



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 49 OF 2016

(FORMERLY MERU SUCCESSION CAUSE NO. 191 OF 1996)

IN THE MATTER OF THE ESTATE OF GEOFFREY KIRICHO MBOGORI (DECEASED)

JANE KAGIGE GEOFFREY.....1ST PETITIONER

KARIMI KIRICHO.....2ND PETITIONER

- VERSUS -

WALLACE IRERI NJERU.....INTERESTED PARTY

BRAZON MUNENE KIRICHO.....1ST OBJECTOR

CHARITY KAIMURI GEOFFREY.....2ND OBJECTOR

RULING

1. Section 45 of the Law of Succession Act, Cap 160 Laws of Kenya (hereinafter "*the Act*") provides:-

"45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased.

(2) Any person who contravenes the provisions of this section shall-

a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

(Emphasis added).

On the other hand Section 82 of the Act provides:-

"82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -

a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that -

i. the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

ii. no immovable property shall be sold before confirmation of the grant;"

(Emphasis supplied)

2. In the case of Muriuki Hassan .v. Rose Kanyua and 4 others [2014] eKLR, when faced with a situation of sale of property belonging to an estate before succession was undertaken, **Makau J** held:-

"The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased's beneficiaries and the sale of land to them is challenged in this application. In such circumstances, the interested parties' interest cannot be considered in this matter and the remedy for them is if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan."

3. In Re Estate of John Gakunga Njoroge [2015] eKLR Murithi J held:-

"10. A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act....."

15. For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under Section 82(b) Proviso (ii), which provides that:-

"no immovable property shall be sold before confirmation of the grant." (Underlining mine).

4. And in Morris Mwiti Mburugu .v. Denis Kimathi M'Mburugu [2016] e KLR, the Court held:-

".... where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same." (Underlining mine).

5. The net effect of the foregoing is clear; before a grant has been issued and confirmed, no part of the estate of the deceased may be dealt with in a manner that amounts to intermeddling. This includes those not entitled therewith taking possession of, disposition, or alienation, as well as trespassing onto the property. Such acts are subject to reversal by the court summarily. The spirit behind sections 45 and 82 of the Act, in my view, is to preserve the property of a deceased person until the beneficiaries and their respective shares are identified, ascertained and distributed. If intermeddling is allowed, the likelihood of the innocent beneficiaries being prejudiced by having their shares affected by reduction is real whereby, there may be no settlement and or peaceful co-existence or end to disputes between of the family

members. In this regard, it is for the purposes of preserving the social fabric, cohesion and peaceful co-existence of or end to disputes between family members who are beneficiaries to estates, that the law restricts, indeed prohibits any dealings with an estate until the grant is confirmed. The net effect of the aforesaid provisions of the law and decided cases is that, the estate of the deceased cannot be dealt with without the sanction of the court. Before the grant of letters of administration are confirmed, no one including the administrators of the estate of the deceased can deal with the property of a deceased by way of intermeddling therewith or effect a sale of immovable property belonging to the estate. Anyone who purports to purchase property from the estate before confirmation therefore does so at his own peril.

6. On 30th July, 1991, Geoffrey Kiricho Mbogori died at Chogoria Hospital at the age of 70 years. He left behind various beneficiaries and a property known as LR. Mwimbi/Murugi/70 measuring approximately 29 acres. Another property LR. No. Murugi/Mwimbi/229 measuring about 18 acres but in the name of Jane Kagige Geoffrey the Petitioner, was later admitted as forming part of the estate. On 4th December, 1992, on an unknown date in 2003 and on 16th September, 2010, Jane Kagige Geoffrey and Karimi Kiricho (hereinafter "*the Petitioners*") sold to Wallace Ileri Njeru and Njagi Ruche ("*Interested Parties*") a total of seven (7) acres of land from LR Mwimbi/Chogoria/70 (hereinafter "*plot 70*"). The first sale occurred even before the Petitioners petitioned for grant of letters on 15th July, 1996. Although the grant was issued on 14th April, 1997, the same has to date not been confirmed.

7. There have been filed a total of five (5) applications for confirmation in respect of this estate. Two (2) of them are dated 12/10/99 while three (3) others were filed on 3/7/2003, 9/3/2004 and 23/9/2014, respectively. The one filed on 3rd July, 2003 was withdrawn on 12th November, 2003. While the one dated 9th March, 2004 was heard and dismissed on 11th May, 2007. In the said ruling, the court made certain observations and findings that has led to the application for review that is now under consideration in this ruling.

8. By an application dated 26th February, 2016, Brazon Munene Kiricho and Charity Kaimuri Geoffrey (hereinafter "*the Objectors*") applied for the review or setting aside of the ruling and order of 11th May, 2007 made by **Ouko J** (as he then was). The grounds upon which the application was made was set out in the body of the Summons and the Supporting Affidavit of Brazon Munene Kiricho sworn on 26th February, 2016. These were that; the Objector was unaware of the existence of the said ruling in which he was not involved; that there is apparent error on the face of the record and that there was new and important evidence that had been discovered regarding the identity of the beneficiaries. Mr. Kiome learned Counsel for the Objectors submitted that there was new evidence to show that some of those listed or held out to be beneficiaries to the estate had benefitted as beneficiaries elsewhere; thereby confirming that they were neither beneficiaries nor dependants of the deceased; and that the Objectors were not involved in the proceedings that resulted in the subject ruling. Counsel urged that the application be allowed.

9. The application was opposed through the Replying Affidavits of Karimi Kiricho and Jane Kagige Geoffrey sworn on 14th April, 2016 respectively. It was deponed that there was no new evidence to warrant the orders sought; that the application does not meet the salient goal posts for the grant of the review sought; that the matters raised were fit for appeal not review and that since the matter was still running, the issues raised should be raised during the hearing of the application for confirmation of grant. Mr Mwanzia learned Counsel for the Petitioners submitted that the grounds upon which an application review should be made under order 45 of the Civil Procedure Rules had not been proved; that due to the delay in bringing the application, the application could not succeed. The cases of **Lawrence S. Muruthi Gachoya .v. Milka Wothaya Gitahi [2016] eKLR and Betty Maitha Duncan .v. Gilbert Muriuki Chabari & Anor [2016]eKLR** were cited in support of the said propositions. Counsel urged that the application be dismissed.

10. This is an application for review. There is no doubt there is jurisdiction to review an order made in succession proceedings by dint of Rule 63 of the Probate and Administration Rules which imports various Orders of the Civil Procedure Rules including Order 45, formerly Order XLIV. As properly submitted by Mr. Mwanzia, in an application for review, an applicant must establish; the discovery of new and important matter or evidence which after due the exercise of due diligence was not within his knowledge

or could not be produced at the time when the order or decree was passed, or that there is an error or mistake apparent on the face of the record or, there is any other sufficient reason. In addition, the application must be made timeously or without unreasonable delay.

11. The first issue raised by the Petitioners was that the application was being made too late in the day and that the orders were being sought nine (9) years after the orders were made. On their part the Objectors contend that they were unaware of the ruling until they were served with an affidavit in reply to their protest filed on 16th March, 2015. The requirement that an application for review be made without unreasonable delay is legally embedded in Order 45. That requirement is predicated upon the necessity to guard against the likelihood of affecting or prejudising the position of the parties or those affected by the order, ruling or decree who may have already acted on it and drastically thereby changed their position. That is why in my view, there is a requirement for timeous lodgment of an application for review.

12. In this case, the order sought to be reviewed was made in May, 2007. It is now nine (9) years after it was made. Is the delay of nine (9) years unreasonable? In the case cited by Mr. Mwanzia of **Betty Maitha Duncan .v. Gilbert Muriuki Chabari & Anor (supra) Gikonyo J** found a delay of 4 years to be unreasonable. What is unreasonable, in my view, depends of the individual circumstances of each individual case. In that case, the application was made by a person who was a party in the subject proceedings. He had waited for four (4) years before approaching the court for the orders of review. In the present case, the objectors seem to have come to the picture in 2012. It is not clear when they first came to know about the ruling of 11th May, 2007. However, they have sworn that they first came to know about it when they were served with a Replying Affidavit to their protest. That Replying Affidavit was sworn by the 1st Petitioner, Jane Kagige Geoffrey on 7th August, 2015. To my mind, the Objectors' contestation that they first knew about the existence of the said ruling on being served with the said Replying Affidavit was never denied by the Petitioners. Further, the record does not show that the Objectors were aware of that ruling before that date nor that they participated in these proceedings before they lodged their objection.

13. The ruling in question emanated from an application for the confirmation of grant dated 9th March, 2004. There is no evidence to show that the Objectors knew of the said ruling before the Affidavit of 7th August, 2015 was served upon them. In this regard, it will be safe to consider that the time started running against the Objectors when they were served with the Replying Affidavit of 7th August, 2015. The current application was made on 3rd March, 2016. That is about a period of Seven (7) months since the time the Objectors discovered the contents of the subject ruling. To my mind, taking into consideration the circumstances of this case, that the ruling was as between different parties which, amongst others, affected the interests of the objectors who were not parties thereto and that the order has not yet been executed and that it has not been shown that any of the parties has acted on it to his or her detriment or prejudice, I hold that there has been no unreasonable delay.

14. In the first ground, it was alleged that there was an error or mistake apparent on the face of the ruling. Neither the Affidavit in support nor did Ms Kiome pin point what this error or mistake in the ruling was. I have on my own carefully perused the ruling and I have not seen anything that can be called an error or mistake in the said ruling in terms of Order 45 of the Civil Procedure Rules. In this regard, that ground has no basis and is dismissed.

15. The second ground was that there was discovery of new evidence regarding the identity of the beneficiaries who have been wrongfully listed as dependants in the application for confirmation. The Objectors contended that the second Petitioner and her two children Fredrick Mugambi and David Mutembei have already benefited from another estate where they belong; that another person listed as a beneficiary by the name of Eliphaz Mutunga is a son of a completely different person from the deceased. The answer to that allegation was that this information was in existence at the time the ruling was made and therefore there was nothing like discovery of new evidence. The Objectors relied on a certificate of confirmation of grant dated 25th April, 2006 in Chuka PM's Succession Cause No.83 of 2005 which they exhibited together with a "**will**". In that certificate and "**will**", among those who are shown to have benefitted from the estate of the late Chabari Muchiri are Fredrick Mugambi Geoffrey and David

Mutembei Muchiri. These have been alleged to be the same as Fredrick Mugambi and David Mutembei who have been listed as beneficiaries in the present proceedings. The other piece of evidence relied on by the Objectors, is a copy of the Eulogy of one Eliphias Njagi Mutunga who is shown to have lived between 1949 and 2014. He is declared in Eulogy read during his burial on 8th August, 2014 to have been born on 11th June, 1942 at Chogoria to the late Josphat Mutunga Baikithia and Eunice Muija Josphat. He died on 30th July, 2014.

16. There has been no answer from the Petitioners to those two damning of allegations. The only answer is that those facts are not new, that they were in existence at the time the ruling was delivered in 2007. I do not understand order 45 of the Civil Procedure Rules as requiring that the new evidence to be relied on should have come into existence after a ruling or order has been made. What is required is for the applicant to show that as at the time the order or ruling was made, the new facts being relied on were not in the knowledge of the applicant despite any diligence on his/her part. The Objectors allege that they did not know the existence of these facts. Given, the Succession Cause No. 83 of 2005 was concluded in April, 2006. The Objectors were not parties in those proceedings. There is nothing to show that they should have known of its existence. The will of the late Chabari Muchiri was a private affair. Indeed it does not seem to have been propounded in Succession Cause No. 83 of 2005. Eliphias Njagi Mutunga died in July 2014. Obviously that was seven (7) years after the ruling of 2007. That eulogy was not in existence in 2007 when **Ouko J** was delivering his ruling, the subject of the application. To my mind, the Objectors have shown that there is discovery of new evidence which warrant interference with the subject ruling.

17. In any event, the Objectors were not party to the application or the proceedings that resulted in the subject ruling. The ruling was in respect of an application dated 9th March, 2004 by the Petitioners and one Justus Gitonga Kiricho. It is not clear whether the Objectors were either involved in those proceedings or were ever served with the same. In the absence of such evidence, the court will hold the same in their favour, that they were unaware of it.

18. One other issue is the conduct of the Petitioners in these proceedings. It is clear from the record that they have made a total of four applications for confirmation. The estate has been shrinking as days go by and as it does so, the shares continue to mutate downwards as a result of which the beneficiaries continue to be disadvantaged leading to agitation and serious disputes. What comes out clearly is that the Petitioners have been unfaithful in the administration of the estate. In an Affidavit sworn by the Petitioners sometimes in 2012, they state as follows:-

"2. That we are Joint Administrators of the estate of Geoffrey Kiricho Mbogori who is since deceased having been granted Letters of Administration as the estate of the deceased on 14th April, 1997 vide HIGH COURT OF MERU SUCCESSION CAUSE NO. 191 OF 1996.

3.

4. THAT on 16th November, 2010 a Title Deed to LR No. MWIMBI/CHOGORIA/70 was issued to us whereby we were jointly registered to hold LR NO. MWIMBI/CHOGORIA/70 in trust for the family of said (sic) Geoffrey Kiricho Mbogori (deceased).

5.

6.

7. That on the breath of both the ruling of Justice William Ouko dated the 11th of May, 2007 and the Decree of Peter Ngare Gesora, Senior Principal Magistrate dated the 7th of November, 2011, and on, our own volition, we decided to sever, the said LR. NO. MWIMBI/CHOGORIA/70 and transfer 4.5 acres and 2.5 acres to Wallace Ireru Njeru and Njagi Rucha respectively and also all the beneficiaries and dependants of Geoffrey Kiricho Mbogori (deceased).

8.

9. THAT LR. NO. MWIMBI/CHOGORIA/70 has now been subdivided and we now make this affidavit requiring the Land Registrar Meru South Maara District to register the resultant new numbers submitted for registration denoting respective sizes of land as shared for the issuance of new Titles to the respective persons entitled."

19. What other evidence is required to show that the Petitioners are in blatant breach of the Law of Succession Act. They have not only plundered the estate by selling piece after piece immediately after the demise of the deceased, they have indeed transferred the estate into their names and transferred portions of the estate land to 3rd parties before confirmation or without the sanction of the court. They were urging the Land Registrar Meru South Maara District to issue titles to the sub-divisions they had effected in the estate land without the sanction of the court. It is because of such acts of impunity that the administration of the estate of the deceased has not been completed twenty (20) years after his demise and the beneficiaries will keep on fighting for fairness. These Petitioners are clearly guilty of intermeddling, their fitness to run the affairs of the estate is in serious doubt. It is against such background that a total of not less than three (3) people, who are said to be strangers to the estate are said to be listed in the distribution list and the ruling of **Ouko J** of 2007 is being raised as a shield. That won't do!

20. Apart from there being discovery of new evidence, the ruling of 2007 is subject to the reviewed under the grounds "**any other sufficient reason.**" Nowhere did **Ouko J** sanction any of the sale of the estate property. He only interpreted an agreement entered into between the Petitioners and one Wallace Ileri. He never ruled that the said Wallace Ileri was entitled to the share in the estate. The challenge then before court was that the said agreement had not been dated whereby the good Judge only interpreted the provisions of Section 3 (3) of the Law of Contract Act. The issue that both that agreement and the earlier one entered in 1992 were contrary to Sections 45 and 82 of the Law of Succession Act was never brought to his attention. As set out in the beginning of this ruling, the actions of the Petitioners have been completely at variance with the duties and obligations of administrators of estates under the Law of Succession Act. They have admitted transferring the title for the estate land into their names, selling and transferring portions thereof to third parties. I think the lesser I say about their actions the better.

21. In view of the foregoing, I am satisfied that there are good reasons that have been advanced to allow the application. The ruling dated 11th May, 2007 is hereby reviewed and set aside.

22. Further, in the interests of justice and to bring sanity into these proceedings and the estate, and in order to avoid further litigation by instalment, I make the following directions under prayer (b) of the application and Article 159 of the Constitution of Kenya:-

- a) the two applications dated 12th October, 1999 be and are hereby consolidated with the application for confirmation dated 23rd September, 2014 and they are to be heard together;
- b) the Protests dated 11th May, 2000 and 16th March, 2015 respectively be determined by way of viva voce evidence;
- c) Wallace Ileri and Njagi Rucha be and are hereby joined in these proceedings as the 1st and 2nd Interested Parties, respectively to agitate their interests;
- d) the District Land Registrar Tharaka Nithi is directed to file a report on all the dealings on LR No. Mwimbi/Chogoria/70 from 30th July, 1991 when the deceased passed on to-date. He should likewise file a certified copy of the title thereto within 30 days of this ruling;
- e) the parties do file and serve Affidavit evidence in support of their respective cases within 60 days.

f) Mention on 13th December, 2016 to give a date for trial.

It is so ordered.

DATED and delivered at Chuka this 6th day of October, 2016.

A. MABEYA

JUDGE

Ruling read and delivered in open court in the absence of the Petitioners- Advocates who had notice of the ruling date.

A.MABEYA

JUDGE

6/10/2016