



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 371 OF 2006

IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH MUTUNGI (DCD)

ALICE NTHAMBI MUTUNGI1ST ADMINISTRATOR /RESPONDENT

ROSE MWIKALI MUTUNGI.....2ND ADMINISTRATOR/ RESPONDENT

PETER NDIKU MAKUNDI.....RESPONDENT

VERSUS

ROSE NDUKU PETER.....PROTESTOR/APPLICANT

RULING:

1. Before me are two applications for determination. The first one is dated 6/4/2017 and lodged by the Protestor **Rose Nduku Peter** who seeks the following prayers:-

a. That the ruling delivered on 20/03/2014 be reviewed to specify and clarify the specific orders it granted in the protestor's application dated 19/03/2013.

b. The costs of the application be provided for.

The second application is dated 8/01/2018 lodged by the 2nd Administrator **Rose Mwikali Mutungi** and who seeks the following prayers:-

a. The grant issued and confirmed be rectified to remove the name of Administratrix Alice Nthambi Mutungi now deceased and substituted with the name of Joseph Kituku Peter.

b. A fresh grant be issued reflecting the said amendment.

2. Parties herein agreed to have the two applications canvassed together by way of written submissions. Since the Applications seek different reliefs it is appropriate to analyze them separately.

Protestor's application dated 6/4/2017:

3. The Protestor's gravamen is that the ruling of this court dated 20/03/2014 has created confusion as to which orders had been granted since the prayer number two in the application is not the same as ordered in the ruling. It is the Protestor's case that there is a mistake apparent on the face of the record warranting a review as herein sought. The Protestor further averred that she has been unable to extract an order and serve the same upon the Respondents which is causing her great prejudice. Learned counsel for the Administrators/Respondents filed a replying affidavit dated 10/06/2016 and which was in response to the Protestor's application dated 6/4/2016 (later amended and filed on 26/04/2017) in which he averred that the court only considered the three main prayers in the application dated 19/3/2013 as the first prayer merely sought to certify the application as urgent and therefore there is no error apparent on the face of the ruling to warrant a review.

4. Both learned Counsels for the parties herein filed submissions which I have carefully considered. The main issue for determination herein is whether there exists an error apparent on the face of the ruling dated 20/3/2014. The provisions of Order 45 of the Civil Procedure Rules are imported into the Law of Succession Act vide Rule 63(1) of the Probate and Administration Rules which permits the application of Civil Procedure Rules and High Court (Practice and Procedure) Rules. In order for a review to be granted by the court the following conditions must be met:-

- a. There must be discovery of a new and important matter which after the exercise of due diligence was not within the knowledge of the Applicant at the time the decree was passed or the order was made.
- b. There was a mistake or error apparent on the face of the record.
- c. There were other sufficient reasons.
- d. The Application must be made without unreasonable delay.

5. I have perused the ruling dated 20/03/2014 by Justice Jaden and note that the Learned Judge before considering the protestor's application dated 19/02/2013 which had four prayers relisted main prayers as 1, 2 and 3 after finding the initial prayer one as spent. Indeed prayer 1 dealt with certifying the application as urgent and there was thus no need for determination during interpartes hearing. The relisting of the prayers led to initial prayer 2 as No.1 while prayer No.3 became No.2 and prayer 4 became No.3. The same is captured on page 1 and 2 of the ruling. The learned Judge found that the purchaser sought to be removed by the Protestor had been considered and factored in the confirmation of grant pursuant to a consent dated 21/06/2012 that had actually compromised the Protestor's protest and thus the learned Judge found no error or clandestine inclusion of the purchaser requiring a rectification. Hence the protestors prayer 2 in her application dated 19/02/2013 was declined since the court found that the grant was confirmed by consent. The learned Judge finally granted prayers (3) and (4) of that application. To my mind I find there is no error apparent on the face of that ruling warranting a review. There is absolutely no reason why the protestor is unable to extract the order pursuant to the ruling. Again I find the protestor's delay in moving the court two years after the ruling to be quite inordinate in the circumstances. The record clearly confirms that the parties herein compromised the protest through a consent dated 21/06/2012 which led to the confirmation of the grant dated 27/07/2012. During the confirmation, affidavits were filed in support which catered for the purchaser. It is surprising that the protestor would spring up two years later seeking to have the purchaser kicked out. It seems the Protestor has a bone to pick with the purchaser going by the manner she has trained her guns on him. I note that the said purchaser has never been served with the applications dated 19/02/2013 and 6/04/2017 and it would be unfair to issue adverse orders against him yet the consent entered into by the parties dated 21/06/2012 is still in force and has not been set aside. I find the protestor appears to be actuated by an ulterior motive against the said purchaser yet the schedule of distribution in the confirmed grant catered for everyone including the Protestor and her family. She should be concerned about her family's share as the distribution of the estate nears the homestretch. Consequently, I find no merit in the protestor's application dated 6/4/2017. The same is dismissed.

Administratrix's application dated 8/1/2018

6. The Administratrix's application basically seeks that the name of the Co-administrator **Alice Nthambi Mutungi** be deleted and be substituted with that of **Joseph Kituku Peter** on the grounds that the said Co-administrator passed away on the 25/06/2015 before they could complete the administration of the estate by vesting the respective shares to the beneficiaries. The Protestor is opposed to the application on the ground that the death of such administrator should lead to revocation of grant as the same has become useless and inoperative. The Protestor is also opposed to the name of Joseph Kituku Peter being fronted as an administrator because he is her son yet she ranks in priority to be appointed as an administrator. It was further contended that the grant having become inoperative by operation of law the substitution of an administrator is impossible and unknown in law.

7. Learned Counsels for the parties are in agreement that the death of one of the administrators has led the grant being inoperative by operation of law since the grant had been issued to the two administrators jointly and were to work and consult over the administration of the deceased. That being the position, I find that the remaining administrator is incapacitated and cannot perform the task and further that the duty bestowed upon the deceased administrator cannot be transferred to any other person as the authority had been given in personum. In such circumstances the only way out is to resort to section 76 of the law of Succession Act by revoking the said grant. That being the position, the attempt by the surviving administrator to seek for rectification and substitution is misplaced and must be rejected (see the case of – **In the matter of the Estate of Mwangi Mugwe alias Eliza Ngunjiri (deceased) Nairobi High court Succession Cause No. 2018 of 2001** where Khamoni (as he then was) held as follows:-

“An application for substitution was improper and could only be brought under Section 76 of the law of Succession Act for revocation of grant on the ground that it had become useless and inoperative following the demise of the holder. In fact I should suggest that, such a grant is to be revoked as a matter of course once the death of the sole administrator is established.”

8. It is noted that the parties herein entered into a consent on 19/10/2017 whereby they agreed that the remaining administrator **Rose Mwikali Mutungi** to remain as the sole administrator. The Protestor herein has sought to have her name included so as to be appointed as an administrator. During the confirmation of the grant all the shares of the beneficiaries including the Objector were fully identified and that the remaining task for the surviving administrator is to wrap up the exercise of ensuring that all the beneficiaries obtain their respective shares under the estate. Indeed the process of administration has reached the homestretch. This is an old matter and any further delay would prejudice the beneficiaries. Upon the revocation of grant and being guided by the above consent, I find that the best way in the circumstances is to reappoint the surviving administrator who will finalize the process of administration. The Protestor's demand to be appointed as an administrator is unnecessary and will further delay as it looks like the Protestor just wants to checkmate the surviving administrator. No prejudice will be occasioned to any beneficiary since the shares have already been identified during confirmation.

9. In view of the foregoing observations, the application dated 8/1/2018 lacks merit and same is ordered dismissed.

10. Both applications now determined, I proceed to make the following orders:

- a. The grant made on 18/09/2006 and confirmed on 27/07/2012 is hereby revoked.
- b. A fresh grant and a rectified certificate of confirmation is hereby issued in the name of Rose Mwikali Mutungi who is

directed to proceed to finalize the administration of the estate of the deceased.

c. The status quo regarding the occupation by beneficiaries of Land Parcel Numbers MACHAKOS/KIANDANI/3164 and IVETI/MUNGALA/597 shall be maintained pending the finalization of the process of administration of the estate.

d. As parties are members of one family there will be no orders as to costs.

It s so ordered.

Dated and delivered at Machakos this 8th day of October, 2019.

D. K. Kemei

Judge