



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

SUCCESSION CAUSE NO. 12 OF 2006

(CONSOLIDATED) WITH NO. 13 OF 2006

IN THE ESTATE OF GIDEON KATHUMO MUATHE AND JAMES MAKAU MUATHE (DECEASED)

1. SIMON MWEU MUATHE)

2. HENRY MAKAU MUATHE)

3. MWANZIA KATHUMO).....ADMINISTRATORS/RESPONDENTS

AND

JOHN MUISYO MUATHE.....OBJECTOR

ANTHONY MWENDWA NZUKI.....INTERESTED PARTY

RULING

1. The genesis of this matter is that the 2nd and 3rd Administrators through their learned counsel J.M. Tamata filed a preliminary objection dated 14.06.2019 and filed on 17.06.2019 against what was indicated as the application date 03.11.2019 on the grounds that the probate court lacks jurisdiction to hear the dispute relating to the claim of land based on contract/sale agreement and the enforceability of the sale agreement.

2. The court in its wisdom gave directions in its ruling on 7.11.2019 “...*that the preliminary objection dated 14/06/2019 be canvassed in these proceedings and later in submissions. I decline the administrators’ counsel’s request to canvas the same before the further evidence is tendered.*” and ordered the matter to proceed for hearing as earlier on scheduled. This prompted the instant application dated 3.12.2019 that was brought under **Sections 47 of the Law of Succession Act** and **Rule 73 of the Probate and Administration Rules** seeking orders that:

a) Spent.

b) This Honourable court be pleased to review its orders made on 6.11.2019 and direct that the preliminary objection dated 14.6.2019 be heard first for sufficient cause/ reason.

c) Cost do abide in the application

3. The application is premised on the grounds enumerated in it and buttressed by the affidavit Gedion Kathumo dated 3.12.2019.

4. The affidavit sets out three main grounds upon which the orders are sought; the issue in contention is the validity of the agreement involving interested party; the applicant had already filed **ELC 171 of 2019** at Kangundo to determine the validity of the interested party’s agreement of July, 2015; that this court is functus officio and it was an error to enjoin the interested party into these proceedings whereby he allegedly bought a portion of land from some beneficiaries after grant had been confirmed; that the dispute is a matter for the ELC court and hence this court should entertain the objection and thereafter forward interested party’s claim to the civil court.

5. The interested party, via replying affidavit dated 20.1.2020 opposed the application. It was his contention that he bought the subject land

from the administrator who already had a confirmed grant that is yet to be transferred to him and that the dealing by the administrator on the deceased's estate falls under the Succession Act in which this court has jurisdiction. He averred that the decision of the court had not been appealed against.

6. According to the 2nd and 3rd administrators, the court ought to have heard and dispensed with their preliminary objection and ought to review the directions and orders issued in respect of their preliminary objection.

7. The parties agreed to canvass the application vide written submissions. There are no submissions on record but semblance of a submissions dated 15.12.2019 filed by John Muisyo Muathe (objector) and who was later represented by Muema & Associates Advocates which filed a notice of appointment on 20.01.2020. None of the Advocates filed submissions.

8. Having carefully considered the pleadings of both the respective parties, it is my view that the following two substantive issues are up for determination:

a. Whether the application meets the threshold for granting review orders.

b. If the application meets the threshold, what orders should the court issue?

9. The remedy of review is set out under Order 45 of the Civil Procedure Rules 2010. This is provided for under Rule 63 of the Probate and Administration Rules. Order 45 states that:

1. (1) Any person considering himself aggrieved—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 a review of judgement to the court which passed the decree or made the order without unreasonable delay.

10. This order derives from section 80 of the Civil Procedure Act which gives the court power to review its own orders or decrees it had previously passed.

11. The above legal propositions show that review concerns itself with the "court order" or "judgment". The word "judgement" is defined in **Jowitt's Dictionary of English Law 2nd Ed. at p.1025** as follows:

"Judgement, a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding, or on one of the questions, if there are several. The judgment so pronounced is entered on the records of the court. The term "judgement" is also used to denote the reasons which the court gives for its decision: so that where the court consists of several judges, it may and often does happen that each judge gives a separate judgement or statement of his reasons, although there can be only one judgement of the court in the technical sense of the word."

12. I have had due regard to section 2 of the Civil Procedure Act in which the definition of an "order" means the formal expression of any decision of a court which is not a decree, and includes a rule nisi.

13. According to Black's Law Dictionary, 8th Edition, 2004 in the definition of an order, it is stated as follows;

"order" is a command, direction, or instruction or a written direction or command delivered by a court or judge.

"An order is the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings." 1 Henry Campbell Black, A Treatise on the Law of Judgments 1, at 5 (2d ed. 1902).

"While an order may under some circumstances amount to a judgment, they must be distinguished, owing to the different consequences flowing from them, not only in the matter of enforcement and appeal but in other respects, as, for instance, the time within which proceedings to annul them must be taken. Rulings on motions are ordinarily orders rather than judgments. The class of judgments and of decrees formerly called interlocutory is included in the definition given in [modern codes] of the word 'order.' " 1 A.C. Freeman, A Treatise of the Law of Judgments § 19, at 28 (Edward W. Tuttle ed., 5th ed. 1925).

14. A perusal of the ruling dated 7.11. 2019 shows that the court has not gone to the merits of the objection or given its mind to address the issues that are raised in the objection. The court has simply given directions as to how the 2nd and 3rd administrators shall canvass their objection. Those directions are quite clear and unambiguous and that the court gave its reasons why it found it appropriate in the conduct of the proceedings not to entertain the objection at this juncture. The court has the mandate and discretion to control the conduct of its proceedings and parties are expected to be abide by those directions. There are no new matters to warrant a review of the orders dated 7.11.2019.

15. In the result I find that the 2nd and 3rd administrators have not met the threshold envisioned in **Rule 63 of the Probate and Administration Rules** for the grant of review orders. They are yet to be heard and a determination is yet to be made on their objection for which they should be patient a bit.

16. The order that commends itself is that the application lodged by the 2nd and 3rd Administrators dated 3.12.2019 lacks merit. The same is ordered dismissed with no order as to costs.

It is so ordered.

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

D. K. Kemei

Judge