



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 1576 OF 2013 (OS)
IN THE MATTER OF THE ESTATE OF DAVID NYACHIO MOMANYI (DECEASED)

LYDIA MORAA NYAMAMBA.....APPLICANT

VERSUS

BETTY CHEMUTAI KOECH.....RESPONDENT

RULING

1. The deceased David Nyachio Momanyi died intestate on 5th September 2012. On 4th July 2013 the applicant Lydia Moraa Nyamamba and respondent Betty Chemutai Koech petitioned the court for the grant of letters of administration. The grant was issued to them on 24th February 2015 and confirmed on 12th May 2017. The estate was shared to the beneficiaries. The deceased's children (and beneficiaries) were Diana Kwamboka Momanyi, Rita Nyaboke and Shawn Bosire Momanyi. The applicant was a former spouse of the deceased and the mother of Diana Kwamboka Momanyi and Rita Nyaboke Momanyi. The respondent is the mother of Shawn Bosire Momanyi. The deceased's mother was Yunes Binsari Nyachio.

2. The assets forming the estate were Housing Finance Co. Ltd shares, Kenya Airways shares, Safaricom Ltd shares, Kengen Ltd shares, KPLC shares and Mumias Sugar Company shares; money in various bank accounts; vehicles KBN 799M, KPW 320 and KAC 332V; house No. E 2 – 24 Kisii Flats; Miti Mingi/Mbaruk Block 5/478; plots Nos NI7, N178B, P1092, P1092B and V4886 Ruai; LR No. 23173/39 North Muhoroni; and accident compensation monies.

3. Plot No. P 1092 Ruai was ordered to be sold and the proceeds utilized to settle debts and liabilities of the estate, including the costs of administration, and thereafter the surplus be shared equally among the three beneficiaries; house No. E 2 – 24 Kisii Flats, Miti Mingi/Mbaruk Block 5/478, Plot No. N 17 Ruai, Plot No. 178B Ruai, Plot No. V4886 Ruai, Plot No. 1092B Ruai, LR No. 23173/39 North Muhorini, vehicle KBN 799M and the shares in the companies above were to be shared equally among the three beneficiaries; the money in the various bank accounts and the money due from the accident compensation were to be shared equally among the three beneficiaries and the mother of the deceased; and vehicles KPW 320 and KAC 332V were to go to the mother of the deceased. A certificate of confirmation was accordingly issued, and rectified on 2nd August 2019.

4. The applicant has by her application dated 9th October 2019 sought that the court reviews the ruling dated 12th May 2017 that distributed the estate, and the resultant certificate of confirmation as rectified, and order that Miti Mingi/Mbaruk Block 5/478 be sold in place of plot No. P1092 Ruai, and the proceeds be utilized to settle the debts and liabilities of the estate, including the costs of administration, and the surplus be shared among the three beneficiaries. Her case was that, whereas Miti Mingi/Mbaruk Block 5/478 had title and could be readily sold, Plot No. 1092 Ruai had no title and could not be readily sold. The deceased had taken a loan of Kshs.2,385,000/= against House No. E 2-24 Kisii Flats which she had been paying monthly at Kshs.27,000/= (using rent from the flat and her own resources). She feared that the loan may not be repaid (it was now standing at Kshs.1,768,091/=) and the property could be sold by the financier. She was due to retire and without the resources to continue paying the loan. She stated that she had identified a buyer for the Miti Mingi/Mbaruk Block 5/478 who was offering Kshs.6,400,000/=.

5. The respondent opposed the application on the basis that it was all along known that Plot No. P1092 Ruai did not have a title but that Embakasi Ranching Company Ltd was in the process of issuing titles to the plot owners, including the estate. She stated that the applicant had been collecting rent from Miti Mingi/Mbaruk Block 5/478 and House No. E 2 – 24 Kisii Flats and using the same to repay the loan. Her case was that the applicant had not shown that she had come by any new evidence, or that there was any error or existence that the court should correct by review. The applicant's position, in rebuttal, was that the court had overlooked the fact that Plot No. P1092 Ruai had no

title and that could not be readily sold to pay liabilities. She stated that Miti Mingi/Mbaruk Block 5/475 and House No. E 2 – 24 Kisii Flats have not had tenants since 2017 and therefore she has been struggling on her own to repay the loan.

6. The application was made under **Order 45 rule 1** of the **Civil Procedure Rules** and **rules 63** and **73** of the **Probate and Administration Rules**.

7. **Rule 73** of the **Probate and Administration Rules** states that:-

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Section 47 of the **Law of Succession Act (Cap. 160)** provides that the High Court shall have jurisdiction to entertain any application and determine any dispute under this **Act** and to pronounce such decrees and make such orders therein as may be expedient. The court will bear these provisions in mind when considering this application which was substantially brought under **Order 45 rule 1** of the **Civil Procedure Rules**. I further consider that under **section 86** of the **Act** debts of every description enforceable at law and owed by or out of an estate shall be paid before any legacy. Lastly, under **Section 83(f)** of the **Act**, it is the duty of the personal representatives to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts of the estate.

8. In the ruling rendered on 12th May 2017, the confirmed grant that had been jointly issued to the applicant and respondent shows that the court was alive to the fact that the estate of the deceased had debts and liabilities. This is why it ordered that plot No. P1092 Ruai be sold and part of the proceeds be applied to pay those debts and liabilities. The deceased had taken a loan on House No. F2-24 Kisii Flats from National Housing Corporation Ltd which he was repaying by the time he died. In the replying affidavit sworn on 13th July 2016 by the applicant to oppose the respondent’s application filed on 31st May 2016 to confirm the grant, she talked of the loan and indicated that she was the one servicing the same. The court was also alive to the fact that the administration of the estate had to be provided for. It stated that the proceeds of the sale of plot No. P1092 would cater for the costs of the administration of the estate.

9. The deceased had bought the Ruai plots from Embakasi Ranching Co. Ltd. The company had not issued titles to all purchasers of its plots. Nonetheless, the deceased had developed Plot No. P1092. He had built a 4 bedroomed house thereon. In her proposal, the applicant had asked that the plot wholly goes to her daughters Diana Kwamboka Momanyi and Rita Nyaboke Momanyi in equal shares. At that point, she did not indicate that the plot had no title or that the fact presented any problem.

10. Further, the beneficiaries of the deceased were asked to equally share house No. E2 - 24 Kisii Flats, among other properties. It was known that the property had a loan whose repayment was required. The beneficiaries are responsible enough to cooperate with the administrators to make sure the loan is fully repaid, otherwise National Housing Corporation Ltd may exercise its statutory power of sale over the property.

11. Order 45 of the **Civil Procedure Rules** is explicit that a court can only review its decree or order if all, or any of, the following grounds exist:-

a. there must be discovery of a 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;

b. there was some mistake or error apparent on the face of the record; and

c. there was other sufficient reason (**Pancras T. Swai –v- Kenya Breweries Ltd [2014] eKLR**).

The application must have been made without unreasonable delay.

12. This application was brought on the basis of –

“for any other sufficient reason.”

This is how counsel for the applicant put it in the written submissions:-

“12. We submit that the expression ‘or for any other sufficient reason’ is extensive enough to include a misconception of fact or law by the court which confirmed the grant, which in this case was the failure by the said court to acknowledge that the property Plot No. 1092 Ruai, which was ordered to be sold to offset estate liability could not be readily offered for sale for reason that the same had no (title) and to-date still has no title and consequently no would be buyer can risk negotiating the sale for the same.”

13. The facts on record, however, do not support the submission by counsel. The court did not misconceive anything, and neither did it fail to acknowledge anything. The fact that plot No. P1092 Ruai did not have title was within the knowledge of the applicant at the time that the matter of the distribution of the estate of the deceased was brought to the court for decision. She did not bring it to the attention of the court, and she has not given any reason for the failure to bring up the matter. The court was not expected to acknowledge a matter or evidence that was not brought to its attention.

14. In the **Official Receiver and Liquidation –v- Freight Forwarders Kenya Ltd, Civil Appeal No. 235 of 1997**, the Court of Appeal

observed that –

“On the authority of Wangechi Kimita Another –v- Mutahi Wakibiru (1980 – 88) 1 KAR 977 the words “or any other sufficient reason” in Order XLIV rule 1(1) of the Civil Procedure Rules need not be analogous with the other two alternatives this Order in view of section 80 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya which confers an unfettered right to apply for review. Indeed, these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice “be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or error apparent on the face of the record.””

This position was reiterated by the Court of Appeal in **Pancras T. Swai Case** (above).

15. Being mindful of the discretion placed on me to do justice to the parties herein, and considering the facts of this case, I find that there is no sufficient reason to interfere with the distribution of the estate of the deceased, or to review any of the orders that have so far been given in this cause. I consequently dismiss the applicant’s application.

16. In view of the family nature of the dispute, I ask each side to pay its own costs.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 7TH day of MAY 2020

A.O. MUCHELULE

JUDGE