REPUBLIC OF KENYA

High Court at Kakamega

Succession Cause 289 of 1993

IN THE MATTER OF THE ESTATE OF THE LATE LEO MAKOKHA ONGOKA - DECEASED

BETWEEN

FRONICA WANAMUKHANA MAKOKHA ……..…. PETITIONER

AND

AURELIA WAMALWA MAKOKHA …….. RESPONDENT

V

SAMIR LAVESHKUMAR

RABARI ……..……. INTERESTED PARTY/APPLICANT

RULING

Before me is an application dated 10th August 2012 by way of Chamber Summons filed by the interested party/applicant **SAMIR LAVESHKUMAR RABARI**. The application was brought under section 93 of the Law of Succession Act (Cap 160) and Order 45 Rule 1 & 2 of the Civil Procedure Rules, and Rules 49, 63 and 73 of the Probate and Administration Rules. It lists 5 prayers, two of which, have been spent, as follows –

a) (spent)
b) (spent)

c) That this Honourable court be pleased to review and vacate or set aside the orders issued on the 24/07/2012 revoking the confirmation of the grant on 28th July, 2009.

d) That the application dated 11/10/2011 be fixed for hearing after all parties have been served and directions have been taken.

e) That costs of this application be provided.

The application has grounds on the face of the Chamber Summons. The grounds are, inter alia, that the application dated 11/10/2011 having been opposed ought to have been heard on merits; that the respondent (AURELIA WAMALWA MAKOKHA) did not disclose full particulars in court; that the interested party/applicant had bought the land parcel No. East Bukusu/South Kanduyi/1018 at

Kshs.3,000,000/= which he fully paid to one BASILISA MAKOKHA KHAEMBA the registered proprietor; that the interested party needs to be enjoined in the proceedings; that the applicant did not disclose full material particulars to the court that the said BASILIA MAKOKHA KHAEMBA who had been allocated the said parcel passed away hence no response came from her next of kin; that the applicant had sued the interested party/applicant in Bungoma High Court which suit was withdrawn when BASILISA MAKOKHA KHAEMBA passed away and there was nobody willing to be substituted in her place since they had bought the said land from her; and that the interested party was not served with the application dated 11/10/2011.

The application was also filed with a supporting affidavit sworn on 9th August 2012 by the applicant. It was deponed therein ***inter alia*** that the orders issued on 24/07/2012 directly affected him as the current registered proprietor of land parcel No. East Bukusu/South Kanduyi/1018; that at the time he bought and paid for the land at the price of Kshs.3,000,000/= it was in the name of the registered owner Basilisa Makokha Khaemba; that upon finishing payment the respondent sued him in Bungoma HCCC No. 8 of 2011 and after a short while the said Basilisa Makokha Khaemba passed away on 7/4/2011; that since no instructions were received for the substitution of Basilisa Makokha Khaemba who was the principal actor (and 1st defendant) a consent was recorded on 30th June 2011 withdrawing the suit; that following the withdrawal of the case, the restriction placed on the land against the interested party was removed and title issued to him; that having purchased the said parcel of land the application dated 11/10/2011 ought to have been served on him as it directly affected him; that the judge ought not to have heard and issued an order on 24/7/2012 as serious allegations of bias had been attributed to the court.

The interested party/applicant with leave filed a supplementary affidavit sworn by himself on 14th September 2012. This was in response to the replying affidavit sworn on 5/9/2012 by the respondent. It was deponed ***inter alia*** that the application dated 11/10/2011 was never heard and determined as there were so many issues that were never disclosed to the court; that Mr. Luchivya advocate who held brief for Mr. Masinde advocate did not have instructions to enter into a consent since the major beneficiary of the subject matter had died and which information was never brought to the court's attention; that under rule 44 (3) and (4) of the Probate and Administration Rules directions ought to have been given after all the affected parties were served; that there were so many errors apparent on the face of the record that justified the review of the orders of 24/07/12; that the objector/respondent was not to be served with the application for confirmation of grant since she was only to be informed as she was not one of the administrators to be served with the application for confirmation of grant; that what was issued on 14/12/1994 was a grant and not a certificate of confirmation of grant; that in the application dated 11/10/2011 no information was given that parcel No. East Bukusu/South Kanduyi/1018 had been sold and transferred; that the objector/respondent wished to use the back door to have the title deed of the interested party cancelled without giving him an opportunity. This affidavit annexed an affidavit "SRL - 1" sworn on 11/9/2012 by Johnson Masinde Simiyu advocate. It was deponed therein that when served with the application dated 11/10/2011 they duly advised their client (name not disclosed) and duly filed a replying affidavit; that though he sent his assistant Mr. Luchivya advocate to court, the instructions were for him to adjourn the matter, not to record a consent; that he was surprised to learn that the matter had proceeded and a grant issued on 28/9/2009 had been revoked.

The application is opposed. A replying affidavit was sworn on 5th September 2012 by Aurelia Wamalwa Makokha was filed. It was deponed therein, ***inter alia***, that the application dated 11/10/2012 was heard on merits since the court considered the same in the presence of both counsels for parties and delivered a ruling therein; that the parties who were present thereon have not complained; that it was not true that the deponent was present in court on 23/6/2009; that since there existed a valid grant dated 14/12/1994, the court was under a duty to declare the subsequent grant void; that the court was aware of the fact that Plot No. Kanduyi/1018 had been sold by the beneficiary and left the decision on same till parties moved the court appropriately; that the rights of the applicant were challenged in Bungoma HCCC. No. 8 of 2011, but that the deponent's advocate filed a consent in the matter without his instructions and that the deponent had applied for vacating the consent orders.

Parties counsel MS Bulimo & Company for the applicant and MS Momanyi, Manyoni & Company for the respondent filed written submissions, which I have perused. On the hearing date, counsel relied on

written submissions filed.

This is an application for review of the court's orders in the ruling dated 24th July 2012 revoking a certificate of confirmed grant of letters of administration issued by the same court in September 2009. The present application has been filed under Order 45 of the Civil Procedure Rules 2010. Since the said order 45 is the replacement of the previous Order XLIV of the Civil Procedure Rules, I hold that under Rule 63 of the Probate & Administration Rules (Cap 160), it applies in Succession matters. Order 45 Rule 1 provides as follows

"45 (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 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 unreasonable delay."

It is clear from the above provisions of the rules that review can only be applied for on either discovery of new and important evidence, or on account of error apparent on the face of the record, or for any other sufficient reason (or a combination of these reasons), subject to the rider that the application for review has to be filed without unreasonable delay – see ***Kithoi –vs- Kioko [1982] KLR 177*** relied upon by the applicant.

The burden is on the applicant to demonstrate the reason relied upon. This application is grounded on the allegation of an error on the face of the record. The error is said to have been committed because the applicant was not served and a full hearing for the application inter-partes heard. Secondly, that there was no previous confirmed grant. In my view, an error of law is not one of the grounds to justify a review.

When the applicant argues that he should have been served as an interested party, I note that in the application for confirmation of grant dated 13/6/08 filed by Masinde & Co. advocates for one co-administrator – Veronica Makokha, there was no mention that he was an interested purchaser of land. Therefore, there could have been no justifiable reason to serve him with the application dated 2nd August 2012. The actual surviving administrators and beneficiaries have not complained of lack of service of such application. In any case, the failure of the court to require that interested persons be served with the application for revocation is an error of law as clearly stated by the applicant himself. It is not a ground for review under the Law of Succession Act (Cap. 160), since under the law, the court can revoke a grant of presentation or certificate of a confirmed grant even on its own motion. The applicant not having demonstrated any legal reason as envisaged by the law to show an error on the face of the record that would affect him, this application cannot succeed on that ground.

On the second limb of there not being a previous confirmed grant, the applicant in my view has been misleading the court when he says that the only grant of presentation is that issued by Tanui, J. on 14th December 1994. The court record clearly shows that on 24th July 1995, the same Judge issued a confirmed grant in this matter. The later grant which the applicant relies upon and wants to be reinstated through this application is therefore void. We cannot have two confirmed grants in the same file or succession matter. The only avenue is revocation and or rectification of the confirmed grant issued on 24th July 1994 to be applied for under the relevant Probate and Administration Rules, if there is need to correct any error or add or clarify any information therein. Otherwise, it is wrong to have two different and separate confirmed certificates of grant in the same file and succession cause. The complaints against

lawyers herein can be addressed to the Law Society of Kenya by those affected.

For the above reasons, I find that the application of the interested party/applicant lacks merits. I dismiss the same, with costs to Aurelia Wamalwa Makokha, the respondent.

Dated and Delivered at Kakamega, this 28th day of May, 2013

George Dulu

J U D G E