



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 899 OF 2009

IN THE MATTER OF THE ESTATE OF NDETO MUOKA – (DECEASED)

JOSEPH MUTUNGA NDETO.....APPLICANT

VERSUS

JOSEPH MUNYAO KAKULA.....OBJECTOR

RULING

1. This ruling arises from two applications. The first application is dated 18th July, 2019. In the said application, the Petitioner/Applicant herein, **Joseph Mutunga Ndeto**, (hereinafter referred to the Petitioner) seeks an order that this court stays execution of and reviews its orders made in the ruling dated 4th June, 2019. He further seeks an order that pending the hearing and determination of this suit this Court to grant a permanent injunction restraining the Objector/Respondent from damaging, working on, settling or in any other manner dealing with land parcel no. Matungulu/Kyaume/1888.

2. The other application is dated 13th August, 2019. In that application, the applicant is **Joseph Munyao Kakula** (hereinafter referred to the Objector) and he is seeking an order that the Deputy Registrar do execute the mutation forms and all necessary documents necessary to give effect to the orders given herein on 24th September 2018 pursuant to the certificate of confirmation of grant dated 24th September, 2018.

3. According to the Petitioner, land parcel no. Matungulu/Kyaume/1888 is registered in the name of **Ndeto Muoka**, the deceased herein and is part of the deceased's estate. However, on diverse dates between 23rd February, 1982 and 12th December, 1982, the Objector herein purported to have purchased a piece of land from the deceased being 50ft x 100ft from the said parcel of land without the knowledge of the family members.

4. It was averred that the said objector without colour of right intends to trespass on the disputed parcel and to start utilising the same yet the applicant and the other beneficiaries of the estate are desirous of refunding the objector.

5. In opposing the application, the Objector filed grounds of opposition in which he contended that the application is incapable of being granted the Law of Succession Act and that there is no pending suit to which the orders sought may be directed. It was further stated that the issues raised in the said application have been dealt with in the previous rulings made on 24th September, 2018 and 14th June, 2019 hence the applicant is engaging I abuse of the process of this court.

6. I have considered the issues raised herein. It is clear from the body of the application and the affidavit in support thereof that the substantive order being sought by the petitioner is for review of the order made on 14th June, 2019. That order was itself made in respect of the application dated 14th January, 2019 by which the Petitioner sought to review its decision on 24th day of September, 2018.

7. The remedy of review of court orders is not directly provided for in the **Law of Succession Act** and the **Probate and Administration Rules**, but it is imported into probate practice by Rule 63 of **Probate and Administration Rules**, which has adopted a number of procedures from the **Civil Procedure Rules**. Among the imported procedures is the device of review under the **Civil Procedure Rules**. However pursuant to rule 6 of Order 45 of the **Civil Procedure Rules** which prescribes for the remedy of review:

No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.

8. This Court is therefore expressly barred from entertaining an application seeking review of an order made on review. On that basis, he prayer seeking review is misconceived. The lifeline of the prayer for injunction on the other hand hangs on the success of the prayer for review. As the limb for review is incapable of being granted, the limb for injunction must necessarily be rendered stillborn. It follows that the application dated 18th July, by the Petitioner, is misconceived and is hereby struck out.

9. As for the application by the Objector, this Court on 24th day of September, 2018 directed that the Grant of Letters of Administration Intestate of the estate of the late **Ndeto Muoka** who died on 9th May, 1991 issued to **Ndeto Mumbua** (now deceased) is hereby confirmed and Certificate of Confirmation of Grant be issued on the following terms:

1) Part of the land parcel No. Matungulu/Kyaume/1888 measuring 50 x 100 feet be registered in the names of the Objector, Joseph Munyao Kakula.

2) The remaining portion of land parcel No. Matungulu/Kyaume/1888 be registered in the name of the applicant herein, Joseph Mutunga Ndeto.

10. In his application dated 13th August, 2019, the Objector contends that the Petitioner has refused to effect the said decision despite being requested to execute the necessary documents to give effect thereto. In his replying affidavit, apart from contending that this Court cannot order the Deputy Registrar to execute any documents or release the Title Deed and that it is only the ELC that can do, that the Petitioner has regurgitated the issues which were the subject of the previous proceedings herein. As regards the powers of this Court to grant the orders sought by the Petitioner, In **Mawji vs. Arusha General Store [1970] EA 137**, it was held that:

“A Court must have power to effect its orders. This is not a case of recalling an order but giving effect in one part of the order to the decision arrived at in another part. It would be non-sense to stultify the activities of any court of justice that it would be unable to give effect to a decision which it had just handed down. No provision of the rules should be so construed as to preclude a court from giving effect to its decision...Under the inherent powers of the court, a court should not be precluded by anything incidentally set out in the Code or in the rules made under the Code from giving effect to its decision, and giving effect in a way which will result immediately in justice between the parties and in saving of unnecessary proceedings. Even if section 89(2) does give the power to give effect to this judgement by a separate suit, that would not preclude the High Court from giving effect to its judgement in a more efficacious way. Even if section 89(1) restricts the power given by it to the court of first instance, which in the circumstances of this case has no jurisdiction, to order restitution, and there is no provision elsewhere vesting this power in the High Court, that would not prevent the High Court giving effect to its decision. A court must have power, unless it is most clearly set out to the contrary by legislation, to give effect to its decision and that is all that the court sought to do here. It is not suggested that the discretion, which, of course must lie in the court as to the manner in which to give effect to its decision, was wrongly exercised in this case but the argument is that the court did not have the power to make this order. We are satisfied that it did, and, indeed, that any court must have the power to give effect to its decisions.”

11. I therefore hold that this Court the necessary powers to issue the orders sought by the Object. Consequently, I hereby authorise the Deputy Registrar of this Court to sign and executed the mutation forms and all documents necessary to partition, subdivide, excise and any other necessary documents to transfer the portion of land measuring 50 x 100 out of Matungulu/Kyauma/1888 in order to give effect to the orders given by this Court on the 24th September, 2018 pursuant to the Certificate of Confirmation of Grant dated 24th September, 2018. I further authorise the Land Registrar, Machakos to dispense with the production of the Certificate of Title during the said subdivision and transfer of the suit property.

12. There will be no order as to costs of the applications.

13. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 16TH DAY OF JUNE, 2021.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey