



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

SUCC CAUSE NO. 62 OF 2017

FORMERLY MACHAKOS SUCCESSION CAUSE NO. 930 OF 2012

IN THE MATTER OF THE ESTATE OF THE NASON KIMINA MBINDA (DECEASED)

SUSAN NZISA MUTUKU.....1ST PETITIONER

GIDEON MUIA KIMINA.....2ND PETITIONER/APPLICANT

-VERSUS-

RACHAEL MUMBUA NGANGA.....1ST RESPONDENT

SAMSON KATHUKYA KIMINA.....2ND RESPONDENT

RULING

1. Before me is a Chamber Summons dated 7th July 2020, brought under section 76 of the Law of Succession Act (cap.160), and Rule 44 of the Probate and Administration Rules. It seeks four orders, some of which have been spent as follows:

a) (spent)

b) (spent)

c) That the ruling delivered on 12/05/2020 be reviewed and/or set aside and subsequent certificate of confirmation of grant be revoked and a fresh certificate for confirmation of grant do issue as per paragraph 17 of the supporting affidavit.

d) That costs of the application be in the cause.

2. The application has grounds on the face of the Chamber Summons. The main ground being that in 2014, the beneficiaries agreed to the mode of distribution and that some assets were sold and specifically Plot No. 312 was sold and transferred to a 3rd party and that on 12/05/2020 the court ordered revocation of Plot No. 312 and that the transfer to the purchaser be cancelled and the plot be shared equally and that the purchase price be refunded by the applicant, which was causing untold hardship as the applicant (2nd petitioner) who acted in good faith was not able to refund the purchase price.

3. The application is also supported by the affidavit of Gideon Muia Kimina the applicant in which the history of the matter is given.

4. The application is opposed through a replying affidavit sworn on 5th October 2020 by Rachael Mumbua Nganga in which it was deponed that the allegations of the applicant (2nd petitioner) were falsehoods and that the applicant sold several plots such as 910, 633 and 312 without involving other beneficiaries and squandered the proceeds.

5. Susan Nzisa Mutuku also filed a replying affidavit which she swore on 26th January 2021 opposing both the present application and another application dated 2nd December 2020, which later application has now been compromised.

6. The applicant in response filed a further affidavit which he swore on 16th March 2021, in which he annexed affidavit of Benard Kimondiu Kimina, and Nicholas Ndolo Kimina.

7. The application proceeded by way of filing written submissions. The applicant's counsel Janet, Jackson & Susan LLP filed their submissions on 6th April 2021, while the respondent's counsel F. Katunga & company filed submissions on 13/4/2021.

8. Having considered the application, all documents filed on both sides, the submissions filed on behalf of the parties and the law, in my view, this application has no merits and will have to fail.

9. Under section 76 of the Law of Succession Act (cap 160) under which this application has been filed, this court has jurisdiction to revoke, annul or rectify a grant of letters of administration, even if the said grant has already been confirmed. The reasons on which a grant can be revoked, annulled or rectified are listed in the Act. Such revocation, annulment or rectification of grant is not the same thing as a review of a court's decision as sought herein, a procedure known in civil proceedings.

10. Both counsel for the applicant and counsel for the respondent have dwelt at length on review of court orders under the Civil Procedure Act understandably so because the applicant has sought review of the considered ruling of this court. In my view, the applicant was not candid to rely on section 76 of the Law of Succession Act, as the application should have been grounded on section 45(1) of the Civil Procedure Act (cap 21) which provides as follows:

“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 whom from 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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

11. Thus the main reasons why someone is allowed to apply for review under the Civil Procedure Act, is discovery of new facts or evidence or an error on the face of the record. The applicant herein not having demonstrated discovery of new evidence or facts or an error on the face of the record, the application cannot succeed even under the Civil Procedure Act.

12. I will add that in my view, the substantive decisions of this court, whether in a judgment or a ruling, can only be challenged in the higher court, which is the Court of Appeal through an appeal not a request for revision or for revocation or annulment or rectification of grant. If the Judge who made the decision herein was wrong in determining the issue of *inter vivos* gifts given by the deceased to beneficiaries when he was alive as alleged, then that can only be a ground of appeal to the Court of Appeal and not a ground for seeking a review of such findings in this court.

13. To conclude, I find no merits in the application and dismiss the same. The applicant will bear the costs of the application.

DATED SIGNED & DELIVERED, THIS 8TH DAY OF JUNE 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE