



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. SUCCESSION CAUSE NO. 174 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE JAPHET M'NKANABIA

KIRI alias M'NKANATA S/O KIRI alias JAPHET M'NKANASA KIRI (DECEASED)

FLORENCE MWARI NKANATHA.....PETITIONER

VERSUS

GITONGA JAPHET NKANATHA.....INTERESTED PARTY

RULING

1. Before me is a notice of motion dated 20/11/2018 brought under order 45 rule 1 (a) of the civil procedure rules and Rule 63 and 73 of the probate and administration rules seeking

a. A review of the orders of confirmation of grant dated 17/9/2018 and reinstate the cause for hearing of the protest

b. A stay of execution of the grant confirmed pending the hearing and determination of this application

c. Costs be in the cause

2. The application was premised on the grounds set out on the face of it and on the supporting affidavit of Gitonga Japhet Mkanata where he stated in brief that, this matter was set for hearing on 17/9/2018, however, prior to that date he was informed by a clerk at his advocates law firm that the matter would not proceed as the legal fraternity in Meru had decided to suspend court attendances in solidarity with a Judicial Officer whose child had been brutally murdered. This was later confirmed by his advocate Basilio Gitonga. As a result, he did not attend court on the date of the hearing. However, unknown to him the matter proceeded in his absence and the court went on to confirm the grant without considering his protest.

3. The application was opposed by the replying affidavit of Florence Mwari Nkanata who stated that the applicant's failure to attend court was a demonstration of his lack of keenness to have the protest heard expeditiously. In addition the applicant is a grandson of the deceased and her proposal on distribution was fair to all the beneficiaries including the applicant. The court confirmed the grant on 17/9/2018 but the applicant filed the review on 7/12/2018 which was 3 months later therefore being an afterthought. In addition the applicant has not demonstrated if he will suffer prejudice if the grant as confirmed remains.

4. I have carefully perused the application, affidavits, submissions and the record in its entirety. The issue to be determined is **whether to review orders of confirmation of grant dated 17/9/2018?**

5. The respondent in their submissions have argued that there are specific orders of the Civil procedure Rules imported in succession matters vide rule 63 of the probate and administration rules and order 45 and 51 are not among them. However, in considering whether Order 45 applies to succession matters, the court in **John Mundia Njoroge & 9 Others vs Cecilia Muthoni Njoroge & Another [2016] eKLR** quoted rule 63 of the Probate and Administration Rules then stated as follows:

“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil

Procedure Rules.”

6. It is my finding therefore that, the application dated 20/11/2018 which is expressed to be brought under Order 45 Rule 1 and Rule 63 and 73 of the Probate and Administration Rules is properly before this court.

7. The next question to consider is whether the applicant has met the substantive requirements of Order 45, which provides as follows:

1. (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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

8. The specific grounds for review are:

a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

b. on account of some mistake or error apparent on the face of the record, or

c. for any other sufficient reason,

d. whatever the ground however there is a requirement that the application has to be made without un reasonable delay.

See, Leah Wambui Kuria & 2 others v Jane Muchunu & 2 others [2018] Eklr

9. The applicant argued that the reason for his non-attendance was because he was informed by his counsel that the legal fraternity at the time were mourning in solidarity with a judicial officer whose daughter had been brutally murdered. It was therefore not intentional on his part in failing to attend the hearing. He submits that he will suffer prejudice in the event he is not allowed to ventilate the issues raised in his protest.

10. Although the incident cited was beastly act which caused great anguish to the entire Meru County and the nation, it should not be invoked inappropriately. I hope no one will attempt to use the unfortunate incident to derive any form of indulgence or gain out of the sad incident cited herein. Notably, there was no general consensus that cases should not proceed especially on the date in issue. In any case it was the duty of legal counsel as well as the litigant to attend court on the appointed date. The applicant was aware of the date for hearing but for reasons known to him chose to stay away from court. The court noted that the applicant is in occupation of the entire estate property and may be tempted to temporize this case. Nothing has been stated by the applicant to show good faith in his actions. Accordingly, I am not convinced he has offered any sufficient reason to warrant a review of my orders. In the upshot, I dismiss his application for review with costs.

Dated signed, and delivered in open Court this 4th February, 2020.

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F.M GIKONYO

JUDGE

In presence of

M/S Athiero for Muthomi for petitioner

Basilio for interested party- absent

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F.M GIKONYO

JUDGE