



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 159 OF 1997

IN THE MATTER OF THE ESTATE OF KAUMBUTHU MBUGAUGIA-DECEASED

KABURU MBUGAUGIA.....PETITIONER

VERSUS

CIAMATI KAUMBUTHU.....OBJECTOR/APPLICANT

PIUS MIRITI.....1ST INTERESTED PARTY

ALEX NJAGI MBUGUA.....2ND INTERESTED PARTY

CYPRIAN NJAGI MUTEGLI.....3RD INTERESTED PARTY

JOHN PETER N. MUTEGLI.....4TH INTERESTED PARTY

JOHN PETER MICHENI.....5TH INTERESTED PARTY

CECILIA MUKWAMUGO.....6TH INTERESTED PARTY

RULING

1. The application dated 20/11/2019 was brought pursuant to Order 22 Rule 22 and Order 45 Rule 1 of the Civil Procedure Rules as well as Rule 63 of the Probate and Administration Rules seeking the following orders:-

- a. The application be certified urgent and the same be heard exparte and on a priority basis in the first instance
- b. The honorable court be pleased to stay its orders of 17/10/2019 and any further proceedings thereof pending inter-parties hearing of this application
- c. The honorable court be pleased to review, vary and set aside its orders of 17/10/2019.
- d. Costs of the application be provided for.

2. The application was based on the grounds on the face of it and on the supporting affidavit of Ciamati Kaumbuthu who averred that she is the sole Administrator of the deceased estate herein having been appointed on 19/3/2010 and that her appointment has never been challenged. She averred that having gone through the courts proceedings she did not come across any confirmed grant in favour of either Kaburu Mbuguagua or any of the interested parties. That it would be erroneous to proceed to distribute the deceased estate without her input as an Administrator of the estate. That the Deputy Registrar is not a beneficiary or an administrator of the estate of the deceased and assigning him the role of administration over the deceased estate is erroneous. Therefore in the interest of justice the orders sought be granted.

3. The application was opposed by the replying affidavit of Lawrence Nicholas Mutembei sworn on 17/2/2020 where he stated that he was appointed as a legal representative of Pius Miriti who died on 25/5/2017. Nicholas Mutembei averred that the Applicants summons are frivolous, vexatious and an abuse of court process as the Applicant has not met the basic requirements of order 45 of the Civil Procedure Rules. There is no apparent error on the face of the record and the court has no jurisdiction to sit on appeal on its own decision. There is no

new evidence discovered by the Applicant which was not adduced to the court at the time of making its decision and therefore the application is incurably defective and bad in law.

4. The application was canvassed by way of written submissions where the applicant argued that as per the proceedings and the ruling of 10/3/2010 the applicant is still the known administrator of the estate of the deceased the petitioner having been relieved of the role on 2/9/2001. It was also her argument that for one to be an administrator it is not necessary that they have to be a beneficiary. Additionally, that the application dated 25/9/2019 having been served upon the Applicant it is expected that the Applicant would respond. This was however not the case as her replying affidavit and ground for opposition were expunged thus infringing the applicants right to a fair hearing.

5. On the other hand the interested parties argued that the respondent filed for letters of administration on 2/9/1997 and the same was confirmed on 13/3/1998. The grant that was issued was in respect of MUTHAMBI/IGAMURATHI/96 which was transferred to the Respondent who later sub divided and sold it to the interested parties. It was their contention therefore that the outcome stemming from the application herein would affect them. Therefore guided by section 93 (1) of the law of succession act it is clear that the intention of the said section is to protect purchasers for value.

6. On the application they argued that the order sought to be stayed, set aside and/or varied were made to have the Deputy Registrar sign all documents to effect the sub division of land parcel MUTHAMBI/IGAMURATHI/96 in the names of the beneficiaries. It is therefore absurd that the Applicant claims that the orders were given without her participation as a Mr. Karanja held brief for the Applicants advocate. That it is trite law that for orders to be stayed, discharged or set aside certain circumstances must be fulfilled such as; if its shown that the orders were obtained irregularly, that there was a subsequent change of circumstances or that it was unjust to maintain it in force and that it is otherwise unjust and irregular to let the order remain. The applicant herein has not met any of the requirements and therefore the orders issued should remain in force.

7. I have carefully considered the application, affidavits, submissions on record in its entirety and the issues to be determined are whether to review, vary and set aside the orders of 17/10/2019?

8. **Order 45 rule 1** of the **Civil Procedure Rules** provides the circumstances under which an order can be reviewed. The said provisions state that:

“ any person considering himself aggrieved by:

a. a decree or order from which an appeal is allowed but from which no appeal has been preferred or

b. decree or order from no appeal is hereby allowed

and 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 my apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

9. In **Yani Haryanto vs. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992** the Court of Appeal was of the following view:

a. “The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review.”

10. The Applicants advocate was in court on 17th October 2019 when the grounds of opposition and replying affidavits were expunged from the records for reasons that the court had established that she was not the deceased persons wife. This determination stripped her of any rights in the estate of the deceased person and having failed to challenge that decision, this court could not entertain any more of her pleadings particularly where she was opposing the implementation of the grant that was legally on record. The court may not have expressly indicated that she is no longer the administrator but by implication she cannot be an administrator of an estate in which she doesn't have interest.

11. The Applicant application falls short of the threshold required under Order 45 Rule 1 as there has been no discovery of new and important evidence nor was there an error on the face of the record. Consequently I find that the application herein is without merit and is therefore dismissed with costs to the Respondent.

HON.ANNE ADWERA ONG'INJO

JUDGE

RULING DATED AND DELIVERED AT MERU BY EMAIL THIS 1ST DAY OF SEPTEMBER 2020.

HON.ANNE ADWERA ONG'INJO

JUDGE