



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 15 OF 2006

IN THE MATTER OF THE ESTATE NATHAN MBITHI MWANIKI (DECEASED)

CYRUS CHOMBA.....APPLICANT

VERSUS

GLADWELL WAMIRU NATHAN MWANIKI.....RESPONDENT

R U L I N G

1. The applicant in his application dated 18/02/2007 seeks review of the order of the court made on 15th June 2007 on grounds that there was an error apparent on the face of the record.
2. The grounds in support of the application are that the applicant's father one John Ciira was not notified of the date the grant was to be confirmed and neither were his advocates Morris Njagi & Co. informed of the same despite having placed themselves on record.
3. The applicant deposes that there is new and important evidence that is available of the failure to take into consideration the caveat on record and the existence of the notice of appointment by the advocates. The effect of the caveat was that the applicant owns 1½ acres of land out of Baragwi/Kariru/214 which ought not to have been confirmed to the respondent.
4. It is further stated that the said John Ciira Jeremiah who is ill and bed-ridden as a result of paralysis caused by a stroke owned the said land prior the death of the deceased. The family of the deceased and that of John Ciira had lived on the land since land adjudication in the area. The Land Disputes Tribunal had already made an award in favour of John Ciira that he was entitled to the 1½ acre portion out of Baragwi/Kariru/214 measuring 4.6 acres.
5. The applicant further states that the interest of his father on the land was not disclosed during the succession proceedings. When John Ciira learnt of the proceedings, he filed a caveat on 8/02/2006 and instructed Messrs Morris Njagi & Co. to represent him in the succession proceedings.
6. The applicant's father was notified of the gazettelement of the cause personally although he had an advocate on record. His advocate proceeded to write a letter dated 16th November 2006.
7. The respondent/administrator opposed the application on grounds that her late husband and the deceased in this case was the sole proprietor of Baragwe/Kariru/214 and that the applicant should have had a genuine claim over the land, he ought to have pursued it during the lifetime of the deceased.
8. It is also deposed that the decision the applicant's father is relying on, was made by an incompetent panel of elders who did not have the mandate to determine the land disputes considering that the elders were not possessed of the requisite jurisdiction to determine land title disputes. The respondent further states that the matter before the Tribunal was filed eight (8) years after the death of the deceased showing bad faith and an afterthought on the part of the claimant.
9. The respondent states that neither the applicant or his father were beneficiaries in the estate. Finally, that no trust existed in favour of the applicant and his family in respect of the deceased's estate.
10. The record shows that the respondent in her application dated 14/11/2014 sought orders for dismissal of his application for want of prosecution. It was also stated that the estate of the deceased had already been distributed as per the confirmed grant.
11. Also borne by the record is the fact that the parties attempted to settle the matter outside court but no consent was reached.

12. This application seeks for review of orders for confirmation of grant made by Khaminwa, J. on 15/06/2007. The application was filed on 4/03/2008 but there was imminent delay in prosecuting it. It has been pending in court for the last eleven (11) years.
13. On perusal of the application, I note that this is a Succession Cause that was determined in 2007 and there is evidence that the estate has been distributed to the beneficiaries.
14. It is clear from the record that the claim of the applicant and his father is based on trust. It is claimed that the deceased held land measuring 1½ acres in trust for the applicant's father out of Baragwi/Kariru/214. This is in itself a land dispute that ought to be determined in the Environment and Land Court.
15. The applicant claims that his father had obtained an award from the Land Disputes Tribunal whose jurisdiction has been challenged. Whatever, the case may be, the applicant's interest and those of his father can only be determined in a competent court which is not this succession forum.
16. The proceedings before this court were succession in nature and which were determined on 15/06/2007 when the grant was confirmed.
17. The application for review brought under Order XLIV (now Order 45) of the Civil Procedure Rules, if allowed would open a padoras box in these succession proceedings and open the concluded case to other applications for filing protests against confirmation. This would then be dragged into succession court determining a claim of trust on land which is not within its jurisdiction.
18. The caveat filed by the applicant's father was on record when the orders of 15/06/2007 were determined. It was also on record that Messrs Morris Njage Co. were on record for the applicant's father. The fact that they were not notified of the date for confirmation of the grant is not a new and important matter under Order 45 of the Civil Procedure Act. The orders were made by another judge and it is incomprehensible to fathom what was in the mind of the honourable judge when she proceeded to grant the orders sought without notifying the applicant's father or his advocate.
19. I do not find any error apparent on the face of the record in regard to the orders made on 15/06/2007 by Khaminwa, J.
20. In my view, this application does not satisfy the requirements of Order 45 of the Civil Procedure Rules.
21. I find it not merited and dismiss it with costs to the respondent.
22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF SEPTEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mbwiria for Morris Njage for Applicant