



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Succession Case 216 of 2002

IN THE MATTER OF THE ESTATE OF WANJUKI GAKIRU... DECEASED

AND

MBAKU MANYARI.....RESPONDENT

JULIANA RWAMBA MBAKU.....RESPONDENT

VERSUS

NJIRU MUNYARI..... PETITIONER/APPLICANT

RULING ON A PRELIMINARY OBJECTION

1. Miss Wairimu Learned Counsel appearing for the Respondent in this matter to object the hearing of the Application dated 25.10.2002. That Application under Order XLVI Rule 1 of the Civil Procedure Rules seeks Orders that a Judgment entered on 30.1.2001 be set aside or reviewed. The Judgment referred to arose as a result of a Protest filed by the Respondents. The Protest was heard in the absence of the Applicant and seeks that the decision be set aside or reviewed.

2. Miss Wairimu's point is this; upon the Protest being allowed, the grant herein was confirmed. The only option left to the Applicant was to seek revocation or annulment of that grant under S. 76 of the Law of Succession Act, Cap.160. That being the case, she argues that the Application is wrongly before Court and should be struck out. Further, that where there is a remedy known to Law, a party should seek that remedy and not an alternative one.

3. Mr. Utuku for the Applicant in response states that his client has no intention of seeking a revocation of the grant but wants parties taken back to where the dispute started and have the Protest heard on its merits. Further, that the procedure that the Applicant has used, is permissible even though this is a Succession Cause governed by the Law of Succession Act Cap. 160 and that Cap. 21 Civil Procedure Act applies.

4. The Application of the Civil Procedure Act to matters of Succession is governed by Rule 63 of the

Probate and Administration Rules. It states as follows;-

“Save as is in the Act or in these Rules otherwise provided, and subject to any Order of the Court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules namely Orders V, X, VX, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules shall apply so far as relevant to proceedings under these Rules”.

5. The Application dated 25.10.2002 is brought under Order XLIV and therefore that Order per Rule 63 is applicable if relevant. The question is, is it relevant? Order XLIV applies where a party seeks review of an Order because a new matter has been discovered or there is a mistake apparent on the face of the record or for any other sufficient reason.

6. The Applicant seeks review because he was not heard on the Protest filed by the Respondent and that the land was wholly given to the Respondent. Of importance is that he says that the Court proceeded to hear the Protest ex-parte when he had no notice of it. Without determining the Application, that matter is relevant to the matter at hand and if found to be true is a good ground for granting review. Whether or not the Applicant ought to have sought revocation or annulment of the grant is a matter for the Applicant to determine. Where there are two options or more as is the case here, it is for the party to elect which route to take. He has chosen Order XLIV and not S.76 of the Law of Succession Act and it is not for the opposing party to say otherwise.

7. I find that the Preliminary Objection is misguided and I shall overrule it with costs.

Orders accordingly.

Read in Open Court on 23rd day of February 2005

I. LENAOLA

JUDGE

In the presence of;

Mr. Utuku for Petitioner/Applicant

Mr. Mutahi for Miss Wairimu for Respondent

I. LENAOLA

JUDGE