



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 124 OF 2007

PETER MANONO MOGIRE.....PETITIONER

AND

JAMES OMARI MOGIRE.....2ND RESPONDENT

MESHACK OGECHI MOGIRE.....2ND RESPONDENT

RULING

1. The application dated 26th September 2016 is brought under **Order 46 Rules 1, 2 and 4 of the Civil Procedure Rules, Rules 49, 59, 63 and 73 of the Probate and Administration Rules, Section 71 and 73 of the Law of Succession Act.**

2. The applicant seeks the review, variation and/or setting aside of this court's order made on 27th July 2015, the reinstatement of the grant of letters of administration issued on 18th April 2009 and confirmed on 5th March 2010 and a notice to the Land Registrar and the District Surveyor, Kisii County to show cause why they have neglected to implement this court's orders of 2nd March 2011.

3. The application is supported by the affidavit of 1st Petitioner/Applicant, PETER MANONO MOGIRE dated 26th September, 2016 in which he depones that upon issuance and confirmation of the grant of letters of administration in respect to the estate of the deceased herein, the beneficiaries sought court orders to compel the Land Registrar and District Surveyor, Kisii County to execute the sub-divisions as decreed by the court and a court order to that effect was served upon them to sub-divide **LR NO. NYARIBARI CHACHE/B/B/BOBURIA/516** (hereinafter "**the suit land**"). The applicant states that he subsequently paid the requisite survey charges to the Land Registry but the said officers failed to act on the court order thereby prompting him to apply for a notice to show cause to the Land registrar and District Surveyor as shown in a letter marked "PMM6" attached to the applicant's affidavit.

4. He states that despite concerted efforts to follow up on the notice to show cause to be issued by the court, the same was not issued on time or at all and that the court file thereafter went missing only to resurface/or be retrieved on 19th September 2016 when the applicant's counsel discovered that the grant issued on 18th April 2009 had inadvertently been revoked on 27th July 2015 during the Judiciary Service Week that was dubbed "Justice at Last."

5. The applicant contends that his advocates was never notified about impending revocation of grant and that in any case, upon the confirmation of grant on 5th March 2010, the grant of letters issued on 18th April 2009 ceased to exist and was hence not available for revocation as the issues pertaining to the

estate of the deceased had been resolved during the confirmation.

6. The applicant's case is that the court's orders of 27th July 2015 were therefore made in error and without compliance with the rules of natural justice.

7. The respondents did not file any replying affidavit (s) to the application and thus the same proceeded ex parte.

8. When the application came up before me for hearing on 26th October 2016, Mr. Ochwangi for the applicant submitted that the estate of the deceased had already been distributed and that what remained was the actualization/execution of the said distribution by the Land Registrar and the district surveyor.

9. I have considered the application dated 26th September 2016 together with the annexures attached to the affidavit in support of the said application. It is abundantly clear to me that the grant issued to the petitioner on 18th April 2009 was confirmed 5th March 2010 when this court (differently constituted) ordered that the suit land comprising of 33 acres be shared equally among the 3 beneficiaries.

10. I therefore concur with the submissions by counsel for the applicant and the averments of the applicant in his affidavit in support of the application that all the issues revolving around the estate of the deceased had been determined by the court during the confirmation of the grant and that there was indeed an error on the part of the court in suo moto, revoking the grant which had already been confirmed.

11. **Order 45 Rules 1 and 2 of the Civil Procedure Rules** stipulates as follows:

[Order 45, rule 1.] Application for review of decree or order.

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

[Order 45, rule 2.] To whom applications for review may be made.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.”

12. Going by the provisions of the above order, I am satisfied that this instant application is merited and I therefore allow it in terms of prayers 1, 2, and 3. Each party shall bear his own costs of the application.

Dated, signed and delivered in open court this 14th day of December, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

- Miss Mineri for Petitioner
- N/A Abobo for the Respondent
- Omwoyo: court clerk



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