



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 33 OF 2012

IN THE MATTER OF ESTATE OF JOHN KYULI (DECEASED)

ANN AMANGA NTHALE.....1ST APPLICANT

DAVID KYULI NTHALE.....2ND APPLICANT

VERSUS

ELIZABETH NDINDA.....RESPONDENT

RULING

1. Before me is a Summons dated 7th September, 2017 and filed on the 12th September, 2017 wherein the applicant seeks an order for the review of this court's ruling delivered on 31st July, 2017.
2. The background of the case are as follows. The deceased herein one **JOHN NTHALE KYULI** died on 17th December, 2004. Before his death David Kyuli Kaindi was the registered owner of land Title No. LR 209/136/13 situated in Nairobi, and the property is the subject of Succession cause 3403 of 2005 in Nairobi.
3. The applicant filed for Letters of Administration in this matter on 27/1/2012. A grant of letters of administration intestate was made on 14/5/2012 and an application for Summons for confirmation dated 28/2/2014 was filed on 07/03/2014. The application was accompanied by an affidavit sworn by the applicants. The affidavit listed *inter alia* the mode of distribution of the estate of the deceased consisting of ½ of LR 209/136/13.
4. By summons filed before this Court on 13/3/2014, the Respondent moved the court under **section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules** for revocation or annulment of a grant of letters of administration issued to **ANN AMANGA NTHALE** and **DAVID KYULI NTHALE** on the 14th May 2012 on the grounds that she was excluded as a dependant of the deceased. In the said application she brought it to the attention of the court that there is a Succession Cause No 3403 of 2005 in Nairobi wherein the respondent was listed as the step-daughter of her late husband who was a son to David Kyuli Kaindi (who was then deceased) of the estate in this instant matter. She filed an affidavit in protest against confirmation of grant dated 25th March, 2014 notifying court that the 1st applicant had sold part of the estate of the deceased in Succession Cause No 3403 of 2005 in Nairobi, which is LR 209/136/13.
5. After hearing the Application by (the applicant in this case) the widow of one of the beneficiaries to complete execution of the will of the deceased in relation to the properties bequeathed to her late husband vide Succession Cause 3403 of 2005 in Nairobi, in a ruling dated 31/07/2015, the Learned Justice W. Musyoka gave conditions to the executor of the estate of the deceased in that matter (David Kyuli Kaindi) and vide ruling dated 9th December, 2016 revoked the grant of probate made to the said executor (Muvisi Kyuli).
6. The Respondent filed her submissions and sought that the confirmation of grant be postponed pending the final hearing and determination of Nairobi Succession Cause 3403 of 2005.
7. Vide ruling dated 30th June, 2017, in Nairobi Succession Cause 3403 of 2005, Justice W. Musyoka appointed the applicants in this matter as administrators of the estate of the deceased and a grant of letters of administration was issued the same date as well as a certificate of confirmation of grant issued the same day.
8. On 31st July, 2017 I made a ruling on the application by the respondent in this matter wherein I ordered that the confirmation be postponed pending the final determination of Nairobi Succession Cause 3403 of 2005. I observed that the property in this matter before me was part of the estate that is subject of Nairobi Succession Cause 3403 of 2005. The 1st and 2nd applicants are aggrieved by that decision hence the present Application.

9. The law applicable in this application is **Rule 63 of the Probate and Administration Rules, Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules CAP 21 of the Laws of Kenya**. The said application is premised on the grounds enumerated thereon and buttressed by the affidavit of Anne Amanga Nthale dated 7th September 2017.

10. The application sets out three main grounds upon which the orders are sought, these being:

a. **The pending application in the Nairobi High Court Succession Cause 3403 of 2005 has been heard and a confirmed grant is now being executed.**

b. **The shares of the deceased in this cause are stated in the deceased's will attached to the confirmed grant.**

c. **The sale of one of the properties of the deceased in Nairobi Succession Cause 3403 of 2005 does not prejudice anyone for all the beneficiaries of that portion sold gave consent to its sale.**

11. The Respondent, vide a replying affidavit dated 8th December, 2017 opposed the application. It was her contention that the application does not meet the threshold of review.

12. The Respondent further deponed that there is a pending appeal in the decision in the said Nairobi Succession Cause 3403 of 2005 thus it would be prudent to await the outcome of the said appeal before this application is determined.

13. The parties were directed to file written submissions, and the applicant reiterated the averments in the affidavit by stating that there is now a confirmed grant that has been made in Nairobi Succession Cause 3403 of 2005, therefore the same has been heard and determined.

14. The Respondent's counsel in submissions dated 23rd April 2018 argued that the land parcel LR 209/136/13 is the same subject matter pending in Nairobi Case No ELC 56 of 2014. Further, that the suit property is the subject matter of an appeal, Court of Appeal Civil Appeal no 305 of 2017.

15. Having carefully considered the pleadings of both the Applicant and the Respondent, it is my view that the following two substantive issues are up for determination:

a. **Whether the application has merit.**

b. **Whether the application meets the threshold for granting Review orders and if so, what orders should the Court issue**

16. The Respondent's counsel has submitted that they have lodged an appeal in this matter. I have noted vide the respondent's annexure EN1 that the applicants in the instant suit and in the appeal are the same, the said appeal challenges the grant that the applicants in the instant suit seek to rely on. For this reason the merit of this application is hindered by the doctrine of *sub judice*.

17. Section 6 of the Civil Procedure Act provides as follows:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed"

18. It follows because there is a huge dispute over the rights to land parcel LR 209/136/13, and who has any claim over the said land, in as much as it is the estate of the Late David Kyuli Kaindi. That is the gist of the **ELC 56 of 2014** that has not been determined.

19. Accordingly, I have no hesitation in finding that the issues in this suit are directly and substantially in issue in Nairobi Civil Appeal No 305 of 2017 that has been instituted between parties under whom they or any of them claim.

20. Therefore, in view of the close linkage with the issues which must first be determined in Nairobi Civil Appeal No 305 of 2017, and Nairobi ELC 56 of 2014 wherein a third party is alleging ownership to land that is part of the subject matter of this suit, and unless the issue of the rights to land parcel LR 209/136/13, and who has any claim over the said land is determined, this court will be involving itself in resolution of issues which are pending determination before other courts of competent jurisdiction.

21. There are two matters still pending namely; **Nairobi Civil Appeal No 305 of 2017** and **Nairobi ELC 56 of 2014** but nevertheless I am aware that the prosecution of the intended appeal may take long and that there is need to make appropriate orders in this Succession Cause pending determination of the two matters.

22. On the issue of the appropriateness of the remedy of review, the applicant has stated that the Nairobi High Court Succession Cause 3403 of 2005 has been heard and a confirmed grant is now being executed. She has attached a copy of the said confirmed grant and I have considered the same and found sufficient reason to allow the relief sought. In this regard, in the application for confirmation of grant, the properties are listed in paragraphs 4 (i) to (iv) and 5(i) and (ii). It is clear that there are certain properties that are not in dispute. These are listed in paragraph 4(ii) to (iv) and paragraph 5(ii) and there is reason enough to have the grant partially confirmed to the extent that the property therein is not the subject of any dispute.

23. There are certain orders of the Civil Procedure Rules that imported to matters of Succession and **Order 45** is one of them. This is provided for under **Rule 63 of the Probate and Administration Rules. Order 45 Rule 1** provides that:-

“(1) 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”.

24. It follows therefore that the grant cannot be confirmed as it is because of the *sub judice* doctrine. However, owing to the special circumstances of this case, that is the need to distribute the undisputed part of the estate, I find that it is in the interest of justice to partially confirm the grant in terms of the proposal that was agreed upon by the beneficiaries as contained in the general form that was attached to the application.

25. Accordingly, the application dated 7th September, 2017 is allowed and my ruling dated 31st July, 2017 is reviewed as follows-

(a) The grant of letters of administration issued to Anne Amanga Nthale and David Kyuli Nthale on 14th May, 2012 is hereby partially confirmed on the terms that land parcel LR 209/136/13 shall be held by the administrators in trust for the beneficiaries pending the outcome of Nairobi Civil Appeal No 305 of 2017 and Nairobi ELC 56 of 2014.

(b) There are no orders as to costs.

It is so ordered

Signed, Dated and delivered at Machakos this 21st day of November, 2018.

D.K. KEMEI

JUDGE