



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

PROBATE & ADMINISTRATION NO. 61 OF 2012

IN THE ESTATE OF:

MUKEMO MURERE NDEGE.....DECEASED

BETWEEN

ERNEST OCHIENG MURERE.....PETITIONER/ RESPONDENT

AND

JOHN OUMA EKESA.....OBJECTOR

MOSES MITIGOA OBUSUBIRI.....BENEFICIARY/APPLICANT

RULING

1. **John Ouma Ekesa**, the objector herein filed summons for review under Order 45 Rule 1 of Civil Procedure Rules, section 42 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. He is seeking the review, setting aside and/or varying of the ruling which was delivered on 25th March 2019. It is premised on the following grounds:

- a) That evidence on record is that the purchaser bought 0.62 hectares which was reflected in the Title Deed **BUKHAYO/KISOKO/5188**. He cannot therefore get more land than he had purchased.
- b) That evidence on record is that the objector was given 0.93 hectares which was reflected in the Title Deed **BUKHAYO/KISOKO/5186**. The objector sold this land to Prof. Edmond Maloba Were who took possession thereof during the deceased's lifetime. He still retains his Title Deed.
- c) That evidence on record is that the petitioner brother to objector was also given 0.93 hectares represented by Title Deed **BUKHAYO/KISOKO/5185** though still registered in the deceased's name.
- d) That evidence on record is that the deceased retained 0.62 hectares which is reflected in Title Deed **BUKHAYO/KISOKO/5187**.
- e) That the Petitioner partitioned the deceased's land into 3 portions with different acreages and without giving valid reasons.
- f) That any reparation has to reflect the ownership of the deceased's land on the ground and has to cater for the interest of Prof. Edmond Maloba Were a purchaser who has never been a party to this suit.
- g) That in the interest of fairness equality and justice each party should get what the deceased had given out during his lifetime save for the land he had retained for himself. The Order as it stands is incapable of being enforced.

2. The Petitioner respondent herein opposed the application on grounds that it was an abuse of the process of the court.

3. Order 45 Rule 1 of Civil Procedure Rules provides as follows:

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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

Whereas Rule 73 of the Probate and Administration Rules provides:

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

These therefore, are the provisions under which the objector has approached this court.

4. In my ruling dated 25th March 2019, I made a finding that both the petitioner and the objector agreed that their father had distributed his property during his lifetime except one property whose description is in dispute.

5. There was a consensus that during the lifetime of the deceased he sold a parcel of land namely **BUKHAYO/KISOKO/5188** to Moses Mitigoa Osubiri. This is the land parcel that Moses Mitigoa Osubiri discovered later was actually **BUKHAYO/KISOKO/6803**, according to the records held at the Land's office.

6. According to the contention of the objector/applicant, it was the deceased, Mukemo Murere Ndege who partitioned his parcel of land **BUKHAYO/KISOKO/738** into four parcels namely; **BUKHAYO/KISOKO/5185**, **BUKHAYO/KISOKO/5186**, **BUKHAYO/KISOKO/5187** and **BUKHAYO/KISOKO/5188**.

7. The petitioner respondent on the other hand contended that the deceased in his life time partitioned his land parcel number **BUKHAYO/KISOKO/738** into three parcels namely; **BUKHAYO/KISOKO/6801**, **BUKHAYO/KISOKO/6802** and **BUKHAYO/KISOKO/6803**.

8. With these two competing versions, I agree with the objector/applicant that there is a need to review the ruling of 25th March 2019. In order to reach a fair decision, I ought to have resolved these competing versions.

9. The application for consent in the name Mukemo Murere Ndege for sub-division into three parcels of land parcel number **BUKHAYO/KISOKO/738** is marked approved on 10th December 2008. A copy of the letter of consent indicate that the consent was issued on the same date. A copy of mutation form show that land parcel number **BUKHAYO/KISOKO/738** had three resultant parcels namely; 6801, 6802 & 6803. The copy is dated 16th March 2009. The certificate of death indicate that the deceased herein died on 23rd August 2010. We can therefore conclude that he partitioned his parcel of land **BUKHAYO/KISOKO/738** into three and not four portions. These were:

a) **BUKHAYO/KISOKO/6801**,

b) **BUKHAYO/KISOKO/6802**; and

c) **BUKHAYO/KISOKO/6803**.

10. Other than copies of the green cards in respect of land parcels number **BUKHAYO/KISOKO/5185**, **BUKHAYO/KISOKO/5186**, **BUKHAYO/KISOKO/5187** and **BUKHAYO/KISOKO/5188**, there is no documentation that support the process of the subdivision.

11. In Busia High Court Civil case number 44 of 2011, the court made a finding that the deceased herein sold land parcel number **BUKHAYO/KISOKO/6803** to Moses Mitigoa Obusubiri. This decision was not appealed against.

12. In absence of the paper trail from the land registry of how land parcel number **Bukhayo/Kisoko/738** resulted into **Bukhayo/Kisoko/5185**, **Bukhayo/Kisoko/5186**, **Bukhayo/Kisoko/5187** and **Bukhayo/Kisoko/5188**, I find that the objector did not prove that his contention was the correct one.

13. From the foregoing, I therefore find that I will reach the same conclusion as I had in my ruling of 25th March 2019 except for the clarifications I have made. The application for review is dismissed with no orders as to costs.

DELIVERED and SIGNED at BUSIA this 20th day of November, 2019

KIARIE WAWERU KIARIE

JUDGE