



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 227 OF 1993

IN THE MATTER OF THE ESTATE OF JOAB ODERO ALIAS JOAB ODERO ODERO (DECEASED)

BETWEEN

MARK OPIYO ODERO.....APPLICANT

AND

ANN ATIENO ODERO.....1ST RESPONDENT

JANE ADHIAMBO ODERO.....2ND RESPONDENT

RULING

Introduction

1. Deceased was married to **HILDA ACHIENG ODERO** (deceased) and **JANE ADHIAMBO ODERO**.
2. Letters of administration to the deceased's estate were issued on 19.05.1994 to **HILDA ACHIENG ODERO** (deceased); **JANE ADHIAMBO ODERO** and **DAVID JAIRO ODERO** (deceased).
3. A certificate of grant was issued on 07.04.1995 in which all the properties of the deceased including **KISUMU/PANDPIERI/833** were distributed to **HILDA ACHIENG ODERO** (deceased); **JANE ADHIAMBO ODERO** and **DAVID JAIRO ODERO** (deceased).
4. Subsequently by an order dated 28.05.2004, this court (Tanui J, as he then) distributed $\frac{1}{2}$ of **KISUMU/PANDPIERI/833** to the house of **HILDA ACHIENG ODERO** and the other $\frac{1}{2}$ to the house of **JANE ADHIAMBO ODERO**.
5. By a notice of motion dated 24.07.2019, the Respondent who is a beneficiary of the deceased's estate from the house of **HILDA ACHIENG ODERO** (deceased) sought the following orders:

1) MARY ATIENO ADONGO ODERO be made a co-administrator of the estate

2) That the certificate of confirmation of grant be amended in accordance with the ruling of Justice B.K.Tunoi dated and delivered on 28.05.2004

3) The property known as KISUMU/PANDPIERI/833 be sold and the proceeds of the sale be distributed among the beneficiaries

4) Costs be in the cause

6. By consent of the advocates for the Applicant and the Respondent, the notice of motion dated 24.07.2019 was partly compromised. Prayer 1 in the name of **ANN ATIENO ODERO** and prayer 2 for amendment of the certificate of confirmation of grant in accordance with the ruling of Justice B.K.Tunoi dated and delivered on 28.05.2004 were allowed.

7. The Applicant through counsel indicated that he was opposed to prayer No. 3. This court granted the Applicant 10 days to file his objection and the Respondent 10 days after service to file a response. The parties were further directed to thereafter file witness statements in respect of their respective cases and the cause was listed for hearing on 09.12.19 to confirm compliance with the foregoing directions and

orders.

8. Come 09.12.19, the Applicant had not filed his objection to prayer No. 3. The Applicant and his counsel were also absent. Consequently, this court ordered that title to **KISUMU/PANDPIERI/833** be reverted to the name of the deceased and allowed prayer 3 to the effect that property known as **KISUMU/PANDPIERI/833** be sold and the proceeds of the sale be distributed among the beneficiaries.

9. By a notice of motion dated and filed on 18.02.2020, the Applicant seeks a review of the orders made on 09.12.19. The application is supported by two affidavits. In the Applicant's undated affidavit filed on 18.02.2020, he asserts that his response was filed long after the court orders were issued and further that he is oppose to the sale of **KISUMU/PANDPIERI/833** for the reason that he is not employed and relies on rent collected therefrom for his upkeep.

10. Mr. Rayola Ochieng advocate for the Applicant in his undated affidavit filed on 18.02.2020 conceded that the Applicant had by 09.12.19 not filed any response to prayer 3 of application dated and filed on 18.02.2020 but asserts that the application was opposed on the basis of grounds of opposition on 11.11.19. In his further supporting affidavit sworn on 11.09.2020 and filed on 22.09.2020, reiterates his right not to be condemned unheard.

11. The application is opposed by way of an affidavit sworn by **ANN ATIENO ODERO (1st Administrator/Respondent)** on 10.08.2020. She avers that of the 10 beneficiaries of the deceased, only the Applicant who is her brother from the house of HILDA ACHIENG ODERO is opposed to the sale of **KISUMU/PANDPIERI/833** and declining to hand it over to the administrators for the reason that he has been in possession and has been collecting rent and benefiting from the same to the exclusion of other beneficiaries.

12. The application is also opposed by the **JANE ADHIAMBO ODERO (2nd Administrator/Respondent)** by her replying affidavit sworn on 02.05.2020 and filed on 15.07.2020. She avers that the application was brought with undue delay and is prejudicial to her house which has not benefitted from its ½ share of **KISUMU/PANDPIERI/833**.

13. I have considered the application in the light of the affidavits on record and submissions filed on behalf of the Applicant and the two Administrators/Respondents and I have deduced the following issues for determination:

1) Whether the Applicant was denied a chance to be heard

2) Whether the Applicant has made out a case for review

3) What is the effect of sale of KISUMU/PANDPIERI/833 Whether the Applicant was denied a chance to be heard

14. Article 50 (1) of the Constitution underscores the right to be heard and provides that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

15. Further to the foregoing, **Halsbury Laws of England, 5th Edition 2010 Vol. 61 para 639** states that:

"the rule that no person is to be condemned unless that person has been given prior notice of the allegations against him, and a fair opportunity to be heard, (the Audi alteram partem rule) is a fundamental principle of justice."

16. The Applicant and his counsel rightly concede that as at 09.12.19, the Applicant had not complied with the orders of 24.07.19 requiring him to file his objection within 10 days. Whereas it is indeed true that the Applicant had filed grounds of opposition on 11.11.19, those grounds did not answer to the issues of fact raised in the notice of motion dated 24.07.2019 and before the court there was no opposition to those issues.

17. From the foregoing, I find that there is no substance in the argument that the Applicant was denied an opportunity to be heard. It is him and his advocate who squandered the opportunity of being heard. The Applicant's contention that he was denied a chance to be heard is therefore unmeritorious.

Whether the Applicant has made out a case for review

18. Order 45 of the Civil Procedure Rules states as follows:

1. (1) Any person considering himself aggrieved-

(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 judgment to the court which passed the decree or made the order without unreasonable delay.

19. In the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR**, the Court of Appeal stated as follows with regard to review:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

20. I understand the Applicant to say that the court did not consider his grounds of opposition. That is however far from the truth for as stated hereinabove, the grounds of opposition did not answer to the issues of fact raised in the notice of motion dated 24.07.2019. The Applicant did not place any material before the court explaining why the notice of motion dated 24.07.2019 ought not to have been allowed and this court had no alternative that to grant the orders sought.

21. Additional, the Applicant has not offered any explanation for the delay in filing this application on 18.02.2020 which was more than two months from the date the orders he seeks to review were issued on 09.12.19.

What is the effect of sale of KISUMU/PANDPIERI/833

22. The Applicant argues that he does not wish to have his share of **KISUMU/PANDPIERI/833** sold for the reason that he is not employed and relies on rent collected therefrom for his upkeep. He similarly does not deny that that he has been in possession of **KISUMU/PANDPIERI/833** and has been collecting rent and benefiting from the same to the exclusion of other beneficiaries.

23. A valuation report for **KISUMU/PANDPIERI/833** annexed to the affidavit by the 2nd Respondent discloses that the property is rental property made up of a 3 storeyed block containing several single and double rooms, balconies, ablution areas, stairs and large open areas/lobbies.

24. I have considered the order made on 28.05.2004 distributing ½ of **KISUMU/PANDPIERI/833** to the house of HILDA ACHIENG ODERO and the other ½ to the house of JANE ADHIAMBO ODERO and I am persuaded that the court had addressed its mind to the fact that there were several beneficiaries and the property could not be segmented.

25. The proposal by the Applicant that he intends to retain his share of the rental units does not appear viable or prudent at all. It seems more judicious, as urged by the Respondents who represent a majority of the other beneficiaries, to have the said asset valued, sold and proceeds shared by the beneficiaries. The Applicant does not in my considered view stand to suffer any prejudice for he will get his rightful share of the ½ share of the proceeds that will be distributed to the house of his mother HILDA ACHIENG ODERO.

26. From the foregoing analysis, I have come to the conclusion that there is not sufficient ground for review. The notice of motion dated and filed on 18.02.2020 is devoid of merit and it is dismissed with costs to the Respondents.

DATED AT KISUMU THIS 14TH DAY OF OCTOBER 2020

T. W. CHERERE

JUDGE

Court Assistants For the Applicant

- Amondi/Okodoi

- Ms. Odhong for Olel, Onyango, Ingutiah & Co. Advs

For 1st Respondent - Ms. Owino for Owino & Company Advocates

For 2nd Respondent - Mr. Rakoro for Rakoro & Company Advocates