



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.234 OF 2011

IN THE MATTER OF THE ESTATE OF MBISI ISENA (DECEASED)

WILFRED ONCHOKE OBURE.....PETITIONER/RESPONDENT

AND

DAVID BIRUNDU OBURE.....2ND PETITIONER/APPLICANT

RULING

1. By an application dated the 24/7/2019 the applicant, the 1st petitioner/respondent seeks the following orders;

(a) Spent

(b) That the Ruling/order of this court dated 13/6/2019 be reviewed and,..... order be set aside.

(c) That upon grant prayer (b) above the District Surveyor Kisii County in company of a private surveyor do subdivide Land Parcel Majoge/Block1/210 equally amongst the petitioners

2. The application is grounded on the grounds stated on the face of the application and a supporting affidavit dated 24/7/2019 sworn by David Birundu Obure.

3. The applicant claims that it has emerged that the surveyor's report was inaccurate and misleading since the total acres as per the measurement is about 13 acres whereas the actual ground measures 12.5 acres. That the court did not take into account the issue of equality as what was only in dispute in the portion of land marked 'c' on the surveyor's sketch plan. That he has engaged a private surveyor who has made a report which portrays a different picture the here the Government surveyor's report.

4. That the issue of 'Emonga' had been arbitrated before the Land Control Board Ogembo and a decision made. That right from inception the 1st petitioner had grabbed Emonga to his exclusive use as exemplified by the surveyor's report and he was ordered to vacate a portion of it to him (the applicant) which the 1st Petitioner has not done todate.

5. In a supplementary affidavit filed in court on the 8/8/23019 dated 9/8/2019 the applicant depones that the court did not accord the parties an opportunity to scrutinize, analyze, criticize and oppose on support the County surveyor's report on the distribution of land on the ground. That the issue of contention is the allocation of portion 'c' to the 1st petitioner merely on the grounds that there are many sons in the 1st petitioner's house than the 2nd petitioner. That the findings by the private surveyors contradicts the County surveyor's findings on the grounds and lead the court to review rather than maintain its distribution of portion 'c' into half to 1st and 2nd petitioner. That the court did not give an opportunity to the parties to address themselves in the issue of the County Surveyor's Report if the court did the Ruling have been different.

6. The applicant relied on the case of Nguruman Limited vs Shambole Group Ranch and another CA No. Nairobi 90 of 2013. The application was opposed by the Respondent Wilfred Onchoke Obure the petitioner. He avers that the application has been brought in bad faith is unmeritorious and a blatant abuse of the court process. That the essence of the court's final Ruling was that all the beneficiaries of the estate were to stay on the portions that they were occupying and utilizing before their father died. That the Ruling affirmed their late father's wishes on how he shared his land between his 2 houses. That nothing new has arisen that was not within the knowledge of the 2nd petitioner at the time of hearing or before hearing that would warrant the court to relook its Ruling. That they have lived in their respective portions after the 2nd petitioner/applicant who is always committing criminal acts that threatens the breach of peace. That the issue of exact acreage of the land is not a new matter and can be confirmed and it will not change the Ruling of the court since the order of the court was such that if confirmed then late father's wishes on how he had shared his property. That the portion occupied by the 1st petitioner and his brother is still too big compared to what he and his mother occupy. That the decision of in Ogembo **Misc. Appl. No.12 of 2011** was an illegality where the

chairman of the former land disputes tribunal purported to sit and decide on a matter beyond their jurisdiction which amounted to intermeddling with the estate of the deceased. That the application should be dismissed with costs.

DETERMINATION

7. The application is brought under section 80 of the CPA and order 45 of the Civil Procedure Rules (CPR). Order 45 provides for circumstances under which a court can review its order. The applicant is required to show the discovery of a 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 being passed or order made. The next limb states that the applicant should demonstrate the account of some mistake or error applicant on the face of the record or for any other sufficient reason.

8. The applicant's affidavit indicates that he is aggrieved by the court's order on the portion called *Emonga*. The issue of the acreage is not something new to the applicant. It was a matter within his knowledge at the time the matter was heard in court. There is no demonstration of any new and important matter or evidence that was not within his knowledge.

9. He claims that the principle of equality was not applied. If this is an issue that the applicant is aggrieved about, he should appeal. He admits that the issue of *Emonga* was the bone of contention and argues that it ought to have been subdivided amongst the 2 houses and that the ruling has caused acrimony between them. There is no such evidence adduced. The 1st petitioner states they have lived peacefully and that the trouble maker is the applicant.

10. The applicant has further failed to demonstrate that there was some mistake or error apparent on the face of the record. Neither has he persuaded this court that there is any other sufficient reason to review the order dated 13/6/2019. The issue of distribution was adequately dealt with in the said Ruling dated the 13/6/2019. I find no merit in the said application it is dismissed. Each party to bear its own costs.

Dated, signed and delivered this at Kisii 1st day of November 2019.

R.E. OUGO

JUDGE

In the presence of;

Mr. Onyancha For the Respondent

Mr. Nyambati h/b Mr. Momanyi Gechuki Applicant

Ms. Rael Court Clerk