



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1753 OF 2011

IN THE MATTER OF THE ESTATE OF WAMBUI KIIGI (DECEASED)

FRANCIS NJUGUA MIRINGU.....APPLICANT/PROPOSED INTERESTED PARTY

VERSUS

LUCY WANJIKU KIBUNGA.....1ST RESPONDENT

WAIRIMU NJOGU.....2ND RESPONDENT

JAMES NDICHU WAWERU.....3RD RESPONDENT

RULING

1. Before the Court for determination is the Notice of Motion dated 6th August, 2019. It was filed under **Rule 63(1)** of the Probate and Administration Rules, **Section 80** of the Civil Procedure Act, **Order 45 Rule 1** of the Civil Procedure Rules 2010, **Rules 18** and **19** of the High Court (Organisation and Administration) Rules 2016 and all other enabling provisions of the law. In the application, the applicant sought to be enjoined as an interested party in the cause. The applicant also prayed for the review of the judgment and decree of the Court delivered on 7th February, 2019 by Ougo J in respect of the applicant's property title no. Komothai/Igi/1047 to exclude it from the list of assets forming part of the estate of Wambui Kiigi the deceased herein.

2. The application was supported by the grounds on the face thereof and the affidavit sworn by the applicant of similar date. It was his deposition that he is the registered owner and proprietor of the property known as Kimathi/Igi/1047 having purchased it from Moses Kiigi Nganga. He stated that although the vendor had agreed to sell to him the property in 1984, he purchased the property vide the sale agreement dated 17th July, 2006. He averred that the property in issue had been excised from L.R No. Komothai/Igi/97, which resulted into parcels number 1046, 1047 and 1048. Further, that upon successful sub-division, the property was transferred to his name and he was issued with a title deed.

3. The applicant contended that during the hearing of this cause, the respondents herein misled the Court to issue injunctive orders against his property yet they have no claim or right over it. Further, that the property does not form part of the estate of the deceased. It was his case that had the Court been informed of the true facts pertaining to the said property, the Court would not have arrived at the said judgment. He urged the Court to review its judgment and remove the injunction orders made against the property in issue.

4. In response to the application the respondents filed a joint affidavit dated 16th October, 2019. They averred that the applicant had no locus standi to file the present application having not been enjoined in the suit as an interested party. They claimed that the applicant had no legal interest capable of being protected as the property was allegedly purchased from Moses Kiigi Nganga on the strength of the grant that has since been annulled for being defective. This is because there was no property in the deceased's name subject to distribution, L.R No. Komothai/Igi/97 and Komothai/Igi/T.171 having been distributed in Githunguri Succession Cause No. 49 of 1975. Further, that the title to L.R Komothai/Igi/97 were issued in 1981 to Moses Kiigi Nganga, half share and the other half share to Kibunga Kiigi and Waweru Kiigi.

5. It was the respondents' case that the applicant's title was not validly, legally and procedurally acquired having been obtained on the strength of the grant issued on 30th January, 2012, confirmed on 1st October, 2012 and subsequently annulled. They contended that the applicant's sale agreement with Moses Kiigi Nganga recognised the ownership of Kibunga Kiigi, Njogu Kiigi and Waweru Kiigi who had been allocated fifty percent of L.R No. Komothai/Igi/97 in Succession Cause No. 49 of 1975 where the applicant should have addressed his grievances.

6. In addition, the respondent opposed the applicant's prayer for review asserting that the applicant had not shown how the orders sought would directly and legally affect him. Further, that he had not shown his interest in the present suit to be enjoined as an interested party. They also contended that this Court is *functus officio* having conclusively revoked the grant issued on the basis that there was no property available for distribution. They stated that the applicant should seek reliefs against the vendor of the suit property in the Environment and Land Court.

7. The applicant filed a supplementary affidavit in response thereto dated 29th October, 2019. He averred that the injunction issued against the suit property was done by mistake and/or error. This is because he had purchased half portion of the half share of L.R No. Komothai/Igi/97 distributed to Moses Kiigi alias Kiigi Nganga by the late Wambui Kiigi the deceased. Consequently, the said half share purchased is not part of the deceased's estate and the injunction orders issued ought not to be issued save for the other half belonging to the estate. He asserted that he has been prejudiced by the said orders as he has been unable to enjoy his proprietary rights over the property.

8. The application was canvassed by way of written submissions. The applicant submitted that as the registered proprietor of the suit property, he had personal interest in this cause since the orders issued directly affected him. He argued that he was directly prejudiced and would suffer if not admitted as an interested party in the cause. He relied on **Supreme Court Petition No. 15 of 2015 Francis Kariuki Muruatetu v Republic & 4 others** where the Supreme Court outlined the requirements for a party to be enjoined as an interested party in a suit and asked the Court to admit him to give him an opportunity to be heard.

9. On the prayer for review, the applicant submitted that he was not a party to these proceedings and neither was he aware that his property was subject of the proceedings. He argued that L.R No. Komothai/Igi/1047 being a sub division of the half share of parcel no. 97 does not form part of the assets of the deceased herein available for distribution to her beneficiaries. It was on this basis that he laid his claim for the review of the orders of court. He cited the case of **Francis Origo & Another v James Kumali Mungala [2005] eKLR** where the Court of appeal laid down the threshold for the grant of an order of review.

10. In rebuttal, the respondents submitted that the Court was *functus officio*. They argued that where there is no pending suit, the applicant cannot attempt to re-open proceedings which have been heard and determined. In support of this position, they cited the case of **Raila Odinga & 2 others vs Independent Electoral & Boundaries Commission & 3 others [2013] eKLR**. It was their position that the grant having been revoked, the property in dispute cannot be distributed twice.

11. Secondly, they argued that the applicant had not met the threshold set to be enjoined as an interested party. They averred that his presence was not necessary in the proceedings to enable the Court settle all the questions before it. Further, that he did not have an identifiable stake or interest in the estate of the deceased capable of being recognised by the Court. They asserted that his interest thereto was invalidated by the revocation of grant. Reliance was placed in the cases of **Ibrahim v Hassan & Charles Kimenyi Macharia (Interested party) [2019] eKLR** and **Adrian Nyamu Kiugu v Elizabeth Kirimi Kiungu and another [2014] eKLR**.

12. On the main prayer for review, the respondents submitted that the applicant had not fulfilled any of the three limbs applicable for a grant of review orders under **Order 45 Rule 1** of the civil procedure rules. They urged the Court to dismiss the application with costs.

13. Having carefully considered the pleadings and the submissions of the parties to this matter, it is my view that the substantive issues for determination are:

- i. Whether this Court is *functus officio*
- ii. Whether the applicant should be enjoined as an interested party in the cause
- iii. Whether the applicant has met the threshold for the grant of review orders sought.

14. In their pleadings and submissions, the respondents averred that this Court is *functus officio* having conclusively revoked the grant issued on 30th January, 2012 and confirmed on 1st October, 2012. On the basis of the revocation of grant, there was no property available for distribution. They argued that the Court is *functus officio* having pronounced itself in its judgment.

15. The Black's Law Dictionary, tenth edition defines *functus officio* as: -

“[having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

16. The doctrine of *functus officio* was considered by the Court of Appeal in **Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR**, where the court held that: -

“*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

17. The Supreme Court of Kenya in the case of **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR**, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 which reads: -

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

18. While this court is vested with adjudicative powers, once a court becomes *functus officio*, the only orders it can grant are review orders which are an exception to the *functus officio* doctrine. The law allows for the correction of the judgement but not its merits. The Court of

appeal in **Telkom Kenya Limited Case (supra)** also held that: -

“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions...”

19. It is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued with the exception being when a party is seeking for orders of review as is the case herein. In the premise I find that this Court is not *functus officio*.

20. The second issue for determination is whether the applicant should be enjoined as an interested party in the cause. Joinder of parties in a succession cause is a matter of the inherent jurisdiction of the court for purposes of ensuring the ends of justice are met and is ordinarily done under **Section 47** and **rule 73** of the Law of Succession Act and Probate and Administration Rules respectively. The applicant seeks to be enjoined as an interested party in this cause to enable him protect the parcels of land which he claims to have purchased from Moses Kiigi Nganga one of the beneficiaries of the estate of the deceased herein and a title deed issued thereto. He attached a sale agreement and a copy of the title deed indicating that he is the registered proprietor of Komothai/Igi/1047 measuring approximately 0.62 Ha. Although, challenges to how he acquired the property have been raised, one thing is clear that the applicant is the registered proprietor of the suit property.

21. The Supreme Court of Kenya in the case of **Communications Commission of Kenya and 4 Others Vs Royal Media Services Limited & 7 Others Petition No. 15 OF [2014] eKLR** pronounced itself as follows:

“In determining whether the applicant should be admitted into these proceedings as an interested party, we are guided by this Court’s decision in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;*
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;*
- (iii) Joinder to prevent a likely course of proliferated litigation.*

We ask ourselves the following questions:

- a) what is the intended party’s state and relevance in the proceedings and*
- b) will the intended interested party suffer any prejudice if denied joinder.?”*

22. It is therefore evident that the party who should be enjoined in a suit is a person who is necessary for a complete and effectual adjudication of disputes before the court. Notably, the judgment of Ougo J delivered on 7th February 2019 issued a permanent injunction against L.R Komothai/Igi/1047. By virtue of being the holder of the title deed to the said property, the applicant has shown that he has an interest thereto and is an essential party in the determination of any dispute involving the property. The interested party is thus a necessary party in this suit for the court to be able to determine all the issues in dispute relating to the suit property. He is a necessary party whose presence before court is required to enable the court to effectively and conclusively adjudicate on all the matters in question in this cause.

23. Consequently, the question that arises is whether or not he can successfully apply for the review of the Judgment of Ougo J issued on 7th February, 2019. There are certain orders of the Civil Procedure Rules that were imported into matters of Succession and **Order 45** is one of them. This is provided for under **Rule 63** of the Probate and Administration Rules. **Order 45 Rule 1** provides that:-

“(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”.

24. For this court to exercise its jurisdiction under the said Order and grant a review, there must be discovery of new and important matter or evidence which was not within the knowledge or could not be produced at the time by an applicant; or on account of a mistake or error apparent on the record or any sufficient reason. In addition, the application must be made timeously.

25. Firstly, the present application was filed on 6th August 2019 while the decision it sought to impugn was issued 7th February, 2019 which is a period of six months. In this regard, I am satisfied that the application was made timeously.

26. In his application, the applicant did not specifically claim that he warrants the orders sought based on any of the three limbs provided under **Order 45 Rule 1** of the Civil Procedure Rules. It was his contention that the respondents erroneously misled the Court to believe that L.R No. Komothai/Igi/1047 was part of the assets of the deceased available for distribution, yet it was not. That this erroneous misrepresentation led to the grant of orders of injunctive relief, which he is seeking to be reviewed.

27. The respondents dismissed this argument contending that the grant having been conclusively revoked, the resultant titles to the properties therein were void ab initio. Consequently, the applicant had no valid title to any property pursuant to the revoked grant or the alleged sale from any of the beneficiaries.

28. From the record, the impugned Judgment of Ougo J, indicates that the Court in revoking the grant issued on 30th January 2012 and confirmed on 1st October, 2012 ruled that the grant in question was defective as there was no property in the deceased's name subject to distribution. The Court affirmed that the distribution of the estate of the deceased was dealt with in Githunguri Succession Cause No. 49 of 1975 and the properties that were subject to the cause had been distributed. The Court added that no appeal was lodged by any aggrieved party. It was the Court's reasoning that it was improper to file another petition for distribution of an estate which was already dealt with without informing the parties.

29. However, the applicant failed to address the Court on the integral issues raised in the Court's decision. Firstly, that the property in issue had already been distributed pursuant to Githunguri Succession Cause No. 49 of 1975 which dealt with the probate and administration of the estate of the deceased herein. The applicant insisted that the subject property was not owned by the deceased and was therefore not available for distribution and therefore should not be dealt with in this cause.

30. If indeed, the subject property is not estate property as alleged, then the only logical avenue for the applicant would be to pursue the matter in the probate and administration cause that declared it to be such. From the record, the impugned decision is not the one that declared L.R No. Komothai/Igi/1047 estate property available for distribution to the beneficiaries of the deceased. The decision of Ougo J, revoked the grant that had been issued since the estate of deceased had already been distributed subject to an earlier grant in Githunguri Succession Cause No. 49 of 1975.

31. It is evident that the applicant's material does not disclose the discovery of new and important matter, or evidence which was not within his knowledge. Further, it does not disclose a mistake or error apparent on the record or any sufficient reason to warrant the grant of orders of review sought. The applicant is essentially asking the Court to review its judgment on its merits. The prayer for review consequently fails.

32. The upshot of the above analysis is that the application dated 6th August, 2019 partly succeeds and partly fails in the following terms:

- i. The applicant Francis Njugua Miringu is hereby enjoined as an interested party in this cause.
- ii. The prayer for review of the judgment of the Court issued by Justice R.E Ougo on 7th February 2019 fails and is dismissed.
- iii. No orders as to costs.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 15TH DAY OF NOVEMBER, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the Respondents