



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 243 OF 2014**

**FORMERLY EMBU SUCC 24 OF 1994**

**IN THE MATTER OF THE ESTATE OF M'KIENDE KAVIRO (DECEASED)**

**MIRIAM NJOKA NJERU.....RESPONDENT**

**VERSUS**

**JOHNSTONE NJERU MURINGI.....APPLICANT**

**RULING**

1. This is an application for review of the order of this court dated 4th November 2015 brought under Order 45 of the 2010 Civil Procedure Rules. It is based on the supporting affidavit of the applicant dated 24<sup>th</sup> March 2016. The applicant is a biological son of the respondent. According to the applicant, the suit land parcel No. Kyeni/Kigumo/840 was left to him by his paternal grandfather namely M'Kiende Kaviro who died on 27<sup>th</sup> June 1981. It is also his affidavit evidence that his grandfather had two sons, one of whom is the applicant's father and the other one Ngodi M'Kiende, being his uncle.
2. Furthermore, it is his affidavit evidence that he filed succession cause No 24 of 1983 when his father was still alive in respect of the suit land, which was then divided into two parcels with himself taking one parcel and his uncle taking the other. He has also stated that his own father was left with his own land parcel No. Kyeni/Kigumo/877, where his mother (the respondent) does carry out her farming activities. He has further stated that his own mother could not have claimed the suit land and that is why for over twenty years there were no issues in respect of the suit land. In paragraph 11 of the affidavit, the applicant has stated that the respondent never claimed the suit land as an objector and has never sought leave to file objection proceedings.
3. Furthermore, the applicant has stated that it is unprocedural for his mother to file a succession objection without leave after 23 years and also to claim to be appointed as an administrator of her father in law's suit land. The respondent failed to disclose to the court that there were other beneficiaries, who benefited from the succession cause. Additionally, she failed to disclose the proceedings in succession cause No. 24 of 1993 to prove her case. More importantly, the applicant has stated that the respondent did not disclose to the court that succession cause No 24 of 1993 was never substituted with HCCC No. 243 of 2014, the latter being the current case. Equally important, the applicant has stated that the respondent did not disclose to the court the existence of HCC (ELC) 86/2014 which is still pending and which has pending orders, in support of which the applicant has annexed the plaint marked as JM3.
4. Counsel for the applicant filed written submissions dated 6th April 2015. In his grounds, counsel has pointed out that there is an apparent error on the face of the record and that the court was not seized of the legal and factual position of the matter in court. It is also his submission that the applicant's evidence did not follow the admission procedure that is authorized by the Evidence Act

- (Cap 80) Laws of Kenya. And more importantly, that the orders granted by this court were ambiguous and incapable of enforcement as they were made in a non-existent file. In a nutshell, this were the salient features of his elaborate and well articulated written submissions.
5. The respondent has opposed the applicant's application. According to him, a review of this court's order under Order 45 of the 2010 Civil Procedure Rules which is grounded on section 80 of the Civil Procedure Act is inapplicable. According to his counsel, the application sought to be reviewed was to revoke the confirmed letters of administration issued in favour of the applicant on 30th September 1994. According to counsel, the grounds of review under that Order are that there should be an apparent error on the face of the record or discovery of new evidence. There is no error on the face of the record and also there is no discovery of new evidence. And finally counsel has also submitted that the applicant having filed a notice of appeal in respect of the orders sought to be reviewed cannot now come for review of the same order. This he says is barred by Order 45 (1) (a) of the 2010 Civil Procedure Rules.
  6. I have considered the affidavit evidence of both parties. I have also considered their rival submissions. I find as a fact that the order sought to be reviewed was made by this court in Embu High Court Civil Suit No. 243 of 2014, which also was described as a succession cause No 24 of 2014 in the affidavit for revocation of the grant dated 23<sup>rd</sup> June 2014. I also find as a fact that the proceedings which gave rise to the orders sought to be reviewed were conducted in the absence of the respondent. Furthermore, I find that the errors which are apparent in the "pleadings" have led to confusion in giving rise to the order made in favour of the applicant.
  7. The applicant did not disclose to the court that there was in place a certificate of confirmation of grant in favour of the respondent, Johnstone Njeru Muringih, which was made in the Senior Resident Magistrate Court in Embu No. 124/1993. This confirmed grant has not been challenged and is annexed to the respondent's affidavit as annex "JM1". The respondent did not disclose that she had filed a case in the Land and Environment Court at Kerugoya on 22nd November 2013 in ELC No 86 Of 2014 in which both the applicant and the respondent are parties and the same case is still pending.
  8. I find from the affidavit evidence and the submissions of both counsel that this is a proper case in which the order of this court dated 4th November 2015 should be reviewed and the order set aside, because of the failure of the applicant to disclose to the court material matters referred in the foregoing paragraphs. I find that the issues raised by the respondent are matters that are errors on the face the record in terms of Order 45 of the 2010 Civil Procedure Rules. In other words, they are matters that are capable of being reviewed. I further find that they were capable of being reviewed under Order 45 (1) (b) of the Civil Procedure Rules, because the issues raised are matters that constitute sufficient reason in terms of that order. Finally I also find that the filing of the notice of appeal under **Order 42** rule 15 of the 2010 Civil Procedure Rules does not deprive this court of its jurisdiction to review its own order. The reason is that the notice of appeal filed clearly declares that it is the intention of the Respondent of his desire to appeal to the Court of Appeal. It is not in itself an appeal that is contemplated in Order 45 (1) of the Civil Procedure Rules. Furthermore, this court is required by section 1A (1) and (2) of the Civil Procedure Act (Cap 21) Laws of Kenya to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes in court. To hold that this court has no jurisdiction because of the filing of the notice of appeal by the respondent will defeat the overriding objective as embodied in section 1A (1) of the Civil Procedure Act. It is likely to increase litigation costs through the appellate process and to delayed justice in this matter. Article 159 (2) and (b) of the 2010 Constitution of Kenya also requires that justice shall not be delayed and should be administered without undue regard to procedural technicalities. I similarly find that these superior constitutional provisions are in line with provisions of section 1A (2) of the Civil Procedure Act. I therefore find that it is in the interests of justice to allow this application to enable the parties to have a speedy, just and affordable resolution of the dispute in issue.
  9. The upshot of the foregoing is that the applicant's application is hereby allowed and the order of this court dated 4th November 2016 is hereby set aside with no orders to costs.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this 20th day of June 2016

In the presence of Mr Miriti for the Applicant and Mr. Keyonzo for the Respondent.

Court

**J.M. BWONWONGA**

**JUDGE**

**20/06/2016.**