



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 426 OF 2014

IN THE MATTER OF THE ESTATE OF EDITH WANGUI KAHINDO (DECEASED)

JOHN WAMBUGU NJUNGE.....APPLICANT

VERSUS

NERRY WANJIKU WAMBUGURESPONDENT

RULING

FACTS

The deceased Edith Wangui Kahindo died intestate on 4th January 1979. The sole asset consisting of the deceased's estate is Plot No. K-73 in Mathare Valley herein referred to as "the suit property". On 25th February 2014, the applicant petitioned the court for a limited grant of letters of administration in respect of the deceased's estate for the purpose of instituting a suit to recover rent owed to the estate. In the petition, he deponed that he was the only surviving relative who was able to represent the estate in the capacity of a personal representative. A limited grant of letters of administration Ad Litem was made to the applicant on 26th February 2014. The respondent filed an application on 10th December 2014 seeking revocation of the limited grant made to the applicant on the grounds that the grant was obtained fraudulently by making of false statements by the applicant. In its ruling dated 8th May 2015, this court found that the limited grant of letters of administration ad litem of the estate of the deceased was obtained by the applicant in a manner contrary to **section 76** of the **Law of Succession Act Cap 160** and **Rule 44** of the **Probate and Administration Rules**. The court directed that the name of the applicant be substituted for that of the respondent in the limited grant.

PLEADINGS

The applicant filed the present application on 15th February 2017 seeking the setting aside of the *ex parte* proceedings on the respondent's application dated and filed on 10th December 2014 and the ruling thereof dated 8th March 2015 and all consequential orders thereto. The application was based on the grounds that:

- a. the applicant was not served the application the subject of the ruling nor any hearing notice for the said application;
- b. the applicant has come to learn of the ruling dated 8th May 2015 in the course of other related proceedings under the case CMCC 1639 of 2014; John Njung'e Wambugu-vs-Bernard Alusi T/A The ark School and P&A 945 of 2014 Nairobi, In the matter of the estate of Edith Wangui Kahindo;
- c. the respondent fraudulently presented herself as a sister to the deceased, which she is not, and mislead the court regarding the disputed property which is subject of the succession proceedings; and
- d. the respondent fraudulently concealed to the court that the public trustee had pursuant to a family agreement distributed to the applicant the property the subject of the matter before the court referred the applicant to the Nairobi City County to have the property transferred to himself.

The application was supported by the affidavit of the applicant dated 15th February 2017 and his supplementary affidavit dated 22nd August 2017. It was his case that the respondent never served upon him the application stated in the ruling and filed on 10th December 2014; that the respondent presented herself as the eldest sister of the deceased which presentation was false and fraudulent; that the respondent is not and

has never been a sister of the deceased but is a sister-in-law of the deceased; that he lived with his deceased aunt since he was about 16 years up to when she died and he buried her at Langata Cementry; that the record confirmed that he was the sole beneficiary entitle to the deceased's property K-73 which information the respondent did not disclose to the court; that he solely with the assistance of his wife developed the property in issue and rented it out and has been paying rates due for all the years when he had the original documents in his possession; that he is not privy to the illegal sale of his property alluded to and the same is a fraudulent scheme by the respondent to disinherit him; and that the respondent would have no legal capacity to sell an asset that is in the name of the deceased.

The application was opposed by the respondent through her replying affidavit dated 24th July 2017. She stated that the applicant, being her son, was served with the application dated and filed on 10th December 2014 personally at his home in Embakasi East Village near the chief's camp after his advocate declined to receive it; that the applicant has never lived with the deceased since she resided in Rongai while her said plot contained rentals which were being managed by the applicant on behalf of the deceased; that the applicant never developed the property and if he did, it was derived from the same rent he collected from the premises which the respondent would utilize part of the rent received to pay rates and rents and send the income to her and the deceased; that she had been pursuing the transfer and registration of the said property into her name with the knowledge of the respondent; that after several attempts to obtain income from the respondent failed, she disposed of the property so she could secure a bigger asset within her home in Kiserian; that upon sale, she informed the tenants that the ownership had changed to the purchaser; and that the delay of filing this application two years after the ruling has not been explained and neither has the applicant explained his priority over her.

ISSUES

This court has duly considered each party's pleadings together with all the evidence tendered in court and the written submissions filed by each party in support of their cases. The issue for determination is whether the applicant has satisfied the conditions required to set aside the ruling of this court made on 8th May 2015?

DETERMINATION

The law on review applicable to this case is **Order 45 Rule 1** of the **Civil Procedure Rules, 2010** which provides as follows:-

“1 (1) Any person considering himself aggrieved-

by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

I also find useful guidance in the decision of **Kwach, Lakha and O'kubasu JJA** in the case of **Tokesi Mambili and others vs Simion Litsanga Civil Appeal 90 of 2001 – Kisumu** where they held as follows:-

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

Looking at the present application, I find nothing in the material presented before the court to show that there has been discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicants at the time the orders in question were made. The fact that the application dated 8th May 2015 was never served upon the applicant even after the court ordered that it be served does not amount to discovery of new evidence. The issues being raised by the applicant ought to have been raised during the proceedings.

On whether there was a mistake or error on record, I find that the applicants did not demonstrate any error on the face on the record of the court which warrants to be corrected by this court. Neither have the applicants demonstrated to the court any sufficient reason to warrant review. In view of the foregoing, I decline to grant the application as prayed. I note that the applicant has not demonstrated any errors on the part of the ruling delivered on 8th May 2015 to warrant the review of the order.

It has however emerged that the respondent dealt with the suit property and sold it without authority of a confirmed grant. This was clearly admitted by the respondent in her replying affidavit. I find that the respondent lacked the capacity to deal with the property without authority of a confirmed grant as per **section 79** of the **Laws of Succession Act (Cap.160)**. This is prima facie evidence of intermeddling by the respondents. This court, under **section 47** of the **Law of Succession Act**, is vested with jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Further, **Rule 73 of the Probate and Administration Rules** saves the inherent powers of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Plot No. K-73 shall therefore revert back to the name of the deceased until a full grant is issued. The purchaser of the said property shall seek a refund from the respondent. In the meantime, I direct parties to petition the court for a full grant to facilitate distribution of the estate of the deceased.

FINAL ORDERS

i. The application for review is declined.

ii. Plot No. K-73 to revert back to the name of the deceased.

iii. Parties to petition the court for a full grant of letters of administration with regard to the estate of the deceased.

iv. Each party to bear their own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 12TH DAY OF NOVEMBER, 2018.

M.W.MUIGAI

JUDGE OF FAMILY DIVISION OF HIGH COURT

IN THE PRESENCE OF:-

Ms. Chege for the Petitioner

Mr. Mbichiri for the Respondent