



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**SUCCESSION CAUSE NO. 495 OF 2008.**

**IN THE MATTER OF THE ESTATE OF**

**HASSAN MASAYI DUNDI ..... DECEASED**

**A N D**

**ABUBAKAR MULIRO MAASAI ..... PETITIONER**

**VERSUS**

**ALEFARAJ MUSA MAASAI ..... RESPONDENT**

**RULING**

1. Being dissatisfied by the order made by this Court (Chitembwe, J.) on 28/11/2013, ALFARAJ MUSA MAASAI (the First Administrator herein) and MALACHI WANGWE MANYA (a Purchaser) filed the Summons for Review dated 30/06/2014.

2. The said application sought the following orders:-

1. ***This application be certified as urgent and be heard exparte in the first instance.***
2. ***The proceedings and order of this Honourable Court dated 28<sup>th</sup> November, 2013 be reviewed, set aside and or vacated.***
3. ***The costs of this application be provided for.***

3. Pursuant to directions made by the Court, the Applicants herein filed written submissions as well as one ABUBAKAR MULIRO MAASAI, the Second Administrator.

4. This Court has carefully considered the application alongside the entire record and the submissions tendered and it has no doubt that the Summons for Review dated 30/06/2014 ought to be allowed as prayed. I will hereafter endeavour to give the reasons for the said finding.

- a. **The matter was marked as fully settled on 21/02/2013.**

5. On 21/02/2013 the parties in this matter appeared before Hon. Justice Chitembwe and the following proceedings were recorded which I will reproduce *verbatim*.

**“21/2/2013.**

**Before S.J. Chitembwe, J.**

**CC – Juma.**

**Miss Ingutia for 3<sup>rd</sup> Administrator.**

**Mr. Nandwa for 1<sup>st</sup> Administrator.**

**Miss Ingutia:-**

***Matter was for mention. There is a dispute on plot No. E. WANGA/ISONGO/410. We have agreed that any of the Administrators to pursue the ownership of the land in KAK Succession Cause 92/2000, being the estate of Eluko Wakhungu. This matter be marked as settled. Each party to bear its own costs.***

**Mr. Nandwa:- I do confirm the position.**

***Court:- Orders as per the consent. Matter is marked as settled.”***

6. The above settlement followed the filing of formal consent by the parties on distribution of the estate which consent was adopted by the Court on 05/12/2012.

7. On 29/07/2013, the Second Administrator, ABUBAKAR MULIRO MAASAI filed a Summons evenly dated through Messrs C.O. SAMBA & Co. Advocates seeking the following orders:-

1. ***That this application be certified as of utmost urgency and be heard with I the first instance.***
2. ***That the honourable court be pleased to cancel all other titles issued from land parcel number E.Wanga/Isongo/409 pending the hearing and determination of his application interparties.***
3. ***That subject to the cancellation of titles issued in reference to land parcel number E.Wanga/Isongo/409 the subject land revert to the name of the deceased pending redistribution of the estate.***
4. ***That costs of this application be in cause.***

This application came up for hearing on 24/10/2013 where the Counsel then appearing for the Applicant therein pointed out to the Court that there was improper service of the application and sought for a mention date. The Court allowed the adjournment and fixed the application dated 29/07/2013 for a mention on 28/11/2013. The Applicant was ordered to serve.

8. I will also capture the events of 28/11/2013 in Court *verbatim*.

**“28<sup>th</sup> NOVEMBER, 2013.**

**Before Hon. Mr. Justice Said J. Chitembwe, Judge.**

**Court Clerk – Juma.**

**Miss Mahuni for Petitioner.**

**Abubakar Muliro – present.**

**Hussein Mwanza Musa s/o Alfaraj.**

**Hussein:- My father is sick. He is in hospital.**

**Court:-**

***Application dated 29/7/2013 is granted in terms of prayer two (2) and (3). The land to revert to its original owner.”***

It is this order which prompted the application under consideration.

9. A careful look at the proceedings of the 28/11/2013 reveal the following:-

- i. Whereas Miss Mahuni appeared for the Petitioner all the other three Administrators did not attend Court and there was no evidence of service upon them;*
- ii. Abubakar Muliro, the Applicant, appeared in person despite being represented by the firm of C.O. SAMBA & Co. Advocates.*
- iii. A son to the First Administrator appeared (one Hussein) and indeed informed the Court that his father was unwell and in hospital;*
- iv. The application dated 29/07/2013 was not listed for hearing that day but only a mention whose purpose remains unclear.*
- v. The application was not argued before the Court.*
- vi. The Court seems to have issued the orders on its own motion although the application was opposed by the First Administrator through a Replying Affidavit filed on 28/11/2013.*
- vii. The application dealt with parcel number E. WANGA/ISONGO/409.*
- viii. The matter having been marked as settled was not re-opened for further proceedings.*

The foregone definitely calls for corrective measures.

**b. The effect of the orders made:-**

10. As pointed out, the application sought to cancel titles issued in respect to the parcel of land known as E. WANGA/ISONGO/409. I have perused the record and noted that the said parcel of land was during the deceased's lifetime, sub-divided into 13 portions and duly transferred to the deceased's twelve children some of whom sold their respective parcels of land. The affidavit of MWATUMA MASAI MUSANJELI sworn on 28/11/2011 in support of the Summons for Confirmation clearly demonstrates the foregone and even goes ahead to identify the alleged buyers of the various portions which arose out of the said original parcel of land.

11. Be that as it may, none of the proprietors to the various parcels of land which arose out of the original parcel of land No. 409 was neither notified, served nor participated in the proceedings of the 28/11/2013. The affidavit of MALACHI WANGWE MANYA sworn on 30/06/2014 further confirms this position. Indeed the orders made had the effect of affecting their proprietary rights of the then registered owners and they all ought to have been accorded an opportunity to so participate in the matter. That did not so happen and all those affected by the order were condemned unheard.

**c. On the competence of the Summons for Review:**

12. It was submitted by the Respondent that the application was devoid of any merits since the order sought to be received was not annexed to the application and that the Applicants had failed to demonstrate any new or important matter or evidence hence the application remains incompetent. The issue of delay also was raised. I stand to be corrected, but I think this line of argument greatly borrowed from civil practice under Order 45 of the Civil Procedure Rules, 2010 on Review. To that, I do hold that the Law of Succession Act, Chapter 160 of the Laws of Kenya provides a complete regime on how matters falling therein shall be governed and it has no room for the application of any other statute unless the very statute specifically provides for such. In determining the current application the Court is therefore not obliged to take into consideration the factors raised under the Civil Procedure Rules. However even if I have to consider the same, I have no doubt in my mind that the said issues do not hold in the circumstances of this case since the order issued on 28/11/2013 was duly extracted and is in the Court record and that the issues complained of constitute a sufficient ground to seek for a review.

### **Conclusion**

13. As the Court comes to the end of this matter, it so sends caution to parties, more so in succession disputes, to exercise a lot of care and attention and endeavour to involve all parties which ought to be so involved in the circumstances of a particular matter so as to avoid unending litigation and the possibility of heightening tension against the concerned parties who mostly are family members.

14. This Court therefore makes the following final orders:-

- a. *The Summons for Review dated 30/06/2014 is hereby allowed;*
- b. *The orders made on 28/11/2013 are hereby reviewed and accordingly set-aside and/or vacated forthwith;*
- c. *In the event that the orders made on 28/11/2013 were implemented, the Lands Registrar is hereby ordered to revert the status to the one prevailing on 28/11/2013.*
- d. *Each party do bear its own costs.*

Orders accordingly.

**DELIVERED, DATED and SIGNED this 29<sup>th</sup> day of May, 2015**

**A. C. MRIMA.**

**JUDGE**