



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 475 OF 1998

MARY KIMOI SANG.....PETITIONERS

VERSUS

CHARLES K. KANDIE.....RESPONDENT

RULING

Mary Kimoi Sang hereinafter referred to as the Applicant filed this application which is entitled **SUMMONS FOR FURTHER ORDERS** and seeks the following orders;

1. THAT all property belonging to the respondents namely Charles K. Kandie, Francis Kanina Kandie and any other brother or children of the deceased, resident on the suit property hereof be demolished.
2. THAT the Officer Commanding Station Eldama Ravine Police Station do assist in providing security.
3. THAT Costs of the application.

The summons is supported by the Affidavit of the Applicant made on the 29th January, 2013 and on the grounds set out on the face of the summons.

APPLICANT'S SUBMISSIONS

The Applicant is the Administrator of the Estate of Kipsang Kandie (deceased). Judgment was delivered on the 27th April, 2010 in favour of the Applicant as against the Respondents who were ordered to vacate the suit premises within thirty (30) days.

The Applicant deposes that at the time of making the affidavit the Objector had not complied. That there already is in existence an order for eviction but that the Auctioneers need an order from this court directing demolition of the Objector's house.

The Applicant also sought that supervision and security be provided by the Officer in Charge Eldama Ravine Police Station when the demolition exercise was being conducted.

The Applicant further submitted that this court had inherent powers to facilitate the execution of the judgment to its logical conclusion so that she could be able to enjoy her land.

RESPONDENT'S SUBMISSIONS

In response the Respondent relied on his Replying Affidavit dated the 18th March, 2014. Counsel submitted that the application was not based on any section of the Law of Succession.

That if the Respondent was occupying the property illegally this then was an action of trespass. To get enforcement orders there was therefore need to institute a separate action for trespass.

The Respondent prayed that the application be dismissed.

ISSUES FOR DETERMINATION

Upon hearing the submissions of the respective counsel the court has framed the following issues;

Whether the untitled application is for review or variation of the judgment;

Whether there has been delay in bringing the application;

ANALYSIS

Counsel for the Respondent correctly pointed out that the application is brought under no specific provision of the Law of Succession Act nor under any other provision of law.

The above notwithstanding it is apparent from the face of the application that the Applicant seeks for an order of review or variation of the decree, herein. In this day and age and in the light of the provisions of Article 159 (2) (d) of the Constitution, courts strive to sustain rather than strike out an application purely on procedural technicalities.

Therefore in exercise of this court's inherent discretionary powers and in the spirit of the Constitution I shall overlook this omission and proceed to address the application as one for review or variation.

The principles for review of an decree are; that there must be 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; that there must be a mistake or error apparent on the face of the record; or for any other sufficient reason.

The application for review ought to be heard by the same Judge who heard the matter and made the order. The order was made by Honorable Maraga, J (as he then was) who has since left the station but the judge who is in station has jurisdiction to review the Decree.

After hearing submissions of Counsel for the applicant, I have noted that there is no contention of discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced at the time the decree was made; there is no contention of any mistake or error apparent on the face of the record;

The only reason alluded to is the frustration encountered by the Applicant and her agents in trying to execute the decree. It is this court's considered view that this does not qualify as a sufficient reason for the orders sought.

The second issue relates to the timeliness of bringing the application. The judgment sought to be varied was delivered on the 27th April, 2010. The instant application was filed in court on the 5th April, 2013 this translates to a period of three (3) years. The decisions on inordinate delay are legion where a delay of four (4) months has been held to be an inordinate delay.

Timeliness is a crucial factor because the question that comes to mind is that had the application been filed timeously and without undue delay the Judge who had delivered the judgment might still have been in station and would have been able to review and or vary it. No explanation has been offered by the Deponent as regards the delay in bringing this instant application.

This court is satisfied that the applicant has not satisfied the salient requirements for an order for review or variation to enable this court to allow the application.

All is not lost, and I concur with submissions of counsel for the Respondent that the Applicant has an alternative recourse and can proceed to institute an action for trespass.

FINDINGS

For the reasons set out above this court finds that the applicant has not satisfied the salient requirements for an order for review or variation to enable this court to allow the application.

DETERMINATION

The application is lacking in merit and is hereby dismissed.

Each party to bear its own costs.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 17th day of July, 2015.

A. MSHILA

JUDGE