



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 397 OF 2015

(FORMERLY MERU HIGH COURT SUCC. CAUSE NO. 655 OF 2013)

IN THE MATTER OF THE ESTATE OF FRANCIS NTWIKI MUKUI (DECEASED)

AND

ANN NTWIKI.....PETITIONER

VERSUS

JANET KANYUA RWANDA.....OBJECTOR

R U L I N G

1. Before this court are two contrasting applications made by the parties in this cause. The first application dated 6th May 2019 was lodged by the first administratrix, **ANN NTWIKI** where she ought to execute the judgement of this court delivered on 3rd December 2018. The second application has been lodged by the 2nd administratrix **JANET KANYUA RWANDA** and it is dated 7th June 2019. She is seeking for a review or rectification of the same grant confirmed on 3rd December 2018.

2. This court did give directions for both applications to be canvassed simultaneously because a finding in the latter application dated 7th June 2019 has a bearing to the former application dated 6th May 2019. I will therefore begin with the consideration of the application dated 7th June 2019 before I come back to the application dated 6th May 2019.

3. In the amended summons dated 7th June 2019, Janet Kanyua Rwanda has sought the following prayers namely:-

i. Spent

ii. That this honourable court be pleased to review, vary and/or rectify the grant dated 4th December 2018 and direct that the estate be shared out as follows:-

a) L.R No. Tharaka/Tunyai "A"/763

i. Ann Ntwiki - 10.35 acres

ii. Janet Kanyua Rwanda - 10.35 acres

iii. Patrick Muthaura Mbaya (Purchaser) - 1.3 acres

iii. Any further or better orders as will meet ends of justice.

The grounds are as follows:

i. That the Respondent, Ann Ntwiki, without consultation with the applicant sold 18 acres to Patrick Muthaura at Kshs.200,000/- per acre when the value was Kshs.1,500,000/- per acre

ii. That receipts exhibited by the purchaser indicated he paid a total of Kshs.1,957,000/- which in her view could only purchase 1.3 acres and not 18 acres.

iii. *That the new evidence about the valuation of the estate is important and has surfaced and could not have been discovered at the time of confirmation of grant as the applicant contends that she was not given a chance to be heard in her protest.*

iv. *That this court ought to make a finding that the purchaser Patrick Muthaura Mbaya is only entitled to get 1.3 acres and that there is a clear case of collusion between Ann Ntwiki and the purchaser to defraud the estate as well as Janet Kanyua and her children.*

4. The Applicant has supported her application with an affidavit sworn on 7th June 2019 where she has reiterated the above grounds adding that she was late in filing her protest which led to confirmation of grant as proposed by the Respondent and that her attempts to reverse or set aside the confirmation of grant was unsuccessful.

5. She has averred that the agreement of sale of 18 acres of South Tharaka/Tunyai A/763 at Kshs.200,000/- per acre is fraudulent and that the same was done without her participation. She contends that the valuation of the property as per Ms Roma valuers is Kshs.1,500,000/- per acre which in her view indicates that the amount paid by the purchaser could only buy 1.3 acres.

6. She submits that the Respondent sold the estate without valuable consideration which was against her duty as the administratrix. She further contends that valuation report was not before the court at the time of making the orders and that the Respondent abused her power in the administration of the estate herein.

7. The Respondent, **Ann Ntwiki** has opposed this application through her affidavit sworn on 12th June 2019. She contends that this application is an afterthought and that it does not fall within the ambit of an application for review or rectification of grant.

8. The Respondent has pointed out that the applicant filed a similar application framed differently which was dismissed and that currently the applicant is pursuing an appeal.

9. The Respondent has termed the allegation of fraud in the sale agreement as defamatory which can only be determined in a different forum and on a different standard of proof. She refutes the allegation of fraud contending that the applicant has not demonstrated how she stayed away in the administration of the estate to warrant the allegations of fraud and collusion. She points out that the agreement dated 18th December 2018 has not been exhibited in her application.

10. The Respondent has further contended that the interest of the purchaser was determined by this court prior to the issuance of grant and cannot be re-litigated upon in this forum. She has faulted the valuation report pointing out that the same is dated 6th March 2019 while the sale was done on 18th December 2018 when the value was lower than it is currently. She has added that a consideration is something that is between a willing buyer and a willing seller adding that the aim of the applicant is only to delay the process.

11. The Interested Party has also added his opposition to the said application through affidavit sworn on 12th June 2019. He says he is a *bona fide* purchaser for value having bought 18 acres of the estate adding that the decision to give him 18 acres has not been challenged in this the court. He further contends that he bought the parcel of land on 18th December 2014 and not 18th December 2018 as alleged. According to him he paid valuable consideration as agreed between a willing buyer and a willing seller and that the applicant cannot reopen the sale agreement. He further contends that this court cannot re-write contracts.

12. This court has considered the application dated 7th June 2019 and grounds upon which it has been made. I have considered the response made by both the Respondent or the 1st administratrix herein and the Interested Party. The applicant has invoked the orders under **Order 45 Civil Procedure Rules** which rules by construction applies to Succession matters by dint of Rule **63(1) P&A Rules**. Under **Order 43(1)** of the **Civil Procedure Rules** the rule provide as follows:-

" Any person considering himself aggrieved-

(a) by decree 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 judgement to the court which raised the decree or made the order without unreasonable delay."

The reading of the above rule indicates that for an applicant to succeed in a application for review he or she must satisfy the court on either any or all of the following conditions;

(i) The discovery of a new and important matter relevant to the proceedings which was not within her/his knowledge after exercise of due diligence at the time the court entertained the matter.

(ii) Existence of an apparent mistake or error on the face of the record.

(iii) For any other sufficient cause.

13. The Applicant has not touched on the 2nd and 3rd conditions in her application but has based her application on the 1st condition above.

14. The Applicant has invoked this condition in her application and the discovery of a new matter according to her is a valuation report by Ms Roma Valuers, Environment and Property Consultants Ltd. That report is exhibited in her application and the report is dated 6th March 2019. This court has noted from the terms of reference in that report that the valuation was done following instructions from the applicants advocate dated 6th March 2019. The orders which the applicant seeks to have reviewed or varied were made on 4th December 2018 which were basically the confirmation of grant as proposed by the first administratrix after the 2nd administratrix had failed despite being given an opportunity to present any opposition to the Summons for Confirmation of Grant dated 16th October 2018. The record of proceedings herein indicates that the Applicant sought for time on 5th November 2018 to put in her protest and on 3rd December 2018 she had not put in her protest and her excuse was that the 1st administratrix had not included all the properties in the Summons for Confirmation of Grant and so sought for more time to tender evidence of other properties forming the estate of the deceased but allegedly left out by 1st administratrix. This court evaluated the reasons given out and was not satisfied that they disclosed sufficient reasons for further adjournments and disallowed her application. The failure by the applicant to file her protest on time at the time had nothing to do with the valuation of the estate but searches that were to be conducted purportedly to discover properties/assets of the estate left out in the said Summons for Confirmation of Grant. The discovery the Applicant sought was therefore about "**other assets**" comprising the estate rather than the value of the estate.

15. The question of discovery of a new and important matter by the Applicant in this application is an afterthought because from the valuation report the instructions by the Applicant's lawyers to the valuer was only done on 6th March 2019 long after the confirmation of grant on 3rd December 2018.

16. This court also notes that the Applicant had moved this court for review of the orders of confirmation through an application dated 18th December 2018. This court rendered itself on that application which had sought review on grounds that the applicant had discovered that the purchaser, Patrick Muthamia Mbaya, and the Interested Party herein, was a stranger who had unfairly benefited from a share in the estate. This court vide a ruling dated 26th February 2019 disallowed the application after finding that the Interested Party was not a stranger but a *bona fide* purchaser for value whose interests were protected under **Section 93 of Law of Succession Act**. It is apparent that the said ruling triggered the Applicant to file a notice of appeal (as demonstrated by a Notice of Appeal dated 11th March 2019 herein) and secondly to write to the Ms Roma Valuers to carry out valuation of South Tharaka/Tunyai 'A'/763 which comprises the estate.

17. The Applicant in my view has not demonstrated good faith in saying that she has come to court with an application for review because of a discovery of a new matter or evidence which was not within her knowledge at the time. The question of whether or not the portion of the estate sold was sold at the market value is not something to be canvassed through an application for review or rectification of grant. That issue requires a different forum.

18. Furthermore the main issue in the application dated 18th December 2018 was whether the Interested Party was a stranger and whether the transaction that gave him possession of 18 acres was illegal or fraudulent. This court fully rendered itself on the issue after hearing the parties. Upon rendering itself this court is rendered *functus officio* because the issue is now *Res Judicata*.

19. The Applicant has not demonstrated that the Respondent infringed her duties as an administratrix and there is no error on the face of the grant to warrant a review. This court in its decision delivered on 26th February 2019 as observed above found that the purchaser (Interested Party) was not a stranger, that he had purchased part of the estate vide a valid transaction as there was no evidence presented evidencing fraud or any illegality. The Applicant had clearly sought for "**review, vary to vacate and/or to set aside orders of 3rd December 2018**". In this application she has paraphrased the prayers to read "**review, vary or rectify the grant dated 4th December 2018.**" The orders to confirm the grant was made on 3rd December 2018 and the certificate of confirmation was dated 4th December 2018. This clearly shows that both applications refer to one and the same thing stated in different ways. The mischief is clear and it is an attempt to abuse the court process which cannot be allowed. If the Applicant was aggrieved by the decision she should pursue her appeal like she has done but she cannot be allowed to file one Application after another over the same matter when the issue has been adjudicated upon and a decision rendered. Litigation must surely come to an end. In the premises this court finds no merit in the application dated 7th June 2019. The same is hereby dismissed and this time with costs.

20. Now turning back to the application dated 6th May, 2019, it is apparent that the nature of the prayers sought are execution in nature. The 1st administratrix Ann Ntwiki has sought the following reliefs;

i) That inhibition orders registered on the Suitland by the Respondent (Janet Kanyua Rwanda) be lifted.

ii) That the Deputy Registrar be empowered to execute necessary documents in place of 2nd administratrix to facilitate implementation of the confirmed grant dated 4th December 2018.

iii) That in the alternative the signature of 1st administratrix be considered sufficient for implementation of the grant.

21. The Respondent's grounds to oppose the above reliefs in my view do not hold any water in view of my finding in the first application. She says she has not refused to execute the documents and if that is true then she cannot be prejudiced if the Deputy Registrar of this court assists her in the execution of requisite documents to facilitate implementation of certificate of confirmation.

22. Secondly she says the 1st administratrix went to the estate with police officers which I find to be in order because the Applicant came to this court and orders sought security which was granted by this court.

23. The reason that her children would suffer if the grant is implemented in my view is water under the bridge because this court determined the shares of each beneficiary in accordance with the law and the evidence presented. The question that some beneficiaries would suffer because of collusion or fraud is now determined and cannot be re litigated again in this forum. The right forum in the circumstances obtaining is the Court of Appeal.

In the end this court finds merit in the application dated 6th May 2019 and is allowed in terms of prayer 1 and 2 but I will not make any order as to costs.

Dated, signed and delivered at Chuka this 5th day of February 2020.

R.K. LIMO

JUDGE

5/2/2020

Ruling dated, signed and delivered in the open court in presence of Kariuki for the 1st administratrix and Interested Party, Materi for 2nd Administratrix.

R.K. LIMO

JUDGE

5/2/2020