REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

P&A CAUSE NO.30 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE GEDION MULI MWAKE (DECEASED)

FLORIAN MUINDI MWAKE..APPLICANT

VERSUS

TOM MUTUNGA...RESPONDENT

R U L I N G

1. The Applicant herein filed an application dated 20/05/2019 seeking the following reliefs namely:-

a. Spent

b. That the court be pleased to review and set aside its ruling and consequential orders dated 7/05/2019.

c. Spent

d. Spent

e. That the deputy registrar be restrained by an order of the court from signing any documents on behalf of the Applicant to allow the property known as Mwala/Mwanyani/929 to be transferred to the Respondent.

f. That costs be provided for.

2. The application is supported by the annexed affidavit of the Applicant sworn on even date and which raised pertinent issues *inter alia*: that the Applicant is aggrieved by the ruling dated 07/05/2019; that the Applicant has since discovered new and important evidence material to this suit which was not within his knowledge and could not be produced at the time of filing the application dated 4/06/2018; that the purported sale agreements entered in May, 2011 over the suit land between the Respondent and the Administrator is evidence that there was intermeddling of the estate before confirmation of grant: that the Applicant has since discovered a mistake and/or error apparent on the face of the record which the court relied on to render its ruling; that the objection proceedings filed has not been heard yet owing to a missing file thereby making it impossible to prosecute his case; that the Respondent may transfer **LR. Mwala/Mwanyani/929** to himself thereby rendering any subsequent orders a nullity; that if the ruling herein is not reviewed the beneficiaries will be disinherited and condemned for no fault at all.

3. The Respondent filed a replying affidavit dated 30/05/2019 in which he opposed the application on several grounds *inter alia*: that the purported sale agreements presented by the Applicant are fake documents meant to hoodwink the court as he is only aware of the sale agreement dated 18/09/2013; that he is entitled to occupy and use **LR. Mwala/Mwanyani/929** as he had lawfully purchased it from the administrator of the estate who had capacity to sell the same to him; that he is not aware of an earlier alleged sale of the same property to one **Charles Masesi**.

4. The Administrator Esther Kavive Muli filed a replying affidavit sworn on 30/05/2019 wherein she raised the following issues *inter alia*; that a confirmed grant was issued to her on 26/07/2013 and that she later sold parcel **Mwala/Mwanyani/929** to the Respondent herein at a price of Kshs. 700,000/=; that she is not aware of the alleged agreements entered in May, 2011 and June 2012 as she did not sign or thumb print the same; that the Applicant who is a grandson to the deceased does not have authority to institute the application; that the Respondent is not intermeddling with the estate as alleged since he lawfully bought from her after the grant had been confirmed; that the Respondent should be left to have quiet and peaceful occupation of the land that he lawfully purchased.

5. Parties agreed to file written submissions. The Applicant's submission are dated 18/11/2019 while those of the Respondent are dated 30/09/2019.

6. Miss Kioko for the Applicant submitted that the Applicant has discovered new evidence involving the sale agreement between the Respondent and the Administrator and which is dated May, 2011 and June, 2012 which was entered much earlier before the confirmation of grant thereby implying that there was intermeddling warranting a sanction by this court. Learned counsel added that the discovery of the new evidence could not be discovered even after due diligence. It was counsel's submissions that the sale agreement dated 18/09/2013 was an afterthought aimed at defeating justice as the Respondent is not a bonafide purchaser for value as he entered into the sale agreement in May, 2011 with the full knowledge that the administrator had not obtained the full grant. Finally, it was submitted that the Applicant has given plausible reasons to warrant this court to review its ruling dated 7/05/2019. Reliance was placed in the cases of **National Bank of Kenya –vs- Ndungu Njau C.A No. 2111 of 1996** and **Nuh Nassir Abdi –vs- Ali Wario & Others [2013] eKLR.**

7. Mr. Uvyu for the Respondent submitted that the issue of the existence of objection proceedings now pending is not a new discovery since the said issue was dealt with by the court in the Ruling dated 7/05/2019 and in which it was within the knowledge of the Applicant. It was also submitted that the Respondent and administrator have denied authoring the purposed sale agreements and that they are only aware of the agreement dated 18/09/2013 and not any other. Counsel finally submitted that there are no new and important matters that have been discovered since the Applicant had them within his knowledge and further there is no error apparent on the record to warrant a review of the ruling dated 7/05/2019. Reliance was placed in the following cases **Oreno –vs- Seko [1984] KLR 238, National Bank of Kenya –v- Njau [1985 – 98]** and **Shah –v- Dharamchi [1981] KLR 560.**

8. I have considered the Applicant's application together with the rival affidavits. I have also considered the submissions of both learned counsels. It is not in dispute that this court vide its ruling dated 7/05/2019 dismissed the Applicant's Notice of Motion dated 4/06/2018. The issue for determination is whether the Applicant has satisfied the conditions for review of the ruling dated 7/5/2019.

9. Review is provided for under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Section 80 of the Act provides as follows:-

> "Any person who considers himself aggrieved-
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> > **a. by a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred; or**
> >
> > **b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.**

Order 45 Rule (1) of the Civil procedure Rules provides as follows:-

> "(1) Any person considering himself aggrieved-
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> > a. by a decree or order from which an appeal is allowed, but for 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 exercise of due diligence, was not within his knowledge or could not be procured 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 desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

The courts have set the criteria to be adhered by an Applicant seeking to engage the court in a bid to convince it to review its decree or order earlier made on the ground that there is discovery of new and important matter or evidence which after the exercise of due diligence was not within the Applicant's knowledge or that there is some mistake or error apparent on the face of the record. The rationale for this criteria is to bar litigants who may have lost their cases from coming back through the back door and obtain what they had earlier sought from the court but lost. Litigants can at times become quite ingenuous and thus the courts must be alert all the time. In the case of **National Bank of Kenya –v – Ndungu Njau C.A. No. 2111 of 1996** the Court of Appeal held thus;

> "**A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self- evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law."**

Again in the case of **Nuh Nassir Abdi –vs- Ali Wario & Others [2013] eKLR** the court held as follows:-

> "**A decision whether or not to vary, set aside or review earlier orders is an exercise of judicial discretion and the court ought only to exercise such discretions if to do so would serve a useful purpose."**

The Applicant has beseeched this court to grant the review sought on the grounds that there is discovery of new evidence which could not be procured at the time even with due diligence. He has also claimed that there is an error or mistake apparent on the record and which should be sorted out by this court by granting the review. The new issues are as follows:-

i. Discovery of earlier sale agreement between the Respondent and the Administrator dated May, 2011 and June 2012.

ii. Consent given to the Applicant by other aggrieved beneficiaries.

iii. Objection proceedings already lodged.

iv. Error apparent on the record.

I will analyze each of these sequentially as hereunder.

10. On the issue of discovery of earlier sale agreements, I note that the Applicant has annexed copies of handwritten agreements dated 19/05/2011, 22/05/2011 and 24/06/2012 together with a certificate of translation and maintained that the Respondent came up with another sale agreement dated 18/09/2013 as a camouflage to hoodwink the court into finding that there had been no intermeddling with the estate of the deceased on the ground that the same was entered after the confirmation of grant. Both the Respondent and the Administrator have filed replying affidavits in which they denied the existence of the alleged sale agreements since they are only aware of the one dated 18/09/2013 and have further claimed that the alleged earlier sale agreements were forgeries. The Applicant upon being served with the replying affidavits opted not to file further response especially on the disclaimer by the Respondent and Administrator. It was incumbent upon the Applicant to put in a rejoinder one way or another for instance he could have secured affidavits from the persons who allegedly witnessed the sale transaction so as to back his assertion that there had been an earlier agreement prior to the confirmation of the grant. In the circumstances the court is left with the sale agreement dated 18/09/2013. Even though the Applicant has attacked the said agreement on the ground that it does not have the correct terms of the original agreement and is an afterthought, I find the agreement has all the essential elements of an agreement and can easily pass the test. As the Respondent and administrator disowned the alleged earlier agreement and since the Applicant has not made a rebuttal thereto, this court is left with no option but to consider the latest agreement. I have perused the said agreement dated 18/09/2013 and find that it has all the essential features such as the Land Reference Number, the purchase price consideration, mode of payment, obligations of parties, special conditions to be adhered to by the parties, signatures by the seller and buyer with a witness by an Advocate. Clearly I do not see anything wrong with the said agreement as it can pass all the necessary tests. In the absence of proof of the existence of the alleged earlier sale agreements the court has no option but to deem the agreement dated 18/09/2013 as legitimate. In the circumstances, I am inclined to find that there is no new discovery of new matters or evidence to warrant an order for review of orders made on the 7/05/2019.

11. On the issue of consent given to the Applicant to institute these proceedings, it is noted that the Applicant vide paragraph 2 of the affidavit in support of the summons dated 4/06/2018 averred that he had the consent from some of the beneficiaries to swear the affidavit on their behalf. I find this was a matter within his knowledge as he averred to it in the supporting affidavit and he cannot therefore now claim that it is a new discovery which could not be secured even with due diligence being employed. I am satisfied that the Applicant had been aware of the fact that he had consent from some of the beneficiaries while lodging the application dated 4/06/2018. This is not a new matter to warrant this court to entertain it and order a review of its orders dated 7/05/2019. There was no difficulty for the Applicant to have secured a consent from the beneficiaries and which did not require too much due diligence to obtain it. The Applicant seems to be out to put his house in order at this stage through the backdoor.

12. As regards the issue of objection proceedings, I note that the Applicant has already filed summons for revocation of grant dated 14/11/2013. The Applicant claims that he has not yet prosecuted the application due to the fact that the original file is missing. Indeed the issue of the missing file has already been addressed by the Deputy Registrar who has authorized the opening of a skeleton file. This is the skeleton file in which proceedings have been conducted including the determination of the Applicant's application dated 4/06/2018 and which is the subject of the review application herein. The summons for revocation of grant have bene lying idle in this file like a sore thumb and that the Applicant has not bothered to prosecute it. Nothing has prevented the Applicant from setting it down for hearing since the requisite copies of pleadings and documents have been filed herein. The existence of the summons for revocation of grant and objection proceedings have always been within the knowledge of the Applicant and therefore his claim that the same is a new discovery is not correct. On that score, I find the request for review of orders dated 17/05/2019 not merited.

13. Finally the Applicant has claimed that there is an error apparent on the face of the record namely that this court erroneously relied on the sale agreement dated 18/09/2013 to find that there was no intermeddling with the estate by the Respondent. As noted above, the earlier original sale agreements have been disowned by the Respondent and the Administrator as forgeries. The burden of proof lay upon the shoulders of the Applicant pursuant to the Provisions of Section 107 of the Evidence Act. The Applicant failed to put in a rebuttal even by way of filing affidavits from the persons who are alleged to have witnessed the sale agreement. In the absence of a rebuttal then what is left out for the court's consideration is the sale agreement dated 18/09/2013. As noted above, the said sale agreement dated 18/9/2013 passed all the requisite tests for an agreement of sale. There is therefore no new discovery of evidence or an error apparent on the face of the record and thus the court's consideration over the said sale agreement still stands. Hence I find there is no error on the face of the record to warrant a review of the orders dated 7/05/2019.

14. The Applicant herein has sought for stay of execution pending determination of the objection proceedings. As the Applicant's application has not met the threshold of review, then he should proceed to set down the summons for revocation of grant and if need be seek for conservatory orders therein pending the determination of the said summons.

15. In the result it is my finding that the Applicant's application dated 20/05/2019 lacks merit. The same is ordered dismissed. Each party to bear their own costs.

Orders accordingly.

Dated and delivered at Machakos this 20th day of January, 2020.

D. K. Kemei

<u>Judge</u>