REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 245 OF 2007

IN THE MATTER OF THE ESTATE OF MUKANGU M'BAGINE (DECEASED)

FREDRICK KINOTI M'MWONGO .....1ST APPLICANT

STANLEY KIOGORA ARTHUR .....2ND APPLICANT

VERSUS

CATHERINE N. M'MWONGO.....1ST RESPONDENT

AGNES KANANU ..... 2ND RESPONDENT

JENNIFER KENDI .....3RD RESPONDENT

RULING

[1] Before me is a Summons dated 13/05/2019 expressed to be brought pursuant to **Article 40 and 50 (1) of the Constitution of Kenya and Order 9 Rule 9 , Order 45 Rule 1 and 2 and Rule 73 of the Probate and Administration Rules**. The applicants seek amongst other orders the review and or setting aside of the order of 6/11/2018 as well as revocation of the title deeds that arose from the said order.

[2] The grounds upon which the application is founded have been set out in the supporting affidavit of Fredrick Kinoti M'Mwongo sworn on 13/05/2019. It is contended that the respondents' application dated 29/10/2018 was made in bad faith and secretly; it was not served on them. According to the deponent, the respondents falsely made allegations that the applicants had attempted to kill them in order to justify their request to the court that the executive officer do sign the mutation forms and application for consent from the land control board. The applicants accused the respondents further; that they went ahead and obtained the title deed to the portion marked C on the mutation forms which the 1st applicant has extensively developed. That the respondents seek to move to his water project which he constructed as well as planted macadamia trees, grievalia trees and yams. Consequently, the 1st applicant will be prejudiced as the respondents will take over his developments. Moreover, the respondents stay on the 2nd applicant's homestead where their parents' home is located which is the portion marked B. Nonetheless, the 2nd applicant has made developments on the respective portion resulting to the respondents move to portion marked D. In addition, he claims that there is a pending boundary dispute with the respondents on the Suit land and their demarcation has also left out land measuring 0.07HA.

[3] The respondents opposed the application vide their replying affidavit filed on 6/07/2019. They argued that the application is not proper and is an afterthought. They stated that portion C is where they have transferred to from portion B as their brother was given the latter portion. Portion D is where the homestead of the applicant stands with his developments and family. Thus the application ought to be dismissed.

[4] This matter was canvassed by way of written submissions. The applicants submitted that the respondents and 1st applicant both claim to have developed portion C. The 1st applicant claimed that he is the only one who has evidenced development of the said portion C. He urged that this has also been confirmed by the 2nd applicant. To him, therefore, the orders of 6/11/2018 do prejudice the applicants as he stands to lose his developments. Hence, they urge the court that the 1st and 2nd applicants retain portions B and C respectively and the respondents take portion D. They relied on **In the Matter of the Estate of Mutuamwari Muraga (Deceased) [2013] eKLR** and **In Re Estate of S B S [2014] eKLR** to support their claim.

[5] The respondents submitted that after subdivision of L. R. No. NTIMA/IGOKI/618 the applicant moved from his portion which he had developed and started to occupy the respondents portion C. The allegations that the applicant has developments are fabrications and motivated by malice. That the applicant being the 3rd born has been in occupation and has developed portion D since his youth. Moreover, the allegations that the applicants were not served with the application are false as well. Thus, the application ought to be dismissed with costs.

ANALYSIS AND DETERMINATION

[6] The issue of determination is ***whether to review and or set aside the orders of 6/11/2018.***

[7] Review is governed by **Order 45 of the Civil Procedure Rules** which is imported into **the Law of Succession Act** by virtue of **Rule 63 of the Probate and Administration Rules.** There are specific grounds upon which review may be granted to wit:

> **"... 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."**

[8] The application for review should however be made without unreasonable delay. The order the applicants seek to be reviewed was issued on 6/11/2018 and their application is dated and filed on 13/05/2019. This is about six (6) months later. In the case of **Paul Obonyo v Kenya Revenue Authority & 2 others [2019] eKLR** delay of six months without any justifiable reason was found to be unreasonable. According to the applicants, they were not served with the application that resulted in the order they seek to review. However, they have not explained when they became aware of the order. These parties have been before this court on numerous occasions over this very issue and I do not believe the story by the applicant that they were not aware of what was happening. Obtaining titles is quite a process and I do not believe their claim that this was done secretly. I have noted complaints by the respondents that their brother vowed that they will never get their portion C. It appears to me that patriarchy is reigning here. The court even warned the applicants several times over these innuendos. His demeanor betrayed him and did not inspire good faith in their quests. In my considered analysis, the application was not filed without unreasonable delay. I will nonetheless, consider the merits of the application.

[9] The estate property is L. R. No. NTIMA/IGOKI/618 and was sub-divided as per the confirmed grant. According to the applicants, portion C which has been allocated to the respondents should be given to the 1st applicant for he has made extensive developments on it. He is of the view that it would be unfair and prejudice to him if he is not given the aid portion.

[10] These claims made the court on 5/12/2019 to direct the executive officer to visit the Suit Land and find out whether the 1st applicant has built on or developed the portion C. The EO visited the suit land in the presence of the parties as well as the applicants' counsel. In his report dated 9/12/2019 he observed and concluded that the 1st applicant has not built on the disputed portion as alleged. The Applicants seem not to agree with the report but did not provide any basis or evidence for their objection. I must admit that the court has observed the demeanor of these applicants against their sisters and it bears repeating, patriarchy has tinctured their thought and focus. That aside, and in the absence of any evidence to the contrary, one wonders why the applicants are keen on depriving the respondents of the portion C that was allocated to them?

[11] For emphasis, in the judgment of this court dated 11/05/2017 it noted the behavior of the applicants which tends to discriminate the daughters of the deceased by resorting to acts which will frustrate the respondents. Good faith is everything in equity and law. From the foregoing the applicants have not established any or any sufficient reason to warrant review under Order 45 of the Civil Procedure Rules. Therefore, their application is denied. For the avoidance of doubt, the applicants should not interfere with the respondents' use of Portion C. This is necessitated by the circumstances of this case and the need to do justice. See section 47 and rule 73 of the Law of Succession Act and Probate and Administration Rules, respectively.

[12] Before I close, I should state that, parties who embark on developing the estate property especially after the death of the deceased and before confirmation of the grant, in the hope that they will get the particular portion, do so at their peril of offending the law. Such are acts of intermeddling which should be treated under section 45 of the Law of Succession Act, or a breach of duty if by administrators. In such instances, courts should be guided by the maxim that you cannot reap from your own wrongdoing. Courts should also be keen to punish such acts and refuse to take into account developments carried on the estate property in violation of the law during distribution of the estate as a deterrent measure. The approach will bring to an end the uncouth behavior by beneficiaries such as I have described above.

[13] Accordingly, the application is dismissed with costs to the respondents. It is so ordered.

Dated, signed and delivered at Milimani Nairobi this 21ST day of APRIL 2020.

F. GIKONYO

JUDGE

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