



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 130 OF 2010**

**IN THE MATTER OF THE ESTATE OF JAPHETH MATHIU MUNGANIA (DECEASED)**

**THOMAS RIUNGU MATHEW.....PROTESTOR**

**VERSUS**

**SAMUEL GICHUNGE MATHEW.....1<sup>ST</sup> RESPONDENT**

**HELLEN NJIRU KIRIGIA.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. By an application dated 10/06/2019, brought under **Order 45 of the Civil Procedure Rules**, the protestor prays for the review of the judgment of this Court made on 16/05/2019, That consequently, the dismissal of his protest beset aside and the same be allowed.
2. In support of his application, the protestor averred that during his lifetime, the deceased had combined **LR. No Abothuguchi/Githongo 1560 and 1561** resulting in **Parcel No. 3417**. That **Parcel No. 3417** was subsequently subdivided to **Parcel Nos. 3461 and 3462**.
3. The protestor further contended that **Parcel 3462** was transferred to him while **Parcel No. 3461** was transferred to the Full Gospel Church. He stated that, during the trial of his protest. he had provided uncertified copies of the documentation from the lands office to prove the above transactions by the deceased but could not produce them for reason of admissibility. That he has since obtained certified copies of the same.
4. He further stated that the DCIO Imenti North had informed him that the DCI was not investigating a fraud relating to land but rather an inadvertent misplacement of documents and that as a result no report had been made to that effect.
5. The application was opposed by **Samuel Gichunge Mathew, the 1<sup>st</sup> respondent**, He denied the existence of **Parcel Nos. 3461 and Parcel 3462**, respectively. He averred that from the green card for **L.R Abothuguchi/Githongo/1560. Parcel No. 3417** came into existence on 11/8/2017 upon combination of **Parcels No. 1560 and 1561**, respectively.
6. That it was the applicant who had fraudulently subdivided the parcels on the registry index map but could not register the same. That the application had not adduced any evidence that the alleged land documents had been missing as he alleged.
7. On the application by the parties, on 11/9/2019 the Court summoned the Land Registrar, Meru Central to attend court and produce original green cards for L.R No. **Abothuguchi/Githongo/1560, 1561, 3417, 3461 and 3462**, respectively.
8. On 25/11/2019, **George Njoroge, the District Land Registrar Meru Central** testified that, **Parcel No, 1560** in the name of the deceased was combined with **Parcel No. 1561** on 11/8/2017. It was issued with a new number i.e **Parcel No. 3417** and registered on 25/7/2017 in the name of the protestor.
9. He further told the court that, on 11/8/2017 the said **Parcel No. 3417** was subdivided into **Parcel Nos. 3461** measuring 0.046 ha and **3462** measuring 0.964 Ha, respectively. That after the subdivision, **Parcel No. 3461** was on 18/8/2017 transferred to Full Gospel Church Kenya Registered Trustees and tile issued on 25/8/2017. That **Parcel No 3462** was transferred on 11/8/2017 to the Protestor, He produced the certified copies as **Exh 1a to 6**.
10. On cross-examination, he stated that in the year 2005/2006 there was no **Parcel No. 3417**. When shown a transfer form executed on 21/4/2008, he explained that **Parcel No. 3462** did not exist for any transfer to have been executed. It was also his testimony that the mutation

forms were not submitted until the date of registration, on 11/8/2017. That the transfer of **Parcel No. 3462** appears to have been received on 30/4/2008 and the same must have been rejected. That it is not true that the documents had been lost.

11. On 25/11/2019, the parties were directed to file and exchange their respective submissions but as at the time of writing this ruling, none of them had filed any submissions.

12. **Order 45 of the Civil Procedure Rules** is 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 as set out in **Order 45**.

13. An application under that order can be made if the applicant can show that there has been a discovery of new evidence which, after exercise of due diligence could not be produced at the time the order or decree was made or passed, or there is an error apparent on the face of the record or for any sufficient reason. Such an application should be made timeously.

14. For an applicant to succeed on the basis of fresh or new evidence, he must satisfy the Court that the evidence he seeks to rely on, after the exercise of due diligence, was not within his knowledge or could not be produced by him at time when the decree or order impugned was passed or the order made.

15. In the present case, the protestor's contention was that there was an ongoing investigation by the Meru DCI and that he could not therefore procure the said documents. That he only had uncertified copies which could not be relied on for reason of admissibility.

16. That explanation is self-defeatist. Firstly, it is clear that the said documents have been in existence at all times during the pendency of the Protest. Secondly, there was no evidence that there was any investigation that was ongoing at the time. The protestor did not tell Court who made the report of the alleged loss of documents, where the report made, when the report was made, what investigations were conducted and when they terminated and the result thereof.

17. Thirdly, when the Land Registrar appeared and produced the certified copies of the said documents, he denied that the documents had been lost or misplaced.

18. In any event, if at all the said documents had gone missing from the Lands Registry as the protestor would want the Court to believe, he should have applied for the Land Registrar to be summoned to appear and tell the court about that fact. It should be noted that, after the impugned judgment was delivered on 16/5/2019, it took less than two weeks for the documents to be found!

19. Even if the protestor's version was correct, which is not the case, the Court is still not satisfied that the said documents could affect the decision this Court had arrived. The deceased died on 12/11/2007. All the documents sought to be relied on were executed way after his demise. The transactions seem to have been commenced and executed after his demise and continued during the pendency of this matter contrary to law. They were perfected in or about 2017 in utter breach of section 45 of the Law of Succession Act.

20. The transfer documents sought to be relied on were signed on 21/4/2008 yet the deceased had died on 12/11/2007. The Land Control Board consent for **Parcel No. 3462** was approved on 20/3/2007. It was however the testimony of the Land Registrar that that parcel was non-existent at the time! All the transactions that went on after November, 2007 until 2017 were but outright intermeddling with the estate of the deceased. They may have been perpetrated by the Protestor himself or on his behalf and benefit.

21. In view of the foregoing, I find that the protestor has not met the threshold under **Section 45 of the Civil Procedure Act** and I dismiss the application with costs.

**SIGNED** at Meru

**A. MABEYA**

**JUDGE**

**DATED** and **DELIVERED** at Meru this 20<sup>th</sup> day of February, 2020

**F. GIKONYO**

**JUDGE**