In re Estate of Mohamed Kahindi Chula (Deceased) (Succession Cause 26 of 2016) [2024] KEHC 17087 (KLR) (17 May 2024) (Ruling)

Neutral citation: [2024] KEHC 17087 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

SUCCESSION CAUSE 26 OF 2016

M THANDE, J

MAY 17, 2024

BETWEEN

SIDI THOYA ..... APPLICANT

AND

HARRISON MKUTANO KAHINDI ..... 1ST RESPONDENT

RAMA MOHAMED ..... 2ND RESPONDENT

SANTA KAVIHA ..... 3RD RESPONDENT

HAMISI MOHAMED ..... 4TH RESPONDENT

MALINDI MOHAMED ..... 5TH RESPONDENT

JUMAA MOHAMED ..... 6TH RESPONDENT

RULING

1. In her Application dated 20.7.23, the Applicant seeks the following orders:
    1. Spent.
    2. Spent.
    3. Spent.
    4. That this Honourable court be pleased to vary, review and/or set aside the Ruling by Hon. R. Nyakundi, Judge dated, delivered and issued on 27th August 2021 together with the consequential orders.
    5. That the officer in charge of Malindi Police Station to supervise and ensure enforecement of the orders (2) and (3) above.

6. Costs of this Application.

2. The Application is grounded on the facts set out therein and in the affidavit of the Applicant sworn on 10.7.23. The Applicant avers that her name is Sidi Mrasa Mbaya and not Sidi Thoya as indicated in the pleadings herein. She averred that the 1st Respondent obtained a grant of representation in respect of the estate of the deceased, who was her husband, in Succession Cause No. 47 of 2006. The estate was distributed and she got Plot No. 183/Malindi where she settled and developed. She lives peacefully of the property until sometime in 2010 when one Koi Harrison Mkutano, a son of the 1st Respondent filed Civil Suit No. 79 of 2010 against her seeking 3 acres of the property. The matter was however settled by the chief and Koi vacated the property. Peace prevailed and the Applicant even sold 1 acre of the property to one Mohamed Mahmoud Mohamed Abdalla and another acre to Faiza Ahmed Abdulerhman in 2020.

3. The Applicant further stated that sometime in 2022, she on his request, allowed the 6th Respondent, a son of the deceased to stay on the property for a while. To her dismay however, the 6th Respondent put up structures and began to cultivate the property without the Applicant's consent. Upon inquiry, the 6th Respondent informed the Applicant that there was a court order directing that she moves from the property to Plot No. Jilore/Kakoneni/59 (the Jilole property), which had been allocated to one Kabibi Dunda, the widow of a brother to the deceased. The Applicant was shocked to discover that following an application dated 31.3.21, the Court had reviewed the distribution of the estate. The indicted reason for review is that the property did not belong to the deceased but his brother Kaviha Chula. It is the Applicant's case that the matter proceeded without her awareness or involvement. She was thus condemned unheard contrary to the provisions of Articles 47 and 50 of *the Constitution*. She asserted that the Respondents are trying to dispossess her of the property which is her inheritance and render her homeless.

4. The Applicant further alleges that a search filed by the 1st Respondent shows that the Plot No. 183/Malindi measures 24 acres and she was only given 6 acres. Other portions house a number of families who claim to have purchased and have been in occupation for over 30 years.

5. The Application is opposed by the 1st Respondent vide a replying affidavit sworn on 14.10.23. He averred that as the administrator of the estate of the deceased, he distributed Plot 183/Malindi to the Applicant on the belief that the same belonged to the deceased. He thereafter discovered that the property did not form part of the estate of the deceased but belonged to his uncle Kaviha Chula, who had purchased the same from the original owner. Following this discovery, he in good faith, immediately moved to court to correct the error. He then distributed the Jilole property to the Applicant and Plot 183/Malindi to Kabibi Ndunda, the widow of Kaviha Ndunda and her children the 2nd -6th Respondents. The 1st Respondent asserts that the said application was served upon the Applicant's advocates who had represented the Applicant in the matter herein.

6. In her further affidavit sworn on 18.11.23, the Applicant reiterated that there was a plot to defraud her and render her and her family homeless. She averred that there were discrepancies in the mode of distribution of the estate of the deceased. She stated that in the mode of distribution filed on 13.6.19, the 1st Respondent indicated that he distributed 12 acres of Plot No. 183/Malindi to her but in the mode of distribution filed on 29.1.2020, only 6 acres was given to her. Kabibi Ndunda was apportioned 3 acres in the Jilore property yet some portions had been sold and others leased. Further that the search for Plot No. 183/Malindi indicated that the registered owner was Nassor Bin Saleh Haider and not Kaviha Chula. Additionally, that Plot No/ 183/Malindi measures 24 acres and houses a number of families for over 40 years, who are not aware of the sale of the whole property to Kabiha Chula. Further that the Certificate of Ownership of the said property indicates that the original owner is Salehe Bin

Abdalla Bin Heeda of Malindi. It is thus not clear how the property came to be owned by Asgerali Ebrahim who sold it to Kaviha Chula.

7. I have given due consideration to the Application, rival affidavits and submissions as well as the authorities cited.

8. The law relating review of orders is set out in Order 45 of the Civil Procedure Rules 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 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 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.

9. This is a succession matter. By dint of Rule 63 of the Probate and Administration Rules, Order 45 of the Civil Rules is applicable herein. Rule 63(1) provides:

> " 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 Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules."

10. The law allows an aggrieved party to apply for review of an order on the basis of recovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at the time the order was made. A mistake or error apparent on the face of the record is another ground upon which the Court can allow review of an order. The Court may also review an order for any other sufficient reason. The law further requires that an application for review, no matter the grounds, must be without unreasonable delay.

11. An order for review is discretionary and an applicant must persuade the Court that it is deserving of such order by demonstrating the elements set out in the law. The Applicant has not premised the Application on the discovery of new material or evidence, or some mistake or error apparent on the face of the record. The ground advanced by the Applicant is that she was not aware of the application leading to the ruling in question and that she was condemned unheard.

12. The 1st Respondent counters this by stating that the Applicant's advocates on record were duly served with the Application. He averred that upon discovering the error in distribution, he immediately moved the Court by a notice of motion dated 31.3.21. The asserted that the said application was made in good faith and was served upon the Applicant's advocates. He annexed the affidavit of service marked as "Exhibit 3".

13. Our courts have in many decisions pronounced themselves on what constitutes "any other sufficient cause". In the case of Attorney General v Law Society of Kenya & another [2013] eKLR, Musinga, JA stated:

28. "Sufficient cause" or "good cause" in law means:

> ".....the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused". See Black's Law Dictionary, 9th Edition, page 251.
>
> Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should nt leave unexplained gaps in the sequence of events.

14. And in the case of Shanzu Investments Ltd v Commissioner of Lands [1993] eKLR, the Court of Appeal stated:

> " In Wangechi Kimita & Another v Mutahi Wakabiru*CA No 80 of 1985* (unreported) it was held that
>
> "any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by Section 80 for the *Civil Procedure Act*. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous."

15. I have looked at the affidavit of service exhibited by the Respondent, sworn by Festus Kombe Mwarandu on 15.3.19 as well as the hearing notice dated 4.3.19 indicating that the matter would be heard on 20.3.19. The only problem is that the deponent says he served the hearing notice on 14.3.19. I have carefully perused the ruling in question. It is in respect of an application filed in Court on 6.4.21. The 1st Respondent himself stated that he filed the application dated 31.3.21. Clearly the affidavit of service is not in respect of the application in question. There is therefore no evidence of service of the application upon the Applicant. I am therefore persuaded that the application was heard and ruling delivered without the awareness or participation of the Applicant. As such, she was condemned without being heard. This

16. Article 47 of *the Constitution* guarantees to every person the right to fair administrative action while Article 50 guarantees to every person the right to a fair hearing. A key aspect of these rights is the right to be heard and not be condemned unheard.

17. In the case of Mbaki & Others v Macharia & Another [2005] 2 EA 206, at page 210, where the Court of Appeal stated as follows:

> " The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.

The Court went on to say:

> In Pashito Holdings & another v Ndungu & 2 others KLR (E&L)1 295 it was held that "The rule of audi alteram partem, which literally means 'hear the other side', is a rule of natural justice. It is an indispensable requirement of justice that the party who has to make a decision shall hear both sides, giving each an opportunity of hearing what is urged against him."

18. The legal imperative of hearing a person who is likely to be adversely affected by a decision before the decision is made cannot be overemphasized. In the case of J M K v M W M & another [2015] eKLR, the Court of Appeal observed:

> " The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made."

19. In the performance of their judicial function, all courts are required to observe the principles of natural justice. Any decision made by a court will be unjust and unfair if the court deprives itself of the views of any party who will be affected in one way or another by the decision. (See Msagha v Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553).

20. The courts have been resolute in upholding the principles of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. The failure by the 1st Respondent to serve the Applicant with his application which led to the impugned ruling was a violation of the rules of natural justice and the Applicant's right to a fair hearing. This would fall in the category of "for any other sufficient reason" as a ground for review.

21. Section 47 of the *Law of Succession Act* provides that this Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Rule 73 of the Probate and Administration Rules underpins the inherent power of the court to make such orders as may be necessary for the ends of justice.

22. In light of the foregoing, I do find that the Applicant has made a case for the setting aside the orders of 27.8.21. In exercise of the inherent powers of the Court, I make the following orders which are necessary for the ends of justice:

    i. The ruling of 27.8.21 is hereby set aside.

    ii. The Application dated 31.3.21 shall be heard afresh with the participation of the Applicant.

    iii. The 1st Respondent shall bear costs of this Application.

DATED SIGNED AND DELIVERED IN MALINDI THIS 17TH DAY OF MAY 2024.

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M. THANDE

JUDGE