



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

SUCCESSION CAUSE NO. 44 OF 2015

IN THE MATTER OF THE ESTATE OF PIETRO ROSSINI (DECEASED)

AND

WINNIE KAMENE PETER.....PETITIONER

VERSUS

ROSSINI OMAR.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Wamotsa advocate for the Petitioner

Onchagu Kemunto advocate for the Objector

RULING

The drafters of the certificate of urgency and summons dated 28.11.2018 pursuant to Section 45 & 47 of the Law of Succession and Article 159 (2) (d) of the Constitution have asked this court to come through for them by issuing the following orders:

- 2. That leave be granted to the petitioner to introduce new evidence and documents presented in the petitioner's affidavit of Winnie Kamene Peter annexed herein in support of this application and petition herein.***
- 3. That the petitioner's petition herein be deemed as duly amended in terms of the new evidence presented in the petitioner's supporting affidavit of Winnie Kamene Peter annexed herein support of this application.***
- 4. That in the alternative to or in addition to prayers 2 and 3 hereinabove the petitioner and her witnesses stated in the witness statements and documents annexed to the petitioner's supporting affidavit of Winnie Kamene Peter filed in support of this application be at liberty to give viva evidence in this matter.***

Determination

The Law applicable for an application by a party seeking to re-open the case by introducing new evidence has been captured in the persuasive case of **Smith – v New South Waters {1992} HCA 36 {1992} 176 CLR 250** where the court stated:

“If an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded ordinarily, that will fell decisively against the application. But assuming that Judgment is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete or one which reasons for the Judgment have been delivered. In the later successions, the appeal rules relating fresh evidence may provide a useful guide as to the manner in which the discretion to re-open should be exercised.”

Borrowing from the provisions of Article 50 (6) (b) of the Constitution in this respect the fresh evidence for the purposes of re-opening the case must be new and compelling evidence that has become available and it could not have been identified and presented through the exercise of reasonable diligence.

This was also demonstrated by the court further in **Samwel Kiti Lewa v Housing Finance Co. of Kenya Ltd & Another {2015} EKLR** the weight to begin in this regard was stated by **Kasango J** as follows:

“The court retains discretion to allow, re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party: In that regard re-opening of a case should not be delivered where it is intended to fill gaps in evidence.”

Given the facts of this case as averred in the affidavit sworn by the petitioner there is an objection proceedings with regard to the estate property referred as Land parcels No. 1794/2 – 1794/7 Malindi allegedly transferred to the objector through an agreement of sale dated 8.11.2012.

The petitioner is challenging the purported sale. For that reason, the circumstances of the case are that she has come into possession of new and compelling evidence, a connecting factor to the suit properties. That it was necessary that the evidence be closely examined before holding any allegations as well founded.

From the record, the trial on merits is yet to be concluded and a decision on the dispute pronounced by the court. Therefore, as far as possible indeed the respondent would not be prejudiced, if the order on additional evidence is granted by this court.

To the petitioner’s case the contention of new evidence available before the commencement of the trial would have a material effect on the final outcome of the case. The relevance of it can be tested by the objector in cross-examination at the trial hence any such further new evidence is unlikely to prejudice or occasion on injustice to the proceedings as against the petitioner.

In my opinion the additional evidence sought to be introduced could not have been obtained even with reasonable diligence before institution of the suit. To this as clearly explained by the applicant, the additional evidence is relevant for the determination of the issue at hand.

For those reasons to secure the just, timely and effective disposal of the claim as stipulated under Section 1A of the Civil Procedure Act summons dated 28.11.2018 be and is hereby allowed in terms of prayer 2, 3 and 4 with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15th DAY OF APRIL 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Mwanja for Watmosa for the Petitioner