



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.372 OF 2000

IN THE MATTER OF THE ESTATE OF THOMAS MAILU (DECEASED)

STANLAUS MUIA MAILU)

KASIA MAILU)ADMINISTRATORS/RESPONDENTS

KILONZO MAILU)

VERSUS

GEORGE MUINDE MAILUOBJECTOR/APPLICANT

RULING

1. The Objector/applicant herein filed two applications dated 30th June, 2017 and 21st December, 2017. The first application is brought pursuant to Section 47 of the law Succession Act and rule 73 of the Probate and Administration Rules and seeks the following prayers:-

- a. That this Honourable court be pleased to re-open this case to allow the objector to testify further in this case.
- b. That this Honourable court be pleased to allow the objector to call other witnesses and produce further and necessary evidence in support of his case.

The said application is supported by the annexed affidavit of the Objector/Applicant sworn on even date and further grounds *inter alia* that the previous advocates acting for the Applicant had failed to conduct the case with due diligence and thus left out important and crucial evidence; that the Objector has discovered new and crucial evidence that was not well within his knowledge and which should not be left uninterrogated; that the case was closed without the evidence of the Applicant's witnesses thereby causing great injustice; that the Petitioner will not suffer prejudice should this court allow the application.

The second application is brought pursuant to Section 5 of the Judicature Act and Sections 1A, 1B and 3A of the Civil Procedure Act and seeks the following reliefs namely:-

- a. (Spent)
- b. That leave be granted for the Applicant to apply for the Petitioner/Respondent be cited for contempt and committed to civil jail for 6 months for having willfully disregarded the orders of this Honourable court dated 11/11/2015.**
- c. That the Petitioner/Respondent and their servants and/or agents be cited for contempt and be committed to civil jail for 6 months for disregarding the lawful orders of this Honourable court given on 11/11/2015.**
- d. That leave so granted do operate as a recourse to the contempt of court proceedings to the orders aforesaid.**
- e. That other and further relief as this court deems fit.**
- f. That the costs of this application be provided for.**

The application is based on the grounds set out in the statutory statement filed with the verifying affidavit of George Muinde Mailu sworn on even date together with a supporting affidavit raising several issues *inter alia* that an order for status quo to be maintained was issued on the 11/11/2015 but despite the said order, the Petitioner and others have invaded the suit land from 4/11/2017 and commenced activities of demarcation, fencing and building structures thereon; that despite warnings by his lawyers the Respondents have continued with their

activities unabated which state of affairs have caused him inconvenience as the property is in danger of being wasted: that the actions are in contravention of the court order issued on 11/11/2015 and thus their actions are contemptuous and have brought to disrespect the integrity and standing of this Honourable court and this court should safeguard its integrity.

2. Both Applications were strenuously opposed by the Petitioner/Respondents. As regards the Application dated 30/06/2017 the Petitioner's counsel filed grounds of opposition the gist of which is that the application is not made in good faith as the same is res judicata since this Honourable court has already made a decision regarding the same issue.

As regards the application dated 21/12/2017, the 1st Petitioner filed a replying affidavit on 15/1/2018 in which he deponed inter alia that the Applicant is the one who has gone against the status quo order issued on 11/11/2015 as he has resorted to disposing off of land belonging to a brother named Kasia Mailu who died on 14/10/2017 and that the sons of the deceased Kasia Mailu together with the area chief intervened by removing beacons erected by Applicant who had intended to sell to buyers; that it is the Applicant who has been intermeddling with the estate to the detriment of the deceased brother's family; that this case was concluded in 2015 and only submissions are to be filed but the Applicant is intent at delaying the finalization of the case; that the Applicant wants to take advantage of the death of his brother to dispossess the family of their rightful share of the estate; that the Applicant is deliberately misleading the court by seeking to have innocent persons punished while he is actually the one in contravention of the court order.

3. Learned counsels for the parties herein agreed to canvass the two applications by way of written submissions:-

Objector/Applicant's submissions:

Mr. Etole learned counsel for the Objector/Applicant first started with the Application dated 30/06/2017. He submitted that the Objectors earlier Advocates had sought to get documents from the land Adjudication and Settlement department but which did not bear any fruit and it is the Objector's wish that this case be reopened so that he can avail evidence to buttress his case by calling new witnesses. He further submitted that the application is made in good faith as the Objector has a right to be heard on this sensitive issue of land and that the Petitioner will not be prejudiced as he will have the right to respond. Learned counsel relied upon two cases namely **SAMUEL KITI LEWA =VS= HOUSING FINANCE CO. LTD & ANOTHER -MSA HCC NO.37 OF 2007 AND SIMBA TELECOM =VS= KARUHANGA & ANOTHER (Misc Appl. No.451 of 2014 [2014] UGHC 98** where the court held that it retains the discretion to allow reopening of a case which must be exercised judiciously and to ensure that it does not embarrass or prejudice the opposing party.

As regards the second application dated 21/12/2017, Mr. Etole submitted that the order to maintain status quo was issued on 11/11/2015 and that the Petitioners obeyed the same until late 2017 when they invaded the suit land and engaged in annoying activities which are in contempt of the said court order and should be punished accordingly. Several cases were cited in support of the application namely **KATSURI LTD =VS= KAPURCHAND DEPAR SHAH [2016] eKLR AND AFRICA MANAGEMENT COMMUNICATION INTERNATIONAL LTD =VS= JOSEPH MATHENGE & ANOTHER [2013] eKLR** where it was held that the authority and the dignity of the court must be upheld at all times in order to maintain the Rule of law and order which is fundamental in the administration of Justice.

Petitioner's submissions

As regards the first application dated 30/06/2017, Mr. Kitheka submitted that the same is res judicata since a similar application had been made by the Objector's then Advocate and which was dismissed on the 25/5/2016 where the court stated that there was no basis for reopening the case that had been closed on 30/11/2009 as there was not new evidence. It was submitted for the Petitioners that the Objector having not appealed the said order then this court is already functus officio and as such the Applications is an abuse of the process of the court. It was also submitted that the Objectors claim that he has discovered new and crucial evidence is not correct in that the letter he has annexed to his application had been with him way back in 1999 and in which he had used it in an application dated 16/3/2001 for injunction and therefore he cannot now claim to be new yet he had even filed it as part of his documents on 25/5/2016 when his case was closed. Again the objector had been directed to file witness statements since 2009 and to date none has been filed and this is a clear indication that the Objector is out to delay this matter from being concluded. It was submitted that this matter has been pending for the purposes of filing submissions since 25/5/2016 so that it can be concluded and the continued delay is not good as one of the administrators has since died while another is quite elderly.

As regards the application dated 21/12/2017 seeking for the committal of the Petitioners to civil jail for being in contempt of a court order, it was submitted that none of the petitioners disobeyed the order made on 11/11/2015 which was to the effect that the status quo as at that date be maintained and none was to sell or transfer the property namely **Plot No. 37 Kitanga Settlement Scheme** and that the parties were to remain in possession and occupation of the portion of the land they currently occupied as at the date of the order. It was also submitted that it is the objector who purported to sell a portion of the land to certain individuals following the death of one of the administrators Kasia Mailu on 14/10/2017 and that the deceased administrator's children in collaboration with the area chief stopped the Objector who then lodged this Application. It was also submitted that the Objectors advocates letter marked as "GMM4" was neither addressed to the Administrators nor copied to the Petitioners advocates and therefore the persons alleged to be in contempt of court order are not parties to this suit. It is the contention of the administrators that the Objector filed the application dated 21/12/2017 to pre-empt the Petitioners from citing him for contempt for attempting to sell a portion belonging to the now deceased administrator. It was submitted that the order alleged to have been disobeyed was never extracted until 24/11/2017 and same was not served upon the alleged contemnors. Further it was submitted that the objector should have first sought leave from the court in order to institute contempt proceedings in view of the fact that contempt proceedings are of a criminal nature which may land somebody in jail.

Issues and determination

4. I have considered the Objector's two application dated 30/06/2017 and 21/12/2017 together with the rival affidavits and annexures. I have also considered the submissions of the leaned counsels for the parties as well as the authorities cited. I find it is not in dispute that this matter had substantially proceeded and that parties had closed their respective cases and what remained was the filing of submissions so that the matter could be concluded. It is also not in dispute that this court made an order dated 11/11/2015 regarding the suit property Plot No.37

Kitanga Settlement Scheme inter alia that parties were not to sell or transfer any part thereof; that parties were to remain in occupation and possession of the portions they currently occupied as at that date pending the hearing and determination of the suit and that each party was to bear their own costs. That being the position, I find the following issues necessary for determination namely:-

i. Whether this court is functus officio as regards the Objector's application seeking to re-open the case.

ii. Whether the petitioners are in contempt of the court order dated 11/11/2015.

5. As regards the first issue, it is noted that the Objector herein is asking this court to re-open this case so that he can adduce more evidence as he believes that his previous Advocates were not diligent enough and left out some crucial evidence. Indeed it is always appropriate to allow parties avail all the requisite evidence and facts so that the court can thrash out the issues in controversy with finality. A perusal of the court record reveals that the parties herein had wound up their evidence and closed their respective cases on the 30/11/2009. This matter then came before Nyamweya J on 25/5/2016 when an application was made on the part of the Objector herein to have the case re-opened so that he could testify but the said Application was rejected by the learned Judge who ordered the Objector's case as closed and directed the parties to proceed to file submissions so that the matter could be concluded. Hence I find the present application by the Objector to reopen the case to be similar to the one made on 25/5/2016 which was declined by the court. The court therefore became functus officio and the only recourse for the objector was to lodge an appeal against the orders made on 25/5/2016. It is noted that the Objector to date has not preferred an appeal in that regard. It is therefore quite clear that this court has already pronounce itself on the Objector's request to have the case reopened. The only recourse is for the Objector to pursue an appeal to the court of appeal since this court cannot review or alter its decision.

The Objector has claimed that he has discovered new and crucial evidence. However the alleged new evidence appears to be a letter dated 1999 from the department of land Adjudication. The Petitioners in their replying affidavit have deponed that the objector had presented to court the said letter vide an application for injunction dated 16/3/2001 and therefore the Objector has been in possession and knowledge of the said letter and he cannot now claim to have just stumbled upon it. The court record seems to vindicate the Petitioners claim that the Objector has been in possession of the letter for a long time. Indeed the said letter formed part of the list of documents presented to court as at 25/5/2016 when the court ordered the cases closed and directed the parties to file submissions. In fact on the 25/5/2016 it was claimed by the Objectors then counsel that the Objector had not presented his evidence only for the court to confirm from the record that he had actually tendered his evidence and closed his case on 30/11/2009 and it was on that basis that the court rejected the Objectors request for re-opening of the case.

The Objector's request to call witnesses appears to be a belated move and meant to further delay the conclusion of the matter. It is noted that the objector has not even annexed any draft statements of witnesses as a sign of good faith and an indication that he indeed has any witnesses to be called in the event the case is reopened. The court cannot act in a vacuum and the Objector was expected to put forth some bonafides on his part. This was lacking from the Objector.

It is in the interests of both parties to have this matter concluded. This case was filed in the year 2000 and it now almost two decades without the same being concluded. The Petitioners in their replying affidavit have indicated that the second administrator Kasia Mailu has since died as per the certificate of death annexed and further that the third administrator Kilonzo Mailu is now aged over 90 years old. These turn of events clearly demand that this matter should be concluded as further delay would prejudice all the parties herein. An order for re-opening this case does not sit quite well in the circumstances as the Objector has not convinced this court that he merits such an order. The parties had been directed on the 25/5/2016 to file submissions and it has taken over two years for the Objector to spring up the present request for re-opening of the case yet the letter now claimed to be new evidence had been within his knowledge as early as 2001. I am convinced that the Objectors application dated 30/06/2017 is just for purposes of further delaying this case from being concluded. As this court is already functus officio, the said application lacks merit. The parties should just proceed to file the submissions so that this matter could be brought to a closure.

6. As regards the second issue, it is the Objectors contention that the Petitioners herein are in contempt of the order made on 11/11/2015. The Petitioners on the other hand maintain that they are not in contempt of the order but that if there is anything to that effect then it must be to do with the children of the now deceased second administrator Kasia Mailu who were protecting their father's property from being alienated by the Objector herein. It is necessary at this juncture to reproduce the order dated 11/11/2015 for the purpose of determining the extent to which the parties were to be confined by the same. The order was as follows:-

a. That none of the parties herein shall undertake further sale or transfer the property known as LR No. 37 Kitanga Settlement Scheme pending the hearing and determination of the suit.

b. That each party shall remain in possession and occupation of the portion of the said land that they are currently occupying as at today's date pending the hearing and determination of this suit.

c. That each party shall bear their own costs of the chamber summons.

Looking at the above order, it is clear that the parties herein had been barred from selling and or transferring any portion of the suit land namely **LR Plot No. 37 Kitanga Settlement scheme** but they were to continue occupying or being in possession of their portions that they had at the time of the order. In essence therefore, they were to maintain the status quo as at the date of the order. The parties were thus at liberty to work on the land they possessed pending the determination of the suit.

The Objector vide a letter dated 8/11/2017 raising the issue of violation of the court order appears to be addressed to certain persons who are not parties to this suit and further the same is neither addressed at the administrators herein nor even copied to their Advocates. The 1st Administrator herein has maintained the persons targeted by the objector in that letter are sons of the 2nd Administrator Kasia Mailu who had already died on 14/10/2017 as per the annexed certificate of death and who were protecting their father's land from being alienated by the Objector herein. It is the contention of the 1st Administrator that the Objector is trying to pre-empt a possible situation where he might be

cited for being in contempt of the court order as he has attempted to sell part of the suit land. Indeed the said letter by the Objector's Advocates dated 8/11/2017 does not specifically cite the administrators but eight persons who are not parties to this suit and further it claims that the objector is the sole owner of the land yet the same is yet to be distributed amongst the beneficiaries and further the court order was quite specific and allowed parties to continue occupying and being in possession of the portions they had at the date of the order. If any of the Administrators worked on their respective portions, they cannot then be said to be in contempt of the said order. In any event, if any of the administrators had encroached onto the Objector's portion, the Objector should have ensured that the Administrators were properly served with the alleged complaint so as to entitle the objector to now seek to commit them to jail for being in contempt of the order. As the administrators have maintained that they did not violate the order, the burden then shifted to the Objector to avail evidence that they had gone against the express order of the court. This is so because a contempt of court is an offence of a criminal nature as a contemnor might be sent to jail for it. The Objector has now sought to have the administrators committed to jail for being in contempt. I am not satisfied that the Objector has availed sufficient evidence to justify the administrators to be sent to jail. The suit property is part of the estate of the deceased and is yet to be distributed to the beneficiaries. There has been some delay by the parties to file submissions as ordered on the 25/5/2016 so that the matter is concluded. I find the appropriate course in the circumstances is to direct the parties to proceed to file the submissions without any further delay. The contempt Application appears to me to be a distraction brought about by the objector to delay the finalization of this matter. He is fully aware that delay defeats equity in that one of the administrators has since passed on and thus the need to fast track the conclusion of this matter for the benefit of all the parties herein. I find the Application dated 21/12/2017 lacks merit.

7. In view of the foregoing observations, it is the finding of this court that the objector's Applications dated 30/06/2017 and 21/12/2017 lack merit. The same are ordered dismissed. Parties are directed to proceed and file submissions as directed on the 25/5/2016 which should be done within **30 days** from the date hereof. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 18th day of July, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Kamanda for Kitheka- for the Administrators/Respondent

Etole - for the Objectors/Applicant

Josephine - Court Assistant