



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 187 OF 2011

JUDAH NDAMBUKI KITUKU APPELLANT

VERSUS

LEORNARD MUTUKU SESI.....RESPONDENT

RULING

Judgment was delivered herein on 26th January 2016 in favour of the Appellant, and the Respondent subsequently filed an application by way of a Notice of Motion dated 10th February 2016, seeking orders that this Court be pleased to review, vary or set aside the orders made on 26th January 2016. The grounds for the application are that there was an error on the face of the record; the orders amount to reopening **Succession Cause P & A No. 23 of 1993**; and that the matter was concluded in 2005 and grant confirmed, and the subject matter in this appeal and application was not an issue in the said succession cause. It was also claimed that this Court had no jurisdiction on account of the issue of the Respondent's tenancy pending before the rent tribunal.

The Respondent in his supporting affidavit sworn on 10th February 2016 stated that he bought the plot the subject matter of this appeal, and that the proceeds were shared amongst the beneficiaries of the deceased. Further, that this position was later confirmed in a grant issued in 2005 which he attached, and that no application of intermeddling was made at the time of such grant. He also stated that the Appellant was not his landlord as he was only collecting rent on behalf of the beneficiaries.

T.M. Tamata Advocate for the Respondent filed submissions dated 16th September 2016, wherein the above stated arguments were reiterated, and it was urged that the Appellant was making a personal claim pursuing his tenancy with the Respondent. In addition, that there was no issue of intermeddling with the Estate of deceased. Further, that the Respondent had new evidence that two of co-administrators have died, and that the grant ought to have been rectified and other beneficiaries brought on board . Therefore, that allowing the appeal amounted to bestowing the property to the Appellant through a civil suit.

The Response

The Appellant filed a replying affidavit in opposition to the application which he swore on 24th February 2016, and submissions dated 12th October 2016 filed by his Advocate, J.A. Makau & Company Advocates . The Appellant stated that he is a co-administrator of the estate of the late Elijah Kituku, as per the grant issued on 2/9/2005, and he annexed a copy of the confirmed grant. Further, that the Respondent is a tenant of the parcel of land Tala plot number 13B which is subject matter of this suit, and alleged to have bought the parcel of land from the Appellant's co-administrators, the said purchase having been made without the consent of all administrators of the estate of Elijah Kituku.

The Appellant claims that the distribution of the proceeds from the alleged sale was an illegality, as letters of administration of the estate of the deceased had not yet been taken out therefore invalidating the alleged sale, and that the said development on the parcel of land amounts to intermeddling. Further, that as an administrator of the estate of the late Elijah Kituku, the Appellant is obligated to claim for rent from the Respondent on behalf of the beneficiaries of the estate. The Applicant averred that if the orders of the Court are reviewed, the estate of the deceased will be greatly prejudiced, for the reason that the parcel of land Tala plot number 13B formed part of the free property of the deceased that had not been administered at the time of the alleged sale .

The Appellant's Advocate submitted that the Respondent has not met the requirements for an order of review under Order 45 rule 1 of the Civil Procedure Rules, 2010, and reliance was placed on the decision in **National Bank Of Kenya Limited vs Ndungu Njau , Civil Appeal No. 211 of 1996** in this regard. In addition, that no proof has been tendered by the Respondent to show that there is currently a suit before the Business Premises Rent tribunal involving the parties herein. Further, that the Respondent was rightly held to be an intermeddler as per the provisions of section 45 of the Law of Succession Act, with regards to his occupation and use of Plot 13b Tala Market by the Court.

It was urged that the Respondent's claims that he bought the plot were rightfully dismissed by the Court, on the grounds that the sale agreement entered between him and the beneficiaries to the estate of the deceased was null and void, as the beneficiaries did not have the legal capacity to enter into any transaction regarding the properties forming part of the estate of the deceased .

Therefore, that since the Respondent was not in any legal occupation of the said premises being Plot 13b Tala Market, there is no issue to be raised in the succession cause as he does not have legal standing to raise the issue in the succession cause. Lastly, it was submitted that the continuous occupation of Plot 13b Tala Market by the Respondent without any payment of rent which is a source of income for the Appellant, is causing him injustice and denying him the fruits of his judgment.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. I find that the main issue for determination is whether reasonable grounds have been shown for this Court to set aside or review the orders given in the judgment delivered herein on 26th January 2016. This Court is minded of the applicable law and the grounds for setting aside or review of orders which are set out in Order 45 Rule 1 (b) of the Civil Procedure Rules as follows:

- i) There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
- ii) mistake or error apparent on the face of the record,
- iii) any other sufficient reason,
- iv) the application must be made without unreasonable delay.

I note in this regard that most of the grounds raised by the on the issue of the effect of the confirmed grant of representation issued in **Machakos High Court Succession Cause No 23 of 1993** were facts in existence at the time of the hearing of the appeal, and most of them were canvassed and decided upon by the judgment delivered herein on 26th January 2016.

I particularly note in this regard that the said grant was confirmed on 22nd September 2005, when the Court ordered that plot 13A and 13B be sold and the proceeds be distributed equally amongst the beneficiaries. The Respondent herein however at the hearing of the appeal claimed that the plot 13B was sold to him by way of a sale agreement dated 8th May 2000. This Court in the judgment delivered herein

held that at the time of the said sale agreement there was no authority given to the administrators to sell the said plot.

Therefore the judgment did not in any way re-open the said succession cause or confirmed grant, save for confirming the legal position of the sale of Plot 13B to the Respondent in light of the confirmed grant. In addition, after perusal of the said confirmed grant, I note that the Respondent is not named as a beneficiary of plot 13 B therein. The Respondent has therefore not demonstrated any apparent error on the face of the record or judgment.

Lastly, the Respondent did not provide any supporting documents for his assertions of the existing dispute between the parties in the rent tribunal or on the death of the Appellants co-administrators, for this Court to determine if indeed they qualified as new evidence.

I am in this regard guided by, and adopt the holding by the Court of Appeal in **National Bank of Kenya Limited vs Ndungu Njau , (1997) e KLR** as follows:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

The Respondent’s Notice of Motion dated 10th February 2016 is therefore found not to have merit for the foregoing reasons, and is hereby dismissed with costs to the Appellant. The orders of temporary stay granted herein on 11th February 2016 are consequently vacated.

It is so ordered.

DATED AT MACHAKOS THIS 11TH DAY OF JANUARY 2017.

P. NYAMWEYA

JUDGE