



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 519 OF 1986

IN THE MATTER OF THE ESTATE OF BEATRICE NYAKIO MATHIA (DECEASED)

RULING

The application dated 24th August, 2012 seeks review of the orders made by Nambuye J (as she then was) on 14th October, 2011. The Applicant's position is that she bought an asset from the estate, namely Thika L.R No. 4954/46/IX but subsequently the grant was revoked and the court ruled that the said asset formed part of the distributable estate. This position was supported at the hearing by one of the administrators.

The other administrator, Josephat Mathia, swore an affidavit on 29th October, 2012, which was filed in court on 31st October, 2012. He avers that Nambuye J in her ruling observed that the asset was sold to the applicant to defeat the revocation proceedings and that the said sale was declared deceased null and void.

I have perused the ruling of Nambuye J. delivered on 14th October, 2011. From the ruling it is quite clear that the said asset had been sold and Her Ladyship addressed her mind to the validity or otherwise of the said sale. She said at page 16.

“With regard to the Thika property L.R No. 4953/46/IX the court is invited to hold that if any sale of this property has been done, then the same was done fraudulently without the consent of the objector...”

At page 40 of the ruling, the court says:-

“Thika plot No. L.R. No. 4953/46/IX has been admitted by both sides that it belonged to the deceased. As at the time of the initiation of the revocation proceedings it was alleged to be registered in the name of the Respondent/Petitioner and in her replying affidavit to the summons for revocation admitted that she was holding it as trustee and that income generated therefore was being utilised for the benefit of the estate. It therefore follows that, the alleged sale of the same cannot be defended as the same was done without a court order and as submitted by the objectors counsel, if indeed it was disposed off then the same was done with the sole aim of defeating the revocation proceedings and it cannot be protected. Further the purpose for its disposal cannot be protected because, the same was meant to benefit persons not beneficiaries to the estate of the deceased as deponed...”

The court finally listed Thika Building on L.R. NO. 4953/46/IX among the distributive properties of the deceased. The applicant in her affidavit in support of the application dated 24th August 2012, asserts that it was not disclosed to Nambuye J. that she had been registered as proprietor of Thika L.R No. 4953/46/IX since 2006, and she holds the view that if Nambuye J had been made aware of that fact, she would not have held that the said property formed part of the estate. She also argues that under section 93

of the Law of Succession Act Cap 160, the transfer of the said property to hER cannot be affected by a subsequent revocation of the grant earlier made to the administrator.

The review application is premised on Rule 63(1) of the Probate and Administration Rules. Rule 63(1) imports the review process in the Civil Procedure Rules into probate practice. Review is grounded by Order 45 of the Civil Procedure Rules, Order 45 Rule 1 reads as follows:-

“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 form the discovery if 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 appeared on the face of the record, or for any other sufficient reason, denies to obtain review of decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.

2. A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the dependency of an appeal by some other party except while the ground of such appeal is common to the applicant and the appellant , or when, being respondent, he can present to the appellate court the case on which he applies for review.”

The applicant was not a party to the revocation proceedings before Nambuye J. The question then that arises is whether she can bring an application to review an order made in proceedings to which she was not a party. Order 45 rule 1 of the Civil Procedure Rules states that a review application can be brought by “any person considering himself aggrieved of a decree or order....” ***This would imply that any person*** is entitled to bring a review application. This would suggest that any person including one who is not party to the proceedings in which the decree or order was made. However, a closer reading of the rest of the provision clearly indicates that only persons who are party to the proceedings in which the decree or order was made can bring review proceedings. A stranger or outsider to the proceedings has no basis upon which to bring review since he or she was not party to the proceedings. This would include persons who are affected by the decree or order; but not made party to the proceedings.

The order complained in the application dated 24th August, 2012 was made in revocation proceedings in which the Applicant was not party. She concedes as much in the affidavit sworn on 24th August, 2012. In paragraph 10 she says she has never served with any court papers relating to the Succession Cause, and in paragraph 11 that she was not aware that there was a dispute in the estate. She was not party to the proceedings relating to estate, and principally the revocation application which culminated in the orders made on 14th October 2011. She therefore has no basis for bringing a review application perused on order 45 of the civil procedure Rules.

Even if it have to be held that she had standing to bring review proceedings, it is to be doubted whether he case falls within the grounds upon which review may be sought. In the first place, the matter cant be in the Applicant on the face of the order. The applicant says she bought Thika L.R No. 4953/46/IX from the administrator. The fact of this sale was brought to the attention of the court and the court made its final orders only with this fact in mind it cannot therefore be argued that the court made its first was in ignorance of the fact of sale. The applicant argues that the property had been transferred to his name and therefore is no longer formed part of the estate. So my mind it amounts to the same thing. Sale of naturally followed by transfer or registration of the said property in favour of the buyer. The court no doubt have this in mind.

It cannot be argued either that there was discovery of new important matter or evidence which, after exercise of diligence, was not within the knowledge of the Applicant could not be produced by her at the

time when the orders were made. There is new matter. The fact of the sale was known to the court at the time it made its orders. There was nothing awaiting discovery. Secondly, the applicant was not party to the revocation of proceedings. The second limb of this ground is that the new material was not within the knowledge of the applicant or could not be produced at the trial. As the application in this and by no party to the revocation proceedings this ground review is not available to her. I am equally satisfied that there is no other sufficient reason upon which the Applicant can dig on to obtain review of the orders of Nambuye J.

The Applicant seeks refuge under **Section 93** of the Law of Succession Act, which provides that the validity of transfer of an asset to a purchaser by a person to whom representation has been granted is not affected by a subsequent revocation or validation of grant of representation. It has not been demonstrated that the court made its orders on 14th October, 2011 in forgetfulness of **Section 93** of the Law of Succession Act. Further order it has been held previously that a sale or transfer which is obliged to defend the estate or undermine the succession process is invalid, as it cannot be counter named that **Section 93** was intended to afford protection to a transaction that we designed to defend the estate or defeat a legal process. Indeed, Nambuye J apprehend to have this in mind when she held:

“...if indeed it was disproved of then the same was done with the sale aim of defeating the revocation proceedings and it cannot be protected. Further the purpose or its disposal cannot be protected because the same was meant to benefit persons not beneficialness to the estate of the deceased....”.

On the whole, my conclusion is that the application dated 24th August, 2012 is misconceived and without merit. I hereby dismiss it with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 27th DAY OF June, 2013.

W. M. MUSYOKA

JUDGE