nzoia District. At the time of death the deceased owned two parcels of land in S/Kabras/Shamberere being 2594 and 1680. According to a letter from South/Kabras location Chief dated 30/03/2014(although the writings thereon appear altered), the deceased was survived by the following persons:
 - a. Priscilla Vugutsa Kamaliki – widow/administrator
 - b. Sila Majani Kamaliki – son
 - c. Albert Kawai Kamaliki – son
 - d. Moses Chemnyango Kamaliki – son
 - e. Daniel Obunele Kamaliki – son
 - f. Joseph Akida Kamaliki – son
 - g. Milton Ingosi Kamaliki – son
 - h. Zilpa Kadenyi Kamaliki – daughter
 - i. Selipha Masitsa Kamaliki - daughter
6. The Petitioner/Respondent applied for and was issued with Grant of Letters of Administration Intestate (Form P & A 41) on 12/07/2003. Form P & A 5 showed the assets of the deceased as S/Kabras/Shamberere/1680 and 2594 and Bondeni/Kinyoro/361. The Grant was confirmed on 30/11/2004 with all the properties wholly devolving to the Petitioner to hold in trust for the deceased's children as named above.
7. On 3/12/2005 the Objector/applicant entered the scene when she filed the Summons for Revocation of Grant through her advocates, M/s Akwala & Co. Advocates on grounds that the Grant was obtained fraudulently through non-disclosure of the fact that the Objector was a co-wife to the Petitioner and also on grounds that the Petition was filed without the knowledge and/or consent of the Objector who should have been consulted before commencement of proceedings.
8. The Petitioner opposed the Summons for Revocation of Grant vide her replying affidavit sworn on 27/01/2006. On 10/05/2007, the Court gave directions that the Objection would be heard by way of viva voce evidence and on 20/11/2007, the objection proceedings were fixed for hearing on 14/10/2008. On the latter date, the matter was stood over generally for reasons that issues had never been agreed. On 26/03/2010 parties appeared at the registry and fixed the objection proceedings for hearing on 21/06/2010. During the mention on 28/09/2010 parties agreed to proceed to hearing on 07/12/2010. However, the matter did not proceed on that date on grounds that Mr. Akwala Counsel for the Objector had lost contact with his client and needed time to file papers to cease from acting. On that day, Mr. Elungata who was present for the Petitioner urged the Court to dismiss the Summons for Revocation. The Court allowed the Petitioners request and

- dismissed the Summons for want of Prosecution. Parties were at liberty to apply.
9. On 20/01/2011, Akwala & Co Advocates filed the Summons dated 31/12/2010 by which the said firm sought leave of the Court to cease from acting for the Objector/Applicant. The application was served on the Objector/Applicant and fixed for hearing on 28/09/2011. The Objector did not turn up in Court so the leave sought by M/s Akwala & Co Advocates was granted. From then henceforth the Objector/Applicant was to be personally served with Court papers.
 10. On 05/12/2011 the Petitioner who appeared to be acting in person filed a Notice of Motion of same date seeking an eviction order against Mary Runyanyi Ochieng from LP No. Bondeni/Kinyoro/361. The reason for the application was that the respondent was unlawfully residing on the suit land since the respondent's alleged interest in the said parcel of land had been deregistered by the Court. However no supporting documents were annexed to the affidavit in support.
 11. After several adjournments by which the Court intended to have the respondent served, the application for eviction of the respondent from LP Bondeni/Kinyoro/361 was granted on 26/02/2014.
 12. The present application was then filed on 08/05/2014. The Court granted interim orders in terms of prayer two (2) thereof pending interpartes hearing on 08/05/2014. On 08/05/2014 the parties did not appear before the Court and the Court ordered fresh dates to be taken at the registry. On 12/05/2014 the parties filed a written consent extending the interim orders issued on 29/04/2014 and also fixed the application for hearing on 28/04/2014, but there is no record of what may have transpired on 28/04/2014.
 13. The above is the background to the instant application which seeks setting aside of ruling made on 26/02/2014 and order of this Court (though differently constituted) made on 11/03/2014.

The Submissions

14. The Objector/Applicant's submissions are hinged on four (4) questions:

- a. Whether the Notice of Motion that resulted in the issuance of the eviction orders was proper;
- b. Whether the Objector/Applicant was served with the said application;
- c. Whether the applicant is a dependant of the deceased herein, Francis Kamaliki Musebe and
- d. Whether the honourable Court was justified to grant the eviction orders.

15. Placing reliance on Rule 49 of the Probate and Administration Rules, Counsel for the applicant argues that the Notice of Motion dated 05/12/2011 seeking eviction of the applicant herein ought not to have been entertained as it was filed in contravention of the rules. Rule 49 of the P & A Rules provides as follows:-

“A person desiring to make an application to the Court relating to the estate of a deceased person for which no provision is made elsewhere in there Rules shall file a Summons supported if necessary by affidavit.”

Counsel further argues that the eviction orders issued pursuant to the said application have no force of law and should be set aside.

16. The applicant also contends that she was never served with the Notice of Motion dated 05/12/2011 and only became aware of the matter on 27/03/2014 vide a letter dated 24/03/2014 forwarding the Court order dated 11/03/2014 giving her 30 days to give vacant possession of L.P. Bondeni/Kinyoro/361 in default she was to be evicted. The applicant also alleges she was never served with the application by M/s Akwala & Co Advocates by which they sought to cease from acting for her. In other words, the applicant denies being served with any process of the Court either by the Petitioner's Counsel or her own previous advocates.
17. With regard to the third issue, Counsel relies on Section 29 of the Law of Succession Act and contends that the applicant and her daughter are dependants of the deceased and ought to be provided for. In light of the above contention Counsel argues that the Court was not justified in granting the eviction orders without giving the applicant a hearing. Counsel prays for the orders.

18. In response, Counsel for the Petitioner submitted that the only relevant issue in this matter is whether this honourable Court ought to set aside the orders dated 07/12/2010 namely the order issued by Hon. Lenaola J dismissing the Summons for Revocation of Grant. Mr. Mukele for the Petitioner contends that all the other issues of law raised by Counsel for the Objector at the moment are matters which should be canvassed on appeal or review in accordance with Section 80 of the Civil Procedure Act, and Order 45 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides for review of orders or decrees from which an appeal is allowed by the Act, but from which no appeal has been preferred or by a decree Court order from which no appeal is allowed by the Act. Order 45 of the CPR also provides for reviews and sets out in Rule 1 (1) the conditions to be met by an applicant seeking a review of orders or decrees.
19. Counsel for the Petitioner has also raised the issue that it cannot possibly be correct for the applicant to contend that she has lived in LP Bondeni/Kinyoro/361 since 1992 when the land was bought in 2002 just before the deceased died in 2003. The Petitioner submits that the applicant's application lacks merit and should be dismissed with costs.

Analysis and Findings

20. The first issue for this Court to determine is whether the instant application is properly before the Court. The application is expressed to be brought under Section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act Order 40 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules. It is worth noting that the Law of Succession Act is a self-contained Act and provisions of the Civil Procedure Act, unless specifically imported into it are not applicable. A look at Rule 63 of the Law of Succession Act reveals that the provisions under which the present application is brought are not some of the provisions imported into the Law of Succession Act. What this means therefore is that the instant application is incompetent for want of form and is therefore fit for striking out.
21. The applicant has also relied on Article 159(2) (a) (b) and (d) of the Constitution of Kenya 2010. Article 159 (2) provides that in exercising judicial authority which is derived from the people, Courts and tribunals established by or under the Constitution shall be guided by the following principles:-
- a. **Justice shall be done to all, irrespective of status;**
 - b. **Justice shall not be delayed;**
 - c.
 - d. **Justice shall be administered without undue regard to procedural technicalities; and**
 - e.
22. In my considered opinion the applicant sought refuge in Article 159 (2) basically because it may have dawned on her that there was no shelter for her under the provisions of the Civil Procedure Act and the Rules made thereunder upon which this application is anchored. I must however point out that Article 159 of the Constitution is not a panacea for all problems. It is not lost to this Court that where there is a specified law under which certain actions are to be brought before the Court, that law ought to apply unless there are cogent reasons put forward by the applicant justifying a departure from such law/rules. In the instant case, the applicant could have premised this application in Rule 73 of the Probate and Administration Rules, which rule clothes this Court with inherent power to make such orders as may be necessary for the ends of justice just like Sections 1A, B and 3A of the Civil Procedure Act do for actions brought under the Civil Procedure Act. I therefore do not think that Article 159(2) of the Constitution can provide any oxygen to the applicant to breathe through the application which is fit for striking out.
23. Accordingly, I hereby strike out the applicant's Notice of Motion dated 28/04/2015 on grounds that the same has been brought to Court under the wrong provisions of the Law and in the wrong format of a Notice of Motion instead of a Chamber Summons.
24. Having reached the above conclusion on the first issue, I do not find it appropriate to deal with the other issues highlighted by the applicant. As rightly submitted by the Petitioner's Counsel these are issues that should be raised either on appeal or in an application for review in accordance with Sections 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, assuming of

course that the said provisions are applicable in the circumstances.

What is the way forward?

25. Having reached the above conclusions, the applicant is at liberty to pursue any other option available to her in law to pursue her claims in this matter. It would have helped the situation if the objection proceedings had gone to full hearing by calling *viva voce* evidence. I therefore direct that in the interest of justice, the applicant do set down the objection for full hearing and is also at liberty to apply generally. If the objection is not set down for hearing within ninety (90) days from today the same shall stand dismissed with costs to the Petitioner/respondent. The respondent shall also have the costs of this application. The costs shall either be agreed or taxed by the taxing master of this honourable Court.

26. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 21st day of January 2016.

RUTH N. SITATI

J U D G E

In the presence of:

M/s Kidiavai (absent) for Applicant

Mr. Mukele (present) for Respondent

Mr. Lagat - Court Assistant