



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1892 OF 1993

IN THE MATTER OF THE ESTATE OF JAMES NJUGUNA KIONGO (DECEASED)

RULING

1. The application dated 28th April 2016 seeks review of orders that had been made on 4th March 2016 and for a rectification of the certificate of confirmation of grant dated 12th April 2011, ostensibly to conform with the orders sought on review.
2. The said application is brought at the instance of the second administrator, David Kinyanjui Njuguna. He avers that the orders (d) and (f) of the ruling that was delivered on 4th March 2016 were not capable of implementation. He explains that LR Sigona/1769 had been transferred to the deceased's widow, Eunice Njoki Kiongo, that the proceeds of sale of LR Sigona/454 had been fully utilized to finance administration and therefore there is no money to be shared out amongst the beneficiaries, the remaining plots had be distributed to each of the house and the rest sold and the proceeds shared out amongst the beneficiaries, and that the LR Sigona/1893, being an eighth from LR Sigona/1745 was registered in the names of the sons of the fourth house as their half plot. He states that as a result of the above, the administrators are unable to execute transfers in respect of property that was in the names of others persons. He avers that reversing those processes would be expensive and inconvenient. He suggests that each house should share their extra plot and share the proceeds internally within the house. He swore another affidavit on 28th April 2016, specific to the matter of costs, stating that Kshs. 3, 063, 400.00 was spent on administration and therefore there was no money to pay the 4th house as ordered earlier by the court.
3. The fourth administrator, Eunice Njoki Kiongo, swore a further affidavit on 9th May 2016, in support of the application. She avers that the bulk of the estate has been distributed with several assets having been transferred to the names of the beneficiaries. She says that she is one of them; LR Sigona/1769 was transferred to her and she sold it to a Peter Njoroge Waweru. She avers that she spent the money to settle her medical bills and to construct a house on another property, and therefore she has no money to reimburse the buyer. She states that another property was sold to Mr. Komo and the proceeds were utilized for administration purposes, while the proceeds from the sale of Sigona/98 were shared equally amongst the beneficiaries. She has attached to her affidavit an affidavit sworn by Peter Njoroge Waweru to confirm the position.
4. Samuel Kiongo Njuguna alias Eliud Mwaniki Njuguna, Virginia Wairimu Kibunja widow of the late David Kibunja Njuguna, Joseph Njuguna, Beth Wanjiku Njoroge, widow of Livingstone Njoroge Njuguna, Godfrey Kiongo Njuguna, Johnson Njoroge Njuguna and Samuel Waweru Njuguna all support the application. They swore an affidavit on 25th May 2016.
5. David Kinyanjui Njuguna 'B' is an administrator from the 4th house. He swore an affidavit on 10th

May 2016. He does not support the application dated 28th April 2016, instead he makes his own proposals on the distribution of the remaining plots. On Sigona/1769 he states that since the administrators have failed to sign the relevant transfer papers, the Deputy Registrar ought to be directed to sign the same. He pleads that the execution of the documents in respect of Sigona/98 be stayed to await remittance to the 4th house of their fair share of the property. He further pleads that as the 4th house has not been compensated for the loss of the property known as Karai/Renguti/T26, it be given Plot No. 15 Nderi as compensation.

6. There is an affidavit on record sworn by Esther Muthoni Elepelo on 10th May 2016. She is from the fifth house, a widow of one of the sons in that house. She supports the proposals by David Kinyanjui Njuguna 'B' on the mode of disposing the remaining plots in the estate.

7. The other affidavit on record is sworn by Peter Njoroge Waweru. It was sworn on 24th May 2016. The said affidavit centres on the property known as Sigona/98. He avers that it had been sold on 14th November 2012 to Elizabeth Muthoni Ndung'u, but the administrator from the fourth house had failed to sign the sale agreement. He states that the buyer subsequently sold her interest in the property to him.

8. Eunice Njoki Kiongo swore a further affidavit on 25th May 2016. She evinces her willingness to surrender her entitlement to Karai/Riuguti/T32 to the fourth house so that that house can be compensated for its loss of Karai/Renguti/T26; instead of that house being given Plot No. 15 Nderi which she argues is of far greater value than Karai/Renguti/T26. She proposes that the said Plot 15 Nderi be sold and the proceeds shared equally. David Kinyanjui Njuguna swore his own affidavit proposing that Plot 15 Nderi be sold and its proceeds be utilized to settle the claim by the fourth house.

9. There are several other affidavits by various parties, either in support of or opposition to the application.

10. It was directed on 21st June 2016 that the application dated 28th April 2016 be disposed of by way of written submissions. There has been compliance with the said directions for the parties hereto have filed their respective submissions, which I have had occasion to read through.

11. The application the subject of the ruling seeks review of the orders made earlier by the court. The probate court has jurisdiction under rule 63 of the Probate and Administration Rules to review its orders through applications founded on the provisions of the Civil Procedure Rules on review.

12. Review is grantable on two specific grounds, with a third general one. The specific ones are error apparent on the face of the record and discovery of matter that could not have been placed before the court at the time the order was made. The applicant has not sought to demonstrate that there is indeed an error apparent on the face of the record, nor that he has stumbled on an important matter of evidence that he did not have nor could not place before the court at the time the order was made. So I cannot possibly examine the application before me on the basis of the two grounds.

13. That leaves me with the general ground that a court order or decree can be reviewed on account of any other sufficient reason. It would appear then that the applicant would like me to consider this matter on the basis of that ground.

14. It was held by the Court of Appeal, in *Norodhco Kenya Limited vs. Loria Michele*, civil appeal number 24 of 1998 and *The Official Receiver and Liquidator vs. Freight Forwarders Kenya Limited* civil appeal number 235 of 1997, that any sufficient reason for the purposes of review is not analogous to the other two heads, error on the face of the record and discovery of new evidence. In *The Official Receiver* case it was stated that those words mean that the reason must be one that is sufficient to the court handling the review application. It was said in *Tokesi Mambili and others vs. Simion Litsanga*, civil appeal number 90 of 2001, that where the application is based on sufficient reason it is for the court to exercise its discretion.

15. The applicants seek to convince me that the orders made on 4th March 2016 with respect to LR

Sigona/1769 and the share of the proceeds of the sale to Komo to the fourth house could not be complied with. Their case is that LR Sigona/1769 has been transferred to a widow of the deceased and is therefore incapable for transfer to the fourth house, while all the money arising from the sale to Mr. Komo of a property has been exhausted in the administration of the estate; there is therefore nothing to be given to the fourth house.

16. LR Sigona/1769 was allegedly transferred to or, at any rate, registered in the name of the widow on 18th April 2013, going by the title deed on record. The applications that culminated in the orders made on 4th March 2016 were filed in 2013 and 2014, and the direction that the said applications be disposed of simultaneously was given on 10th December 2014. The applicant herein was in possession of that information as at that date, yet he chose not to place it before the court to help the court determine the matter effectually and effectively. He chose to keep that information away from the court. A party who keeps critical information from the court cannot surely expect the court to exercise discretion in their favour.

17. The ruling that the court delivered on 4th March 2016 merely reiterated the earlier orders made by Rawal J on 12th April 2011 and 10th September 2012. It is from the proceedings before Rawal J. that it was directed that the fourth house be paid part of the proceeds of sale of the property sold to Mr. Komo. It is a specific order of the court which cannot be met by a mere claim that all the sale money has been spent. The administrators are bound to find the money and comply with that order. In any event any party unhappy with the order ought to have appealed against it. I do not find any basis at all for its review, if at all it is available for review.

18. The application is founded on section 74 of the Law of Succession Act, Cap 160, Laws of Kenya, which states as follows:

‘Errors in names and descriptions, or in setting out the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court, and that grant of representation, whether before or after confirmation, may be altered and amended accordingly.

19. Section 74 is designed to correct errors in the names and descriptions in a grant of representation. It is also targets errors with respect to the setting out of the time and place of the deceased’s death in the grant representation. What is sought to be rectified here is not a grant of representation, but a certificate of the confirmation of the said grant. A grant and a certification of its confirmation are not one and the same. Clearly, section 74 of the Law of Succession Act cannot be invoked for the purpose of achieving what the applicant seeks. The application is also not about correcting errors in the names and descriptions, nor setting out times and places. It seeks redistribution of the estate which is outside the realm of Section 74.

20. I did not find any basis for review of the orders made on 4th March 2016, nor for rectification of the certificate of confirmation of grant on record. The application for determination, dated 28th April 2016, is clearly without any merit. It is for dismissal and I do hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 10TH DAY OF FEBRUARY, 2017.

W. MUSYOKA

JUDGE