



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 99 OF 2003

IN THE MATTER OF THE ESTATE OF MOSES KIPKENEI CHELIMO...DECEASED

AND

PHILOMENA JEPKEMBOI TANUI.....APPLICANT/OBJECTOR

KENETH NARISHA KENEIAPPLICANT/OBJECTOR

VERSUS

SILAS KIPTANUI CHELIMO.....RESPONDENT/ PETITIONER

R U L I N G

The objectors application dated 12/6/2015 prays fundamentally for the order that this court be pleased to review, strike and or set aside the entire ruling made on the 28th day of October 2014 for the reason that the same is in conflict with succession cause No (H.C.) 422/2005.

The application is supported by the annexed affidavit of both applicants.

Their argument is that by the time the court was delivering its ruling of 28/10/2014, it was not made aware of the succession cause No.

422/2005 filed at Nakuru in which the applicants had had the grant confirmed in their favour.

Both the applicants are claiming to be the widow and son of the deceased respectively. The widow argued that she married the deceased under the tenets of customary law and had the 2nd respondent as the only issue of their union. She argues that save for typographical errors of the grant the estate has been devolved to them.

The respondent did file a replying affidavit sworn on 14/10/15 in which he argued that the death certificate used by the applicants in the Nakuru succession cause No 422/2005 was a forgery and that the same was disowned by the Registrar of Births and Deaths.

That he was the only beneficiary to the deceased estate as he died without leaving behind any wife or children. Consequently by virtue of using forged documents they did not deserve any share in the deceased's estate.

I have perused the entire application together with the respective annexures. I have also read the ruling by my brother Justice Karanja dated 28/10/2014 which the applicants are praying for its review.

Its apparently clear that the issue which my brother dealt with was whether or not the applicants were widow and son of the deceased respectively. He found that they were not and thus their application was dismissed.

The question of the succession cause in Nakuru for some reason was not brought to the attention of the court. In that cause the applicant herein obtained grant over the estate of the deceased person herein.

The respondent have argued that the death certificate was a forgery and the Registrar has since confirmed such. I have read the letter dated 19/8/2015 addressed to M/s Ndegwa, Waweru & Co. Advocates in which the County Coordinator Trans Nzoia County one Z.S. Rotich concluded that

“ However, the act cannot sustain the cause and have today marked the main register of death under entry No 037031695 invalid. Also note that the other document is valid having been verified and authenticated by the Registrar of death in Machakos.”

Respectfully the said document was obtained by the respondent alone, without the input of the applicants . The letter by Ndegwa Waweru & Co. Advocates was not copied to the applicants, neither was the response by the County Coordinator. Further there is no evidence to suggest that their counterpart in Machakos had any input or say.

That said, the issue at hand is whether in light of the foregoing this court can review the decision earlier own reached on 28/10/2014. Order 45 of the Civil Procedure Rules which in my view applies herein provides as follows;

“Any person who consider himself aggrieved -

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, in an account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or orders may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

From the reading of the above portion of the Civil Procedure rules , it is clear to me that the Nakuru succession case was not brought to the attention of the court by each of the parties. As it were there are two parallel succession matters in respect to the same estate. The grants have been issued in both. There is obviously a serious conflict. The Law in Succession Act does not envisage two parallel succession matters in respect to the same estate. If both are sustained then there shall be a serious conflict in the estate.

Having arrived at this I do not find any prejudice to be suffered by both parties should this application be allowed. The court is alive to the fact that succession disputes are volatile and each party ought to be granted a day in court. The respondent is claiming to be a brother to the deceased while the applicants are widow and son respectively. None of the parties appealed against the decisions of Honourable Karanja J so as to settle the question of the two files. I find it necessary to review the orders of this court dated 28/10/14 as follows;-

- 1. The orders issued on 28/10/2014 by this court are hereby reviewed and set aside.**
- 2. File Nakuru succession case No 422/2005 (H.C) be and is hereby transferred to Kitale and consolidated with this file.**
- 3. There be stay of execution of any orders issued in this file or file No. 422/2005 Nakuru High**

- Court pending the hearing and determination of the proceedings herein.**
- 4. Each party shall bear their respective costs.**
 - 5. This matter be mentioned within 45 days for further directions.**

Dated this 23rd day of June, 2016.

H.K. CHEMITEI

JUDGE

No appearance for the Petitioner

Ongaro for the Respondent

Court Assistant - Emily