REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 386 OF 2004

In the Matter of the Estate of Chabari Rukaria (Deceased)

BETTEY MAITHA DUNCAN……..……PETITIONER

Versus

GILBERT MURIUKI CHABARI……...……OBJECTOR

HUMPHERY MUGAMBI MUGA……PURCHASER/APPLICANT

RULING

[1] The significant orders sought in the Chamber Summons Application dated 8th August 2012 are:-

1. ***An order of stay of execution of the orders issued on 30th July 2012.***
2. ***A review the orders of 30th July 2012.***
3. ***Any other orders it deems just and equitable in the circumstances; and***
4. ***Costs to be in the cause.***

[2] The said application expressed to be brought pursuant to Rules 63 and 73 of the Probate and Administration Rules is premised upon the following grounds:

a. *That the Objector on 2nd July 2012 misled the honourable court into hearing the application dated 23th July 2012, whereas what had been scheduled for hearing on that date was the application dated 16th March 2010.*
b. *That the Objector failed to inform the court that the estate herein had been distributed and sold to other third parties/purchasers after confirmation of grant.*
c. *That the application dated 23rd May 2006 was heard without taking directions as is mandatorily required by Rule 44 of the Probate and Administration Rules.*
d. *That the Objector failed to disclose to the court that after confirmation of the grant title deeds were issued to other parties who were not given a chance to participate in the proceedings.*
e. *That there is an error apparent on the face of the record.*
f. *There are sufficient reasons to warrant review of the said orders.*

[3] Briefly the Applicant's case was that when this matter came up for hearing on 2nd July 2012, it was the application dated 16th March 2010 that had been slated for hearing as attested to by the court record. The Applicant contended that contrary to the said position, the advocate for the Objector misled the court into hearing the application dated 23rd May 2006 which did not have a hearing date and without notifying the other parties and that further directions were not taken out pursuant to Rule 44 of the

Probate and Administration Rules in respect of the application dated 23rd May 2006. The Applicant submitted and believes the confusion of the pleadings and misrepresentation by the advocate are the major causes of the crisis in this matter which resulted into very serious orders of revocation of grant being issued. On the basis of the above facts, the Applicant contended that there was an error on the face of the record, and there are sufficient reasons to warrant review of the orders issued on 30th August 2012.

[4] The application was opposed through a Replying Affidavit sworn by the Objector on 24th September 2012. It was deposed *inter alia* that all the parties were aware of the date and were in court on the material day. They did not oppose the application for annulment of grant. He argued that counsel for the purchaser and the purchaser himself were in court when the said counsel indicated to court that he did not wish to oppose the application as presented. According to the Objector, this application is a mere afterthought by the purchaser. Therefore, there are no sufficient reasons to warrant the issuance of the orders sought.

DETERMINATION

Review and stay of execution

[5] Although two substantive orders; of stay of execution and review of the order made on 30th July 2012 were sought, from the arguments advanced herein it seems the Applicant concentrated on review of those orders and did not really submit on the limb for stay of execution. I will, therefore, address my mind to the request for review of the orders of the court. Review as a discretionary remedy has evolved in law ordinarily to correct an error which would otherwise prevent proper determination of the litigation on merit. The error should, however, be a material one and readily discernible from the record, that is to say, it is recognized easily without much probing or copious explanations to establish it. In other instances, review will be permitted where there has been discovery of new and important matter or evidence which could not have been in the knowledge of or produced by the applicant at the time the order was made even after exercise of due diligence. And lastly, review will be granted where sufficient cause is established. But the major concern in the remedy of review of orders of court is to do justice. See Section 80 of the Civil Procedure Act, Cap 21 of the Laws of Kenya and Order 45 of the Civil Procedure Rules which perfectly encapsulates the remedy of review. Let me now examine the facts of this case to establish whether review is merited.

Alleged error

[5] I must carefully consider the record, this application and the rival submissions by the parties. On 15th March 2012 it was recorded in the Registry, Probate and Administration, that:

"S***ummons dated 16th March 2010 filed for hearing on 2nd July 2012."***

The record for 2nd July 2012 shows that that Mr. Ondieki, Gituma and Muriuki for the Objector, Petitioner and the purchaser respectively were all present in court. Mr. Ondieki for the Objector made these submissions to the court:-

"***Our appeal is dated 23rd May 2006. The appeal is yet to be heard. The petitioner filed a replying affidavit dated 11th March 2009. I am ready to proceed."***

Mr. Muriuki for the purchaser then responded as follows:

"***We are not filing any response."***

Mr. Ondieki then argued the application dated 23rd March 2006 and ruling was reserved for 26th July 2012. All this time Mr. Muriuki for the purchaser was in court and he said nothing. Accordingly, the contention by the Applicant that he did not participate in the hearing because they had not been notified

of the hearing of the said application is not, therefore, true as the Applicant's counsel was in court when the said application was prosecuted and he intimated to court that he was not filing any response thereto. In these circumstances, I do not regard the actions by counsel for the Applicant to be an error in the sense of the law on review. I will view this matter in the lenses provided in the cases of **MAWJI vs. LALJI LLR No 2778 (CAK)** and **KETTEMAN vs. HANSEL PROPERTIES LTD [1988] 1 ALL E.R. 38 AT PAGE 62.**

Alleged lack of Directions

[5] On the question on directions under Rule 44 of the Probate and Administration Rules, the following is important. On 2nd July 2012, the court permitted the application dated 23rd May 2006 for revocation of grant to be canvassed after counsel for the parties made apt representations. The purchaser's advocate was in court at the time and was aware the said application was being prosecuted; his submissions were that they are not filing any replies. It was on the basis of the submissions by counsels that the court allowed the application to be canvassed and so the direction the court took is sufficient for purposes of rule 44 of the Probate and Administration Rules. In fact, the purchaser or his counsel did not raise the issue that he is now raising. Consequently the arguments thereto are not sufficient reasons envisaged for review. I do not think even in the most generous moments the issues being raised could be *discovery of a new and important matter which could not have been in the knowledge of the Applicant.* The Applicant and his counsel were well aware of what was happening in court. Accordingly, nothing turns on this point.

Unreasonable delay

[6] I have not forgotten that an application for review should also be filed and prosecuted without unreasonable delay. In this case, there has been unreasonable delay as the orders that the Applicant seeks to have reviewed were made on 31st July 2012- almost 4 years ago. See ***Halsbury's Laws of England, 4th ed. Vol. 16(2) at ξ910.***

Any other sufficient cause

[7] But is there any other sufficient cause for which I can order review? I see none. Revocation was granted because the Petitioner did not include all the estate properties in the petition as required in law. Green Cards for parcels No. 1859 and 1860 were produced as evidence of the properties that had been omitted, albeit it may have been inadvertent. Parties and their counsels kept on telling the court that they are negotiating and were likely to fasten a settlement of the issue in controversy, but none was forthcoming, hence this ruling. Again, looking at the arguments by the Applicant and his standing in the matter, my view is that, as a purchaser from a person to whom representation had been issued, the law has provided him with a shield in Section 93 of the Law of Succession Act CAP160 of the Laws of Kenya as follows:

93 (1) A transfer of any interest in immovable or movable property made to a purchaser either before or after commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

[8] In light of the above, the Applicant has not satisfied any of the conditions for review. I find his application dated 8th August 2012 to be without merit and I accordingly dismiss it. Given the nature of this case, I will not condemn him to pay costs of the application. Accordingly, I order each part to bear own costs. It is so ordered.

Dated, signed and delivered in court at Meru this

25th day of April 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Kaumbi advocate for Muriuki advocate for applicant.

Mr. Ondieki advocate for the objector.

F. GIKONYO

JUDGE