



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1665 OF 2008

IN THE MATTER OF THE ESTATE OF MOFFAT MARIGA NGETHE (DECEASED)

RULING

1. The deceased to whom this succession cause relates died testate on 11th January 1987. Nellie Wanjiku Moffat the surviving widow to the deceased applied for grant of letters of administration on 17th July 2008 and the same were issued to her on 31st October 2008 and subsequently confirmed on 9th March 2010 with the deceased's only asset being a parcel of land registered as **L. R. NO. KIAMBAA/KIHARA/811** in the sole names of the deceased.
2. The applicant seeks setting aside and review of the orders issued by J. Kimaru in his ruling of 18th April 2013. The application is based on grounds that the estate of Moses Mariga Ngethe owned a parcel of land known as **KIAMBAA/KIHARA/811** which was subdivided into 3 portions 4837/4838 and 4839. On 4th November 2011 the applicant purchased **KIAMBAA/KIHARA/4839** from Nellie Wanjiku Moffat (the administrator of the estate of the deceased's estate) for Kshs. 1,800,000/- and the same was duly transferred to him and he was issued with a title. That no limitation was noted in the said certificate of confirmation but the same stated that Nellie Wanjiku Moffat owned **KIAMBAA/KIHARA/811** absolutely. That the ruling delivered on 18th April 2013 cancelled the title and revoked the subdivision giving rise to the same. The applicant claims that she was an interested party but was not served with the application giving rise to the said ruling and was not heard. The applicant argues that the Ruling dated 18th April 2013 has condemned the applicant unheard despite the fact that she is an interested party. That once the grant was confirmed in favor of Nellie Wanjiku Moffat and she became entitled to exercise the powers conferred to her under section 82 of the Law of Succession Act (Cap 160) and that the applicant is entitled to rely on section 93 which protected the rights of the purchaser. That the applicant was condemned unheard and it is in the interest of justice that the same is set aside.
3. The respondent Gideon Karima Mariga opposed the application in his replying affidavit filed on 16th January 2015. He avers that the applicant has failed to provide any reasonable evidence to support her application for review and is undeserving of the same. He deponed that the 2nd respondent the co-administrator in his father's estate secretly subdivided the deceased's only property into 3 plots **KIAMBAA/KIHARA/4837**. She transferred to herself in trust of Moffat Mariga Waithira, 4838 to Harrison Kamau Mariga and 4839 that she sold to Grace Wakionyo Kungu who was not a beneficiary to the deceased's estate totally disinheriting her two sons Amos Ngethe Mariga and Anthony Njau. That the place where they had made permanent structures was registered in the names of Harisson Kamau Mariga and Anthony Njau Mariga who are threatening to evict him. This necessitated him to file the application giving rise to the ruling of 18th April 2013 which declared that the 2nd respondent lacked capacity to transfer any portion of the land without the consent of the children since her interest on the said parcel is only life interest as such

the sale of the said parcel to the applicant was fraudulent and as such the applicant should claim a refund of the purchase price from the 2nd respondent.

4. The 2nd respondent in her replying affidavit filed on 11th February 2015 avers that there is no one who has interfered with the applicant's quiet enjoyment of the suit land. That after the said ruling there was a meeting arranged between her and the 1st respondent by their advocates to work on the modalities of the piece of land adding that the applicant is still in possession of her title documents as no transfer has taken place to effect the orders of the Honorable Court. She stated that she contributed towards the purchase of the said parcel of land which they bought with the deceased although the same was registered solely in the name of the deceased adding that the purported effect of the orders is misguided and misrepresented as no transfers has or will take place adding that she supports the applicant application that the said parcels of land should not be amalgamated.
5. The application is basically on review of the orders granted by Justice Kimaru of 18th April 2013, where he expressed himself as follows;

“The 1st respondent admits to having subdivided the said parcel of land and having sold a portion of it particularly to the third party and the learned judge found that the 1st respondent held the title in respect of the said parcel of land as a life interest and therefore lacked capacity to transfer the property as under the law she is only entitled to a life interest and was therefore she holds the title as trustee of the children of the deceased. That the title revert to the name of the respondent with a caveat that she holds the same in trust for her children and he caused a fresh grant to be issued to Nellie Wanjiku Moffat, Amos Ngethe Mariga and Gideon Karimia Mariga.”

6. Rule 63(1) of the Probate and Administration Rules which provides that, ***“save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.*** Hence the same applies. Order 45 of the Civil Procedure Act 2010 to provides that a court can review an order as follows on;

“(a) Discovery of new and important matter or evidence which after the exercise of due diligence was not within the time when the decree was passed or the order was made;

(b) Mistake or error apparent on the face of the record;

Or for any sufficient reason;

(d) The application must be made without undue delay.”

Order XLIV of the old Civil Procedure Act currently Order 45 of the Civil Procedure 2010 provides;

“(1) Any person considering 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, or on 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 order, may apply for a review of judgment to the court which passed the decree or made the order without.

7. In the case of **James M. Kingaru & 17 Others vs J.M. Kangari & Muhu Holdings Ltd & 2 Others [2005] eKLR**, Visram J (as he then was) held as follows:

*“Applications on this ground [review] must be treated with caution. Review cannot be sought to supplement the evidence or to introduce new evidence. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence **or that he had been deprived of the evidence at the time of trial.**” {emphasis mine}*

8. The effect of the said Ruling of 18th April 2013 reverted the title of the suit parcel of land back to the names of the respondent, this in essence cancelled the transfer of the same to the applicant affecting the purchaser’s interest in land. It should be noted however that this court is no sitting in appeal of the said decision. The applicant claims she was not aware of the said order nor was she served with the said application. Although the application was filed two years after the said ruling there is sufficient cause to review the said order. The applicant seeks to be heard a right available to her under the Constitution under Article 50 (1) (k) . I therefore find that the applicant has shown sufficient cause to set aside the ruling delivered by Justice Kimaru on the 18th April 2013 in respect of **Kiambaa/Kihara/4839** and all subsequent orders arising therefrom. The ruling is set aside as prayed. Costs shall be in the cause.

Dated signed and delivered this **28th** day of **May** 2015.

R. E. OUGO.

JUDGE

In the presence of:

.....**Applicant**

.....**Respondents**

.....**Court clerk**