REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 278 OF 1987

IN THE MATTER OF THE ESTATE OF MAKOKHA KOLOMBANI OTSIAMBO (DECEASED)

RULING

1. The application dated 29th January 2019 seeks transfer of the instant succession cause from the High Court Kakamega to Mumias Principal Magistrates' Courts, review of confirmation orders and rectification, among others.

2. It is brought at the instance of Marsella Makokha, a widow of the deceased. She avers that the administrator concealed the matter to her the matter until the day he ambushed her by asking her to attend court on the date fixed for confirmation. She says she is illiterate, and that it was only later that she established that she had been given one acre out of the total acreage of eight in S/Wanga/Ekero/ 408. She states that the deceased had given her three and a half acres out of S/Wanga/Ekero/ 408 before he died, which the administrator dishonored by giving her only one acre. She avers that Philip Makokha was awarded land, yet he was dead as at the date of confirmation. She would like the estate transferred to Mumias as she is now old, and the Mumias is more accessible than Kakamega.

3. The response is by Sylvester Odanga Makokha. He avers that the court became *functus officio* after it confirmed the grant, in 1989, some thirty years ago. He states that the grant was confirmed after a consent signed by all was placed before the court. On Philip Makokha it is averred that he died on 25th October 1989, after the grant had been confirmed on 4th October 1989, and he has attached a death certificate to support his assertion.

4. The application essentially seeks review of orders. Review is grounded on error on the face of the record or discovery of matter of such importance, that it would upset the court order on record. From what has been placed before me I do not see any error on the face of the record, nor any new matter that the applicant has discovered that she could not lay her hands on in 1989, when the grant was being confirmed. There is, therefore, no basis at all upon which I can review the confirmation orders.

5. Secondly, the grant was confirmed in 1989, and review is now being sought thirty years after the event. Review applications ought to be filed within reasonable time. A lapse of thirty years cannot be reasonable time. The limitation set by the reasonableness of time is that once orders are made by a court they are to be acted upon. Court orders are not made only to be locked away in some cabinet or cupboard. Some action is expected. With respect to confirmation, transmission of the property in accordance with the certificate of confirmation of grant should follow, guided by the Land Registration Act, No. 3 of 2012 and the Land Act, No. 6 of 2012. It must have happened in this case, and I have seen some evidence of it. I agree the application has been overtaken by events. So much water has passed under the bridge.

6. I note from the record that the applicant did file an application dated 10th November 1990, which sought similar orders with the instant application, review of the confirmation orders, on the same or similar grounds. The Judge who got seized of that matter then referred it by consent to arbitration by elders before the Mumias District Officer. The elders made an award, dated 3rd September 1992, which stated that the land remain in the hands of the persons named in the title deed, but the applicant was to continue using the three and a half acres during her lifetime, after which the same was to revert to Sylvester Odanga Makokha. That award was read to the parties on 18th December 1992, and the same was set aside by an order made on 26th October 1994. That paved the way for hearing *inter partes* of the application dated 20th November 1990. That application has never been prosecuted. It came up for hearing several times, the last time being 30th May 1995, when it was stood over generally. In a sense, therefore, the filing of the instant application is in abuse of court process, given the pendency of the application of 20th November 1990, and the matters raised remain *sub judice*.

7. On the question of Philip Makokha, I note that he died after the grant had been confirmed. Even if he had died before the grant had been confirmed, it would have made no difference. The fact of the matter was that he survived the deceased and he was entitled to a share in the intestate estate, whether dead or alive. If he had died prior to confirmation, then his share ought to have been devolved to his estate, for entitlement had already accrued to him on account of his having survived the deceased. Entitlement to intestate succession is lost, through the principle of lapse, only in cases where a child, who has no progeny, predeceases the intestate, not otherwise.

8. On the transfer of the matter to the Mumias court, I have not seen any valuation report placed on record to show me whether the Mumias court would have pecuniary jurisdiction over the matter. in any case, this cause was concluded the moment grant was confirmed. If the applicant was unhappy with the orders on confirmation, she should have appealed. All these efforts she is making now, instead of appealing, are misplaced. For the probate court is pretty much rendered *functus officio* once it confirms a grant.

9. I find no merit in the application dated 29th January 2019, and I hereby dismiss it. Each party shall bear its own costs. The applicant is, once again, advised to file appeal, against either this my order, or the order which confirmed the grant, for that is the best way out of the quagmire that she finds herself in. The jurisdiction of the High Court over this matter is exhausted, and the Deputy Registrar should consider closing this file, and moving it to the archives. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS ………….10TH ……………..………. DAY OF ………DECEMBER……….………., 2021

W MUSYOKA

JUDGE