



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 403 OF 2014

(Formerly Migori Principal Magistrate's Court Succ. No. 35 of 2014)

**IN THE MATTER OF THE ESTATE OF: PITALIS OJIWA
KACHANDO.....DECEASED**

BETWEEN

**THOMAS OTIENO OJIWA.....PETITIONER/
APPLICANT**

VERSUS

TOBIAS ONGONDO SORO.....OBJECTOR/RESPONDENT

RULING

1. The application under consideration is the Notice of Motion dated 08/09/2015. It was taken out by the Petitioner and seeks the following prayers: -

i) That the Honourable court be pleased to order stay of execution of the order herein pending the hearing and determination of this application.

ii) That this Honourable court be pleased to review its orders herein.

iii) That costs of this application be provided for

2. The application is supported by the Affidavit of the Petitioner sworn on **08/09/2015** and filed together with the application on **09/09/2015**.

3. The application is opposed by the Objector through a Replying Affidavit sworn on 09/11/2015 and duly filed.

4. By directions of this Court made on 13/11/2015 parties through their Counsels filed written submissions to the application hence this ruling.

5. The background to the application is well captured in the rulings of this Court (Majanja, J) delivered on 16/07/15 and 31/08/2015 respectively where the Court revoked a Certificate of Confirmation and reconfirmed the grant where the Objector was granted 6.03 Hectares of the estate land.

6. The record has it that the then property of the estate being the parcel of land known as **SUNA EAST/KAKRAO/711** was surveyed and sub-divided and respective title deeds issued to the beneficiaries

including the Objector. The Objector now holds title to one of the sub-divisions thereof known as **SUNA EAST/KAKRAO/5959**.

7. The Petitioner in his application contends the existence of a mistake or error apparent on the face of the record in that he discovered that the agreement subject of the confirmation and subsequent reconfirmation was a forgery courtesy of the Criminal Investigations Department, Migori County. The Petitioner annexed a copy of the Sale Agreement as well as an Identification Report of the Deceased herein among other documents in support of the application.

8. The Objector is opposed to the application on two fronts. First, he contends that the order sought to be reviewed was not annexed as part of the application and second that the estate property was sub-divided hence non-existent and indeed new titles are in place. He remains unaware of any adverse findings made by the Police against him and states that the agreement was scrutinized by the Court and determination arrived at. To him, if the Petitioner was not satisfied with the court's findings then the best way was to appeal against that decision and not to seek a review.

9. I have, with patience, considered the application alongside the parties submissions. I note that prayer (i) of the application is spent and that leaves prayer (ii) as the main prayer.

10. First let me start by looking at the competency of the application before me. The application was brought under **Order 45 of the Civil Procedure Rules 2010** which is a replica of the **Order XLIV of the former Civil Procedure Rules**. As the practice and procedure in succession matters is a self regulating one under the Law of Succession Act and the Probate and Administration Rules, the provisions of the Civil Procedure Rules can only apply when strictly permitted by the parent Act and the Rules.

11. Under **Rule 63 of the Probate and Administration Rules**, the provisions of **Order XLIV (now Order 45)** of the Civil Procedure Rules are expressly provided to be applicable in succession matters. That being the position in law, the application is therefore competently before Court.

12. The Objector also raised the issue of the absence of a copy of the order sought to be reviewed in the application in a further challenge to the application. He referred to the judicial decisions of **Hon. Yussuf Kifuma Chanzu -vs- Equity Bank of Kenya Ltd and Capital Construction Limited, HCC NO. 762 of 2009 Nairobi** (unreported) and **Leah Wanjiku & Njoroge & Bernard Ndungu Gitau -vs- Paul Njau Njenga and Hanna Wanjiku Njenga, ELC NO. 245 of 2008** (unreported) for that proposition.

13. Whereas I agree with the general proposition in law that in review applications the order sought to be reviewed ought to form part of the application, I would not uphold that position in the circumstances of this case for two reasons. First, I have seen a copy of the order in issue duly extracted and signed in the Court record although it was not annexed to the application. Second, this Court is enjoined under **Article 159 of the Constitution of Kenya** to dispense substantive justice instead. I therefore find that the contention fails and is dismissed.

14. The Petitioner has outlined two grounds in support of the application. They are the discovery of new evidence and an error apparent on the face of the record. On the discovery of new evidence, the Petitioner contends that he came across an Identification Report on the deceased finger prints which was taken to the Director of the National Bureau of Registration together with the deceased's identity card and the Sale Agreement. According to the Petitioner the Director remarked that the documents were **"unsuitable for comparison for further necessary action."**

15. From the face of the said remarks, it means that no comparison at all was made and hence the allegation of discovery of new evidence does not arise. Likewise the allegation of forgery remains without sufficient proof as so required in law. This Court hence finds that there is no new evidence which was discovered by the Petitioner to warrant the exercise of the Court's discretion in his favour.

16. Turning to the second ground of the existence of an error on the face of the record, I find that the same is pegged on the agreement. That agreement was the subject of a *viva-voce* hearing before the Court

and a ruling was delivered where the Court upheld the validity of the agreement. That ruling still stands unchallenged to date. I cannot therefore see how the alleged error arises on the face of the record. This ground also fails.

17. As I come to the end of this ruling, I wish to observe that had the Petitioner been successful in demonstrating any and/or both of the grounds upon which the application for review was made, this Court would have the jurisdiction to recall and cancel the sub-divisions which arose from the parent estate land which includes the Objector's parcel under **SUNA EAST/KAKRAO/5959**.

18. However from the foregone discourse, the application has to fail and is hereby dismissed with costs.

DELIVERED, DATED and SIGNED AT MIGORI this 17TH day of MARCH 2016.

A. C. MRIMA

JUDGE

Delivered in the presence of:

No appearance for the firm of S. M. Sagwe & Company Advocates for the Petitioner/Applicant.

No appearance for the firm of Oduk & Company Advocates for the Respondent.

Court Clerk - Mr. Magige