



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
HC.SUCC NO.263 OF 1994
(IN THE MATTER OF THE ESTATE OF PETER KIMILU MULUMBI)

GRACE MUMO KIMILU AND CHARLES K KIMILU..... APPLICANTS

VERSUS

PAUL KIMILU.....OBJECTOR

RULING

1. This is an application brought under Order XLIV rule 1 and 6 of the Civil Procedure Rules (now repealed) [the Rules] in which Grace Mumo Kimilu and Charles Kimilu (the Petitioners/Applicants) seek the following the main orders:

“2. That there be a stay of execution of this Honourable court’s ruling delivered on 13th day of May, 2009 pending the hearing and determination.

3 That, this Honourable court does review its ruling delivered on 13th day of May, 2009.”

The application is premised upon the grounds that some of the properties given to the Respondent’s family were acquired by the Petitioners’ family and do not form part of the estate and further that there is need for *viva voce* evidence of the parties to explain the circumstances of acquisition.

2. The application is supported by the affidavit of Grace Mumo Kimilu (the first Petitioner) made on the 18th September, 2009. In paragraph 3, 4, 5 and 6 thereof, she depones as follows:

“3. That I have not been satisfied by the distribution as key issues have not been considered and in particular:-

4. That, this issue could only be brought out well if parties are allowed to testify on oath and explain the circumstances of such acquisition.

5. That my son and I purchased Plot No.86 Maanzoni and fully developed the same and I live thereon and have evidence of purchase of the plot which evidence can only be adduced in a hearing and have settled and developed there and paid its development loan.

6. That, Plot No.48 was purchased by myself and the Plot is in my son's name and is not part of the estate of the deceased.”

3. The application is also supported by the affidavit of the Charles Kimilu (the second Petitioner) made on the 14th December, 2009 paragraphs 2, 3, 4 and 5 whereof are in the following terms:

“2.That my father, the deceased herein passed away on leaving huge loans on land parcel No. 86 Maanzoni and 82 Nzaini.

3. That I personally struggled to clear all the loans therein from my salary.

4. That I strongly feel that justice has not been done by the Objectors being given these plot parcels of land absolutely as I am the one who has been developing the same.

5. That I personally purchased parcel of land No.48 Nzaini.”

4. The Respondent/Objector, Paul Kimilu swore an affidavit on the 29th September, 2009 in opposition to the Application. He says the application is brought in bad faith to deny him the enjoyment of the estate of his deceased father; that all the assets distributed by the court were owned by his deceased father and nothing was owned by the Petitioner; and that land parcel Nos. 86 and 48 were purchased by his late father from Kaleli Mutiso and Kanuu Kimuyu respectively and accordingly formed part of the estate, his deceased mother having been buried on land parcel No.86.

5. I have considered this evidence in light of the written summons respectively filed by the Petitioners for the Respondent on 13th September, 2010 and the 5th January, 2010 respectively and have come to the conclusion that the application must fail for a number of reasons.

6. Order XLIV (1) of the Rules reads as follows:

“1.(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 of 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 unreasonable delay.[Emphasis added].

7. There is no evidence before me that any of the matters deponed to in either or both of the supporting affidavits fall within the ambit of this sub-rule. Each of them the Petitioners avers that they purchased or otherwise contributed to the acquisition and development of land parcel Plot Nos.48, 82 and 86 respectively. But they both fail to demonstrate when and how and from whom the said properties were purchased and or developed by them. There is not a single document produced by either Petitioner to support the averments made in their respective affidavits which I have reproduced in paragraph 2 and 3 respectively hereinabove.

While there may be aspects of the evidence which can only be properly orally adduced, the Petitioners have not laid any basis thereof by producing evidence of the payments alleged to have been made.

8. In the result, and for the reasons I have given, the application in the Notice of Motion dated the 18th September, 2009 and filed on the 22nd September, 2009 cannot succeed and I hereby dismiss it with costs.

Dated and delivered at Machakos this 25th day of **July**, 2011.

P. Kihara Kariuki
Judge