



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 482 OF 2012

IN THE MATTER OF THE ESTATE OF JOHN MUCHOKI NDEGWA DECEASED

CHARLES NDEGWA MUCHOKI

JOHN GIKANDI NDEGWA.....PETITIONERS/APPLICANTS

VERSUS

BENARD WAMBU NDEGWA

JANE NYAMBURA

MARY NYAWIRA NDEGWA

MAGDALENE.....PROTESTORS/RESPONDENTS

RULING

1. The application is premised under no provisions of the of **Law of Succession Act**; but this failure to set out the enabling provisions of law does not defeat the applicants right to have their application heard and determined; in essence the Applicants seek a review and or setting aside of the Order of this Honourable Court granted on the 15th May, 2014 by the Hon. Justice Wakiaga;
2. The Application is supported by the joint affidavit made by Charles Ndegwa Muchoki and John Gikandi Ndegwa and is dated the 11th day of October, 2016 in which they depone to the fact that they are the Petitioners herein and are competent to make the Supporting Affidavit.
3. The review and or variation sought relates to an order by the Honorable Judge staying the instant proceedings pending the hearing and determination of Nyeri ELC. Case No. 35 of 2014 filed by one of the respondents herein, namely, Benard Wambu Ndegwa.
4. At the hearing hereof the applicants appeared in person whereas Ms Anne Thungu appeared for the respondents; both parties made oral presentations; hereunder is a summary of the rival submissions;

APPLICANTS SUBMISSIONS

5. That uncle had filed a case in the ELC court and was taking them round in circles; their uncle got his portion and their father got his portion; that the Title Iriani/Kairia/ 805 is in the name of their father but

their uncle was cultivating their fathers portion; that the parcel Iriani/Kairia/803 was in the name of the protestor;

6. That they are prejudiced and affected psychologically and want the case to be finalized; and therefore seek an order to review the order made by Hon. Wakiaga J in which he ordered that the ELC case seeking determination of a trust be heard first; thereafter the protest be heard;

RESPONDENTS SUBMISSIONS

7. The application was opposed and the respondent relied on the affidavit of the protestor sworn on the 13/01/2017; the applicant's know that there is an ELC Case No.35/2014 in which they are sued as the administrators of the estate of John Muchoki Ndegwa;

8. That the present protestor was seeking a declaration of trust over parcel no. Iriani/Kairia/805 and was likely to lose his entitlement if this case proceeds; because there will be nothing to claim after distribution;

9. The applicants have not demonstrated sufficient grounds for an order for review; the applicants were both present in court the date the order was made; Charles one of the applicants was present and addressed the court; and were not being candid about not knowing about the orders;

10. The 1st protestor's case relates to a trust which cannot be determined in a succession cause; no prejudice suffered has been shown by the applicants; one of them resides on the land and the other is outside; and status quo has been maintained;

11. That there are no sufficient grounds to warrant the orders sought and it is in the interest of justice that the orders remain; the ELC case has a date for the month of October, 2017;

12. The respondent prays that the application be dismissed.

ISSUES FOR DETERMINATION

13. After taking into consideration the submissions of both parties this court finds the following issues for determination;

(i) Whether there has been delay in bringing the application;

(ii) Whether to review or vary the order as prayed;

ANALYSIS

14. It is noted that a copy of the Order sought to be reviewed has been annexed to the application; that an application for review ought to be heard by the same Judge who heard the matter and made the order but in this instance the Honorable Judge has since left the station therefore any judge who is in station has jurisdiction to entertain the application and grant the order sought.

Whether there has been delay in bringing the application;

15. The first issue relates to the timeliness of bringing the application. The Order sought to be reviewed was granted on the 15th May, 2014; the instant application was filed in court on the 11th October, 2016 which translates to a period of approximately fourteen (14) months; the decisions on inordinate delay are legion where a delay of four (4) months has been held to be an inordinate delay.

16. Timeliness in this instant application was a crucial factor because had the application been filed without undue delay maybe the Judge who had granted the Order would have been still in station and would have been able to review and or vary it.

17. This court finds that the application was not brought in a timely manner and no explanation has been offered by the applicants as regards the inordinate delay;

Whether the application to review or vary the order is merited;

18. The remedy for review of an order as set out in Order 45 Rule 3(1) of the Civil Procedure Rules, is available to an aggrieved party in any of the following circumstances; where there is discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the knowledge or could not be produced at the time the order was made; or when there is a mistake or error apparent on the face of the record; or for any other sufficient reason.

19. The order complained of is a stay of the proceedings herein pending the outcome of the case filed in the Environment and Land Court by one of the respondents; in which the respondent seeks a declaration that a trust in his favor exists in the property forming the estate of the deceased;

20. Upon perusal of the affidavit made by the applicants it is noted that they have not furnished the court with any material to demonstrate that there has been any discovery of new and important material or evidence after the passing of the order sought to be reviewed; nor is there any contention that there is an error or mistake apparent on the face of the order;

21. The last category is 'any sufficient cause'; the applicants anxiety and any prejudice suffered whilst they await the outcome of the case filed in the Environment and Land Court cannot be said to fall in this category; the reason being when reading the order as a whole it would appear to suggest that there must have been existing circumstances, that even after exercising due diligence, was not within their knowledge or could not be produced before the court; and that had these circumstances been brought to the attention of the court before it rendered its decision, then most likely it would have caused the court to arrive at a different decision;

22. This court reiterates that anxiety and prejudice occasioned as they await the hearing and determination of the ELC case fall outside the ambit of Order 45 and is found not to be a ground to warrant review or variation of the order made on the 15th May, 2014.

FINDINGS AND DETERMINATION

23. This court finds that the application was not brought in a timely manner and no explanation has been offered by the applicants as regards the inordinate delay;

24. This court is finds that the applicants have not satisfied the salient requirements for an order for review to enable this court to grant the application.

25. The application is hereby dismissed;

26. There shall be no order as to costs; each party to bear their own costs.

27. The matter be listed for mention on the day of October, 2017 for further directions.

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 8th day of June, 2017.

HON. A. MSHILA

JUDGE