



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Andrea Ooko Tianga (Deceased) (Succession Cause
5 of 2009) [2024] KEHC 1837 (KLR) (12 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 5 OF 2009
PJO OTIENO, J
FEBRUARY 12, 2024**

BETWEEN

ESTHER ADHIAMBO BARASA PETITIONER

AND

HASSAN AMIANI ONGACHI 1ST OBJECTOR

ATHMAN SWALEH AKHONYA 2ND OBJECTOR

AND

GRACE OUDO OMWALO RESPONDENT

WEST KENYA SUGAR CO. LTD RESPONDENT

RULING

1. As conceded by Counsel for the Objectors/Applicants, this file had a clear chequered tenure in Court. That tenure now ought to be brought to its deserved terminal.
2. By the Notice of Motion dated 17.5.2023, the interested parties pray, in the main, that the Court reviews or sets aside its orders made on the 16.5.2023. The grounds put forth to premise that application are disclosed to be that; as at the date the order was made, there was no application on record seeking Confirmation of the Grant and there was no leave for the Applicant and the Court to act so because no leave had been given and the only business that was then pending was the determination of the application dated 27.9.2018 by way of written submissions which the parties had duly filed but the said application was not attended to.
3. It is added that it was erroneous to seek to distribute the estate before the challenge by the Applicants as Purchasers were dealt with and resolved and that, as such Purchasers, they stand to suffer irreparably unless the said orders are reviewed.



4. Those grounds on the face of the application were reiterated in the Affidavit of Support sworn by 1st Applicant only adding that the Applicant was in Court on the 16.5.2023 when they were surprised to hear Counsel for the Petitioner seek that application for confirmation dated 3.3.2023 be allowed when the date was purely to confirm compliance.
5. The application was resisted by two Replying Affidavits sworn by the administratrix and the interested party, Esther Adhiambo Barasa and Grace Oudo Omwao, respectively.
6. On her part, the administratrix, takes the position that the application is grounded upon falsehood because the Summons for Confirmation of Grant was duly filed, canvassed and allowed on the 16.5.2023 after that dated 27.9.2018 had been marked withdrawn in the presence and concurrence of the Applicants and that there is no leave to be sought and granted before Summons for Confirmation of Grant may be lodged. The deponent then added that the Applicants recourse if any lies elsewhere and not in these succession proceedings adding that the estate has been fully transmitted and beneficiaries issued with documents of title.
7. For the interested party, the application was tamed a non-starter and an abuse of the process of the Court because it has been brought and pursued by strangers to the estate, without *locus standi*, and that on the merits, it fails to meet the legal requirements for an application for review. The interested party then adds that the application also fails the test of the form for applications set by the *Probate and Administration Rules*, in particular Rule 59 thereof. The Court is said to have become *functus officio* and the matter barred by the doctrine of estoppel, just as much as there is no legal or beneficial interest demonstrated to merit the orders sought.
8. When served with the Replying Affidavits the Applicant filed a further Affidavit in which it sought to urge that contrary to the assertion by the Administratrix and interested parties that the claim if any lies at the Land Court, they assert having in fact obtained an adjudication in Kakamega CMC. Misc. Application No. 7 of 1997 which awarded to them land measuring three (3) and twelve (12) acres respectively hence it is not permissible to file a fresh suit but must proceed in this case as liabilities. For those reasons, it is urged that to decline the application would be to unfairly enrich the administratrix and the interested parties.
9. Parties have all filed written submissions, albeit the Applicant did so belatedly, and the Court has had the opportunity and benefit in reading such submissions.
10. Before going to the merits and seeking to find out if a case for review has been made out, it is important to go through the records of the Court and establish what business was scheduled for the 16.5.2023 and whether the application dated 27.9.2018 was indeed pending determination.
11. The record reveal that on the 14.3.2023 the Applicants attended Court and disclosed to Court that their claim was that of Purchasers and not inheritance and after guidance by the Court; they told the Court: -

“We are guided. We can go there and we seek to withdraw the application dated 27.9.2018.”
12. On the basis of that request, the application was marked withdrawn and matter set for the 16/5/2023 for the Administrator to report to Court the status of administration. However, when all the parties attended Court on the appointed date, 16/5/2023 in the presence of Mr. Mango and Shifwoka, the Counsel for the Petitioner informed the Court that he had filed a Summons for confirmation of grant dated 3.3.2023 and sought that the same be dealt with. He informed the Court that the application had not been opposed and that there were only two beneficiaries to the estate, being their respective



clients. The application was thus allowed and the estate distributed culminating in the issuance of the Certificate of Confirmation of Grant dated the same day.

13. From the above chronology of events, it cannot be true that the Applicants' objection by the application dated 27.9.2018 was pending determination by the Court. The truth is that that application was withdrawn in the presence and at the instance of the Applicants. It equally cannot be true that on the 16.5.2023 there was no application for confirmation as the application dated 3.3.2023 was filed in Court on the 6.3.2023.
14. To the extent that the application for review is grounded on the two falsehoods, a Court of law must frown upon such because justice cannot thrive in the environment tainted with falsehood.
15. On the merits, even though the application is stated to seek the remedy of review, none of the thresholds for review was put forth nor demonstrated. As said before the Applicant take the erroneous position that there was no Summons for Confirmation of Grant on the date the Grant was confirmed and that even if the same was there, the same had no legal basis as no leave had been granted to file same. Those grounds are grounded on both falsehood and misconception of the position of the law. The falsehood is that there was indeed an application by Summons of Confirmation of Grant dated 3.3.2023, and the application dated 27.9.2018 had been withdrawn.
16. The misconception is that no law require that the Court grants leave to file an application for Confirmation of Grant. Without the threshold for review being met and established, the Court cannot act otherwise, not even on account of sympathy. The application is thus found to have no merit and is thus dismissed.
17. The dismissal however does not render the Applicant without a remedy. They were counselled by the Court that their claim is over land and not inheritance and that they should approach the appropriate Court. That door is still open if the Applicant be minded to use it including the second door of them just executing a Judgment and decree they say to hold.
18. Having failed after being counselled by the Court and noting that they are not family members to the administratrix, the order on costs is that the Applicant shall pay costs of the administratrix.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 12TH DAY OF FEBRUARY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:-

Mr. Mango for the Administratrix

Mr. Munyendo for Shifwoka for the 1st interested party

Mr. Indimuli for the Objectors

Court Assistant: Polycap

