



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

SUCCESSION CAUSE NO. 6 OF 1997.

**IN THE MATTER OF ESTATE OF LATE GEOFFREY ERASTUS
WAMBAYA:..... DECEASED.**

AND

MARY WAMBAYA :..... APPLICANT.

R U L I N G.

The application dated 27th March, 2014 by Jacob Joseph Wambaya, said to be one of the beneficiaries of the estate of the late Geoffrey Erastus Wambaya (deceased) and a son to the late Esperance Perside Wambaya, is essentially for the eviction of any trespasser upon land parcel No. Kapkoi/Mabonde Block 1 (ex-prison) 187 on the basis of the judgment delivered on 21st February, 2003 and lifting any restrictions thereon and an order to the respondent to release the original titles failure to which the Land Registrar issues new titles.

The application also seeks an order of temporary injunction restraining the respondent from offering for sale, alienating, disposing off, transferring or in any other manner whatsoever dealing with the aforementioned portion of land and an order for the dismissal of the review application.

The grounds in support of the application are that the High Court sitting in Kitale went through the issues raised and placed before the court touching on the estate of the deceased and made a judgment on the 21st February, 2003, making up the apportionment and distribution of all the assets and liabilities of the deceased's estate. That, the first house of the deceased made an application in the year 2004 for review of the orders of the 21st February, 2010 which application has never taken off. That, the applicants have not been served with any review orders either revoking or restraining the judgment as delivered on the 21st February, 2003. That, the mode of distribution in the judgment of 21st February, 2003 do stand.

That, the objector has since passed away. That, the then presiding judge has since been elevated to the Court of Appeal.

That, no new evidence has been shown and that the restrictions on the suit land have been placed by the daughters of the deceased.

The foregoing grounds are fortified by the averments contained in the applicant's supporting affidavit dated 26th March 2014 and are opposed by the respondent, Mary Wambaya, on the basis of the averments contained in her replying affidavit dated 1st July, 2014.

At the hearing of the application, learned counsel, M/s. Koech, submitted on behalf of the applicant that this succession cause was finalized on 21st February, 2003 but an application for review was made on 25th February, 2004. The application remains pending to date and the objector has since passed away.

The applicant took out necessary letters of administration and the judge who made the judgment has since been elevated to the Court of Appeal.

Therefore, the application for review can no longer stand. Learned counsel went on to submit that the applicant is being denied the fruits of a judgment which has neither been set aside nor reviewed and in the meantime, the respondent has registered cautions on the estate and fraudulently disposed part thereof.

That, the respondent has subjected the applicant to hardship and trespassed on land given to the applicant.

Learned counsel contended that the review application has already been overtaken by time due to the respondent's indolence and that the applicant is proper on record having obtained necessary grant of letters of administration. Further the respondent has even gone further to interfere with a parcel of land in Kisumu by obtaining a title deed which was later canceled by the registrar of lands due to the fraudulent transmission.

On her part, the respondent through the learned counsel, **Mr. M. Wafula**, submitted that the matter has not been dragged by the respondent as borne by the court record. That, the delay has been occasioned by the absence in court of the applicant and her counsel who are therefore guilty of laches. That, the pending application for review is due for hearing on 6th October, 2014. That, there is demonstration that the estate is being wasted neither is there evidence of disposal of part of the estate by the respondent.

That, the alleged sale of land in Kisumu was nullified since the situation on the ground changed as there was change of the administration. That, the alleged transaction was not fraudulent and registration of restrictions would not be an impediment to development of the property as it was meant to preserve the estate.

The respondent contended that this application has not satisfied the conditions for grant of an injunction and is meant to circumvent the application for review and should therefore be dismissed.

Order 42 Rule 5 and Order 50 Rule 1 of the Civil Procedure Rules have been invoked in this application. Rule 5 of Order 42 CPR essentially deals with record of a decree where an appeal proceeds on grounds common to all parties while rule 1 of Order 50 CPR deals with the definition of a month. The relevance of these provisions to this application cannot be seen by this court.

Order 40 of the Civil Procedure Rules which deals with temporary injunction and interlocutory orders has not been invoked by the applicant thereby rendering his request for a temporary injunction a misconception.

However, Article 159 (2) (a) (b) and (d) of the Supreme Law of the land has been invoked herein. It therefore behoves upon this court to do justice to all without any delay and without undue regard to procedural technicalities.

Having considered the application in the light of the supporting grounds and the submissions by both sides, it is apparent that the bone of contention is the application for review lodged in this matter by the respondent on the 25th February, 2004.

The application despite the passage of time is pending hearing and determination and hence the present application which is obvious an expression of the frustrations undergone by the applicant due to continued delay in having the final judgment of the court implemented as ordered.

The said judgment was delivered on 21st February, 2003, by the Hon. Justice Nambuye who has since been elevated to the Court of Appeal but without prejudice to the review application being heard by any other judge.

The applicant implied that the elevation of the said lady justice to the Court of Appeal has the effect of compromising the respondent's application for review.

Such an application by dint of Order 45 rule (2) of the Civil Procedure Rules may be heard of a judge other than the one who passed a decree or made any order.

The judgment of the 21st February, 2003 by Justice Nambuye effectively settled the issues emerging from the distribution of the estate of the deceased. The respondent and the original applicant were catered for as widows of the deceased. The present applicant is son to the late original applicant.

The application for review was made by the respondent with the intention of having the court review its judgment and re-distribute the estate. A stay of execution of the judgment was also sought. This therefore means that the judgment of the court has never been executed due to the existence of the application for review.

However, nothing stands in the way for the execution of the judgment. The review application is yet to be heard and determined but no stay of execution has been issued by the court in the meantime. The parties are and have always been at liberty to execute the judgment.

Until and unless, an Order of stay of execution is given by the court, the applicant and the respondent have the liberty to execute the judgment either jointly and/or severally.

Indeed, the application for review has taken along period to prosecute but its existence is no bar to execution of the judgment which remains valid to date.

Apparently, both parties have been indolent in this matter. The applicant had all opportunity to apply for dismissal of the review application for want of prosecution but did not do. The respondent had all the time to prosecute the application but did not do so within the earliest period possible. It may however, be noted that when the application came up for hearing before this court on 16th June, 2014, it was adjourned to 6th October, 2014 at the instance of the applicant who still went ahead to bring this present application with a view to having parties litigate on matters which were seemingly settled by the court's judgment of the 21st February, 2003 or to having the parties litigate on fresh issues which have arisen since the delivery of the judgment.

Such fresh issues may require fresh suits before relevant courts.

In sum, this present application is devoid of merit and a waste of valuable judicial time if not an utter abuse of the court process.

The parties should await the hearing and determination of the review application dated 25th February, 2004 and in the meantime avoid involvement in fresh squabbles pertaining to the estate of the deceased.

Both having contributed to the delay in having this entire matter concluded expeditiously should take the blame if justice has been delayed in contravention of Article 159 (2) (b) of the constitution.

This application therefore stands dismissed with costs to the respondent.

[Read and signed this 31st day of July, 2014.]

J.R. KARANJA.

JUDGE.