REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 255 OF 2017

EMILY JEMATIA NGISIREI..... PLAINTIFF

VERSUS

JOSEPH MISOI.....1ST DEFENDANT

ROMANA SINGOEI.....2ND DEFENDANT

SOLOMON KORIR.....3RD DEFENDANT

AND

GRACE JEPKOGEI..... APPLICANT/PROPOSED INTERESTED PARTY

RULING

Grace Jepkogei has come to court under section 80 of the Civil Procedure Act, Cap. 21, Laws of Kenya and Order 45, Rules 1 and 2 of the Civil Procedure Rules, 2010 praying that the order made by this court on 28.6.2018 to be reviewed and set aside and that the Interested Party to be enjoined in this matter and that the proceedings herein be declared a nullity. The application is based on grounds that the suit property is registered in the names of ***Kibor Arap Ngisirei*** who is deceased. That the plaintiff/respondent had not taken out letters of administration at the time of instituting the suit and therefore, had no authority to institute these proceedings. The proposed interested party is a daughter of the deceased and therefore, a beneficiary to the estate of ***Kibor Arap Ngisirei*** hence, she has a right to be involved at every stage of proceedings including the estate of the deceased. It is alleged that Romana Singoei to whom the order is made in favour is not a beneficiary to the estate of the deceased. It is alleged that ***Emily Jematia Ngisirei*** has not obtained letters of administration in respect of the estate of the deceased and therefore lacks *"**locus standi.**"*

Grace Jepkogei states that her claims are not and cannot be assumed as she is the daughter to the plaintiff and the allegations that the suit property belonged to the late Kipkorir Arap Mugun who transferred it to his son to hold it in trust for the other sons pending transfer, remain unproved. As a matter of fact, the Respondents herein have not provided/given sufficient reason as to why the said Kiprorir Arap Mugun did not transfer the property to them knowing fully well that they are older than the deceased. She has made this application having been dissatisfied with the order of the court and she believes she is entitled to do so. That these whole proceedings related to the Estate of the deceased person, one Kibor Arap Ngisirei.

That in response to paragraph 7, her Advocate advises her which advise she holds to be true that the Law of Succession Act does not place the Defendant/Respondent anywhere near the first in terms of beneficiaries' hierarchy in succession. As a matter of law, the party to whom the order is made in favour of does not rank anywhere on a beneficiary to the Estate of the deceased.

That in response to paragraph 8, her Advocate advices her which advise she holds to be true, that the Court made the order erroneously and on a mispresentation of facts by the Respondents and indeed the process of succession in matters such as these oughts to precede any such order.

That in response to paragraph 9, the Court order on record does not define any limits as to the estate of use of the said property by the Respondent and as a matter of fact, the 2nd Respondent ROMANA SINGOEI already sold the land even before the Court order was made.

That in addition, the deceased left behind eleven (11) children and a widow all of whom are beneficiaries and who were never parties to the process leading to the granting of the said order. She is a beneficiary to the Estate of the deceased by virtue of being his daughter and therefore she has justified interest in the property and should be enjoined in the proceedings.

She believes that beneficiaries they are entitled to the Estate of their father and her Advocate advises her which advise she holds to be true

that the Respondents can only access and use the property with their permission, which permission they have not given.

That her Advocate further advises her which advise she holds to be true that if the Court order is implemented and the Respondent proceed to use the property as they deem first prior to succession process and the Respondents fail to be included as beneficiaries by the succession court, it will be almost impossible to reverse the present court order.

Romana Singoei on her part states that states that she is a female adult of sound mind and the 2nd Defendant/Respondent with the express authority of the 1st and 3rd Defendants/Respondents herein hence competent and duly authorized to swear this Affidavit. That she has read and had the contents of the Applicant/lnterested Party's Notice of Motion dated 9th July, 2018 together with the affidavit in support thereof and having understood its full meaning and import, wish to respond thereto as hereunder:

The Applicant/lnterested Party is the daughter of the Plaintiff and hence her claim and/or interest are well taken care of. The suit property belonged to the late Kipkorir Arap Mucun who transferred it to his son to hold it in trust for the other sons pending transfer, a fact admitted by the late Kibor Arap Ngisirei, in his sworn affidavit and oral submissions in court on 24th March, 2017 that he was only holding it in trust for himself and his 2 brothers (BENJAMIN SINGOEI and KIPRONO ARAP KORIR). And whom the court had ordered be enjoined before his demise,

That in response to the orders given by the court, the Applicant/lnterested Party was present in court together with the Plaintiff and did not raise any discontent with it. This application is therefore an afterthought and a bid to circumvent the court order.

That they have superior rights to the Applicant/lnterested Party's interest since they rank high in terms of beneficiaries' hierarchy in succession as provided for in the Law of Succession Act of Kenya. The court had earlier directed that succession shall be undertaken after the order of the court has been complied with and the survey has been carried out. That the orders are only for curving out land for usage and not ownership. The issue of ownership shall be decided later in the course of the hearing as well as in succession proceedings.

According to this respondent, the application to enjoin Applicant/lnterested Party at this stage is premature and done in bad faith and as such, the Applicants' application is brought in bad faith and amounts to an abuse of the court process as it is an attempt forestall the Defendants pursuit of the rights to the suit properties.

That the survey work has been scheduled be carried out on 18th July, 2018, wherein the summons has already been served to the respective stakeholders and the Defendants/Respondents have paid the requisite fee to the surveyors and the registrars.

That this is the 3rd time the surveyors are visiting the said property and it is prudent and fair that the court dismisses this application so that the process can finally see the end of the tunnel. That she therefore prays that the application be dismissed with costs to them.

I have considered the application and rival submissions by Mr. Oyaro, advocate for the Interested Party and M/s Romana Singoei and do find that Emily Jematia Ngisirei, the mother to the Interested Party filed the suit herein before the death of her husband claiming that the defendants intend to deprive the family of land parcel No. Moiben/Moiben/Block 2/Segero/693 registered in the names of Kibor Arap Ngisirei. She states that the defendants are brothers to her husband. It was claimed that the defendants had taken advantage of the state of the husband.

The plaintiff also applied for conservatory orders against the respondents restraining them from tilling, ploughing and or occupying 1.5 acres of land on Parcel of land Moiben/Moiben/Block 2(Segero)/699 on the 9.11.2017 in the presence of all parties except Romana Singoei, the court ordered that the status quo to be maintained and that there be no selling, leasing or dealing with the land in any manner until the hearing of the suit and that Nicholas Kibor Ngisirei be enjoined as a defendant.

Moreover, that Romana Singoei to be allowed to utilize 3 acres of land until hearing and determination of the suit. The chief of Segero was to liaise with a surveyor to measure 3 acres to be utilized by Romana Singoei. The court gave parties the 20.12.2017 for hearing.

The interested party now seeks to review the court order made on 28.6.2018 when the initial court order was made on 9.11.2017. The orders made on 28.6.2018 was for the enforcement of the court order made on 9.11.2017.

This court reiterates the law that a review under Order 45 of the Civil Procedure Rules and section 80 of the Civil Procedure Act only applies when there is an error apparent on the face of record or discovery of a law and important matters that could not be discovered after due diligence at the time the order was made.

In **Kwame Kariuki & Another Vs. Mohamed Hassan Ali & 4 Others [2014] eKLR,** the Court observed that: -

"It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."

On the purpose of review, ***Mwihoko Housing Company Limited Vs Equity Building Society [2007] 2 KLR 171*** is relevant. It was held, inter alia: - ***"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a***

ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;

"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"

The Court further took from a commentary by Mulla on similar provision of the Indian Civil Procedure Code, 15th Edition at page 2726 thus:

> **"Application on this ground must be treated with great caution and as required by rule 4 (2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that existence of the evidence was not within his knowledge,** where review was sought for ***on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of view and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."***

The court finds that the applicant's father is already a party to the proceedings as a defendant therefore, the issue of the suit be a nullity does not arise. The plaintiff filed the suit before the death of the proprietor of the parcel of land hence did not require letters of administration to file the suit as the proprietor was still alive.

I do find the application for review under Order 45 of the Civil Procedure Rules, 2010 not merited as it raises no error apparent on the face of record and no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the applicant when the order was made. Moreover, the interested party cannot be enjoined in the suit as she is not the legal representative of the deceased who is already a party to the proceedings. The logical action to be undertaken by the applicant is to apply to substitute the deceased father. The application is dismissed with no orders as to costs being a family dispute.

Dated, signed and delivered at Eldoret this 17th day of July, 2018.

A. OMBWAYO

JUDGE