



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 463 OF 2011

IN THE MATTER OF THE ESTATE OF NAAMAN M'MWARANIA (DECEASED)

ELIZABETH NAAMAN PETITIONER

-Versus-

DAVID MWITI M'MWARANIAAPPLICANT

LILLIAN GAKII INTERESTED PARTY

RULING

1. Before me is an amended summons dated 26th February 2019 which is expressed to be brought pursuant to **Rule 49 of the Probate and Administration Rules, Order 45 of the Civil Procedure Rules 2010 and all other enabling provisions of the law**. The applicant seeks among other orders: that this honorable court reviews its judgment in respect of plot No. 14 Kula Mawe Isiolo and declares it part of the estate of the deceased and distributes the same to David Mwiti and Japhet Muthee in equal shares; and that the court directs the petitioner to subdivide land parcel NO. KIIRUA/RUIRI/3507 in a way that the applicant's share includes his developments.

2. The application was supported by the grounds in the application and supporting affidavit of David Mwiti M'Mwarania sworn on 26th February 2019. It is contended that Plot No. 14 forms part of the estate as after the irregular transfer was challenged it was reverted back to the name of the deceased and by that time judgment had already been delivered. According to him, the consequence of this is that the said land parcel is within the jurisdiction of this court and should deal with it as such. Concerning land parcel No. Kiirua/ Ruiiri/3507 he stated that the administrator has categorically stated that it will be divided in a way that will ensure the applicant's developments are not included in his share.

3. The application was opposed through the replying affidavit of Elizabeth Naaman. Japhet Muthee Naman and Lilian Gakii also filed affidavits sworn on 28th March, 28th March and 15th April 2019. It is firmly contended that plot No. 14 does not form part of the estate hence the orders sought are incapable of being granted. Moreover, judgment was delivered on this issue making the court *functus officio*. In spite of the applicant accepting in the past that the plot was fraudulently in the name of Japhet Muthee Naman he has gone ahead to interfere with official documents and now alleges otherwise. The documents produced by the applicant would appear as forgeries as it cannot be supported by the history of the record. Japhet deposed that when he visited the county offices and notified of the chances he filed a case in ELC No. 7 of 2019

4. They also spoke to land parcel No. Kiirua/ Ruiiri/3507, and asserted that the applicant's allegations are false as the administrator will do what is just and fair. Furthermore, the evidence of developments on the land is fake. In any case, they have not received the certificate of confirmation or discussed the issue of sub-division.

5. On 30th April 2019 the court directed that both the preliminary objection to have the application struck out and the application be heard together and canvassed by way of written submissions. The applicant, respondent and petitioner filed their submissions which this court has taken due consideration of.

ANALYSIS AND DETERMINATION

6. Is review of the judgment of 12th February 2019 merited? Review sought relates to; (1) a declaration that Plot No. 14 Kula Pesa is estate property and be distributed as such; and (2) a directive on specific subdivision of land parcel No. Kiirua/Ruiiri/3507.

7. **Order 45 Rule 1 (1) of the Civil Procedure Rules** provides for review in the following terms:

“(1) Any person considering himself aggrieved—

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

In the case of **Francis Origo & another v Jacob Kumali Mungala [2005] eKLR** the Court of Appeal held

“From the foregoing, it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.”

8. The judgment that the applicant seeks review of was delivered on 12th February 2019. This application was filed in court on 27th February 2019. Thus, the application was indeed made without unreasonable delay.

9. What about the merits of the application for review? According to the applicant, Plot No. 14 Kula Mawe belongs to the deceased. He produced an internal memo dated 12th February 2019 from the County government of Isiolo and property rates records which state that the owner is the deceased. Japhet Mwitii deposed in his affidavit that these records appear to be forgeries through corruption of which he has filed ELC Case No. 7 of 2019. Of this issue, the following excerpt from the judgment subject of the review request is relevant:

“[23] Evidence by the County government on this plot and particularly whether the transfer is a forgery or not would have been most useful. However, parties were directed to canvass the issue during viva voce evidence. The report by the DCI has not been availed also. It would therefore be imprudent for the court to pretend that it can resolve this issue from the evidence on record. But the law is not helpless; rule 41(3) of the Probate and Administration Rules is the guide. The dispute on plot No. 14 Kulamawe Isiolo is ownership which should be resolved completely and effectually by the Environment and Land Court. And this court will abide by the decision thereof.”

10. It is clear that this issue was raised during the trial and was dealt with accordingly. The plot was set aside under rule 41 of the Probate and Administration Rules to abide by the decision of ELC. Despite the additional evidence annexed to the application, the dispute on ownership still persists and should be determined by ELC after which this court will give effect to the decision thereof. Therefore, this court cannot review its judgment thereon. Mere presence of new evidence does not change the fact that ownership of the plot is in dispute and should be resolved by ELC. Such evidence should be produced in and will profit the ELC case. I need not remind of the sweetest canticle on jurisdiction in the case of **Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd [1989] KLR 1** that-

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. In light of the above, the judgment herein cannot be reviewed in respect of plot No 14.

Specific manner of subdivision

12. The second issue is whether a request that the court issues a directive that subdivision of land parcel No. Kiirua/Ruiri/3507 to be done in a particular manner so that the applicant’s share includes his developments. On 9th March 2013 the court appointed Elizabeth Naaman, Japheth Muthee and David Mwitii M’Mwarania as joint administrators of the estate. The duty and work of administrators is to implement the grant. The petitioner stated that they are yet to receive the confirmed grant for implementation. Execution of the confirmed grant is yet to commence. Therefore, such request by the applicant is premature. In any case, joint administrators are supposed to act in unison and in the best interest of the beneficiaries. The applicant is one of the administrators and should be in tandem with the others rather than rush to court in a huff and haste; an act which is likely to create confusion in the administration of the estate. There is also nothing to show that the grant is being implemented in a manner contrary to the distribution table or prejudicial to any of the beneficiaries. Accordingly, the request is declined for it has been made prematurely.

13. In the upshot, the application is unmeritorious and therefore, dismissed with costs to the respondents.

Dated, signed and delivered in open court this 3rd day of June 2019.

F. GIKONYO

JUDGE

IN PRESENCE OF

Kitheka for interested party

Muchiri for petitioner

Kiautha for applicant/objector – absent

F. GIKONYO

JUDGE