



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 72 OF 2012

IN THE MATTER OF THE ESTATE OF LABAN K. WAITHAKA (DECEASED)

BETWEEN

REGINA MUTHONI KAMAU APPLICANT

VERSUS

JOSEPH WAITHAKA KAMAU RESPONDENT

RULING

Before me for determination is the Notice of Motion dated 16th July, 2014. It is brought under Rule 63 of the Probate and Administration Rules, Law of Succession Act, Order 45 Rules 1 and 2 Order 51 Rule 1 of the Civil Procedure Rules (2010) and all enabling provisions of the law.

The Applicant prays that the court be pleased to set aside and or review its Judgment in respect of the land parcel No. ELDORET MUNICIPALITY BLOCK 9/220 AND ELDORET MUNICIPALITY BLOCK 9/390.

The application is premised on the following grounds;

- 1. That the affidavit of Joseph Waitthaka Kamau which the court relied upon in making its decision had contained two versions in respect of the above plots.**
- 2. That the court ended adopting the contents of paragraph 27 of the said affidavit which had excluded the Applicant herein from inheriting parcel No. Eldoret Municipality block 9/17/220 and also 9/17/390.**
- 3. That the application is meritorious and is made in good faith.**

The application is supported by the affidavit of Regina Muthoni Kamau, the Applicant herein sworn on 16th July, 2014. She depones that the affidavit on which the court relied had many errors as a result of which she was disinherited. The errors were pointed out in paragraphs 6, 7, 8, 9, 10, 11 and 12 of the supporting affidavit as follows:-

- *That paragraph 19 of the said affidavit indicates that Plot No.ELDORET MUNICIPALITY BLOCK 9/17/220 be given to me whereas and Plot No. 9/17/390 be sold and proceeds shared among all the beneficiaries.*
- *That the contents of paragraph 27 sub paragraph 11 and 12, the same parcel of land Plot*

No. ELDORET MUNICIPALITY BLOCK 9/17/220 that was to be allocated to me was indicated as being sold and proceeds being shared among all the beneficiaries whereas the Plot No. ELDORET MUNICIPALITY BLOCK 9/17/390 is indicated as being given to me.

- That the court went ahead in its judgment and adopted the proposal contained in paragraph 27 save for paragraph 11 which in respect of ELDORET MUNICIPALITY BLOCK 9/17/390 and as a result the court adopted the contents of sub paragraph 12 unknowingly which was a mistake and as such completely omitted in inheritance of the Kapsoya Plots which I believe was a big error that originated from the affidavit of JOSEPH WAITHAKA.

- That even the documents that were annexed in the said affidavit indicated that Plot No. ELDORET MUNICIPALITY BLOCK 9/17/220 was to be given to me.

- That what the court was to decide was in regard to ELDORET MUNICIPALITY BLOCK 9/17/390 nothing was mentioned in regard to Plot No. ELDORET MUNICIPALITY BLOCK 9/17/220 during the hearing.

- That it was well settled during all our meetings and even the submissions in court that I should inherit Plot No. ELDORET MUNICIPALITY BLOCK 9/17/220 and to date no one has raised any objection on the same.

- That I believe it was an error on the face of the record and the same can be corrected by way of review.

The Respondent Joseph Waithaka Kamau, opposed the application by way of Grounds of Objection dated 11th August, 2014 and filed on 12th August, 2014. The same was filed pursuant to Section 47 of the Law of Succession Act. They are as follows;

- 1. The application as couched is defective in form and substance.**
- 2. The prayers of review and setting aside are not synonymous but distinct legal remedies which cannot be pursued simultaneously.**
- 3. A party cannot compel court in an application to give regard to its evidence which was disregarded in a Judgment.**
- 4. A party dissatisfied with a Judgment of court has the option to appeal against such decision to a higher court than to purport to ask the same court to reverse its Judgment through an application.**
- 5. The application flies against the doctrines of *functus officio* and *res judicata* as the court has already rendered itself on all issues before it.**

The application was disposed of by way of filing written submissions. Those of the Applicant are dated 10th November, 2014 and were filed on 11th November, 2014. For the Respondent are dated and filed on 14th November, 2014.

I have accordingly considered the entire application, the Grounds of Objection and the respective submissions filed on behalf of the parties. I now take the following view of the application;

The principles guiding the court in an application for review of an order or decree are, if there is a discovery of new and important matter or evidence which was not within the knowledge of the Applicant or could not be produced when the decree or order was passed, or on account of an error apparent on the face of the record or for any sufficient reason.

In the instant application, the Applicant seeks a review of the decree on account of an error

apparent on the face of the record; the error being occasioned by the contents of the affidavit of the Respondent on whose strength the Grant of Letters of Administration was confirmed resulting in disinheriting the Applicant.

From the Judgment of the court, it was clear that there were only two contentious properties; being Plot No. 390 and the Lorian Farm. Court then directed that the parties file a further affidavit on a mode of distribution that was agreeable by all beneficiaries. When parties returned to court on 30th September, 2013, they informed the court that they had agreed on how they wished to have the properties distributed. Court was then referred to a Further Affidavit filed by the said Joseph Waithaka Kamau filed on 21st November, 2013. At this juncture only Plot No. 390 was contentious. The proposals from either house on how they wished it distributed are contained in the Judgment. In an attempt to have each beneficiary accorded an opportunity to indicate how they wanted the distribution of the property be done, every beneficiary was required to file an affidavit on their proposed mode of distribution.

Towards the close of the hearing, the respective parties engaged the advocates on record who informed the court that they would rely on the affidavits filed by the respective parties.

Accordingly, the distribution by the court was per the Further Affidavit of Joseph Waithaka Kamau. This outlined the agreed mode of distribution of the parties save for Plot No. 390 that was contentious. For the considered reasons enunciated in the Judgment, the court ordered that the plot be sold by the two administrators and its proceeds be used to pay any debts, rents or rates on all other parcels of land registered in the deceased's name.

It has been contended by the Applicant that the mistake was occasioned by the court in adopted sub-paragraph 12 of the affidavit it relied on thus disinheriting the Applicant of Plot No. 220.

Order (a) of the Judgment specifically indicated that the estate was to be distributed in accordance with paragraph 27 of the Further Affidavit of Joseph Waithaka Kamau with the exception of its sub-paragraph 11 which referred to Plot No. 390. Sub-paragraph 12 of paragraph 27 again appeared to refer to Plot 220 as that to be sold instead of Plot No. 390.

According to main paragraphs 19 and 20 of the affidavit, it is clear that Plot No. 220 measuring three quarter ($\frac{3}{4}$) was assigned to the Applicant. Ultimately therefore, there was a mistake in the framing of sub-paragraphs 11 and 12 of paragraph 27 . The same ought to read in the opposite of each other.

I do therefore agree with the Applicant that there is an error apparent on the face of the record which can only be corrected in this application. Had this error been brought to the attention of the court at the appropriate time a correction would have been effected.

Accordingly, this application is allowed in terms of prayer No. (c). The Judgment of this court dated 8th July, 2014 is reviewed only as regards the terms of confirmation of the Grant in line with paragraph 27 sub-paragraphs 11 and 12 of the Further Affidavit of Joseph Waithaka Kamau sworn on 20th November, 2013 to read as follows;

“27. 11. Plot No. 390 – To be sold by the two administrators. The proceeds of sale shall be used to pay any debts, rents or rates on all other parcels of land registered in the deceased's name.

12. Plot No. 220 – To be given to Regina Muthoni.”

The rest of the distribution shall be in accordance with paragraph 27 sub-paragraphs 1-10 of the aforesaid Further Affidavit.

A Certificate of Confirmation of Grant shall be drawn so as to conform with the orders herein.

Each party shall bear its own costs.

DATED and **DELIVERED** at **ELDORET** this 21st day of November, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mrs. Chumba for the Applicant

Mr. Kibii holding brief for Ngigi Mbugua for the Respondent