



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 41 OF 2016

(Formerly Migori Senior Principal Magistrate's Succession Cause No. 408 of 2005)

IN THE MATTER OF THE ESTATE OF MAGANGI OBUKI (DECEASED)

-between-

PATRICK ARASA MAGANGI..... OBJECTOR/RESPONDENT

-versus-

JOHN GATI O'BOKE.....PETITIONER/APPLICANT

RULING NO. 2

1. This ruling relates to the Notice of Motion dated 23/03/2017 which seeks the following orders: -

1. THAT this application be certified as urgent, and be heard ex-part in the 1st instance and service be dispensed with.

2. THAT the ruling and subsequent orders of this court delivered and made on 27th February 2017 be stayed, pending the hearing of this application, inter partes.

3. THAT the confirmed Grant of letters of Administration which were issued to the applicant on 25th November 2005 be reinstated / reissued to the respondent pending the hearing and determination of this application.

4. THAT pending the hearing and determination of this application, this Honourable court does preserve estate property being L.R. No BUGUMBE /MASABA /111.

5. THAT the ruling and subsequent orders of this court delivered and made on 27th February 2017 be stayed, pending the hearing and final determination of this application.

6. THAT the ruling and subsequent orders of this court delivered and made on 27th February 2017 be set aside and/or be varied accordingly.

7. THAT proceedings leading to the cancellation of the applicants title of LR. NO. BUGUMBE/ MASABA /111 Kehancha Land Registry in refence to the Ruling and order dated 27th February 2017 be nullified / set aside and the applicant's title be reinstated.

8. THAT the land Registrar Kehancha be ordered to revert ownership of LR. NO. BUGUMBE/MASABA /111 to the applicant, JOHNES GATI O'BOKE.

2. The application is supported by the Affidavit of Learned Counsel Mr. David Kerario Marwa evenly sworn on 23/03/2017 and is strenuously opposed by the Respondent herein through his Replying Affidavit sworn and evenly filed on 19/04/2017. I will henceforth refer to the application as '**the instant application**'.

3. The brief background to the instant application is that the Applicant/Original Petitioner herein petitioned for and was granted the representation of the estate of the deceased herein, **Magangi Obuki** on 25/11/2005 by the **Migori Principal Magistrate's Court in Succession Cause No. 408 of 2005**. The Grant was subsequently confirmed and the parcel of land, **BUGUMBE/MASABA/111** (hereinafter referred to as '**the suit land**') which was initially registered in the name of the deceased was transferred to the Applicant's name.

4. Sometimes in June 2016, the Respondent/Objector filed an application for the revocation of the Grant. Before settling that application for hearing, another application was filed by the Applicant on the directions on this Court. That was the Notice of Motion dated 16/08/2016 which sought orders to stay this cause pending the hearing and determination of a criminal case against the Applicant being **Migori Chief Magistrate's Criminal Case No. 3387 of 2016 Republic vs. Johnes Gati Oboke**. I will henceforth refer to that application as '**the stay application**'.

5. With the concurrence of the parties herein, directions were made by this Court (**Omondi, J.**) on 09/11/2016 on the hearing of the stay application *inter alia* that it be heard by way of written submissions and parties were directed on timelines within which to file and serve their respective written submissions. Both parties complied and a ruling was delivered on 27/02/2017 which ruling is the subject of the instant application.

6. The instant application was heard by way of oral submissions where **Mr. Jura** Learned Counsel appeared for the Applicant and **Mr. Abisai**, Learned Counsel appeared for the Respondent.

7. The gist of the instant application is that there is an error on the face of the record which ought to be remedied by way of review. The Applicant contend that the Court erred in the said ruling as it considered and found for the stay application as well as the application for revocation of the grant and yet the application for revocation of the grant was never heard. He further contends that he was unfairly condemned unheard as far as the application for revocation of the grant is concerned and prays that the situation be remedied by the instant application so as to accord him an opportunity to participate in the hearing of the application for revocation of the grant at the opportune time.

8. Opposing the instant application, the Respondent invites this Court to find that the impugned ruling substantively dealt with and resolved the entire dispute between the parties and that the Court acted within its discretion as donated by **Section 76** of the **Law of Succession Act**, Chapter 160 of the Laws of Kenya which allows a Court to revoke a grant even on its own motion. The Respondent, in calling this Court to be alive to the Applicant's intention to endlessly delay the conclusion of this matter, submitted that the application for revocation of the grant was indeed considered by the Court and was found meritorious. The Respondent also took issue with the jurisdiction of this Court (**Mrima, J.**) in reviewing the orders made by a Judge who no longer is at the station. He further opposed the application in arguing that the Law of Succession Act did not provide for the application of Civil Procedure Rules hence the instant application, having been brought under the provisions of the Civil Procedure Rules, cannot see the light of the day.

9. I have carefully perused the instant application and the entire record. Since there are two preliminary issues raised by the Respondent; one on the jurisdiction of this Court and the other one on the competency of the instant application, I will first deal with those issues.

10. On jurisdiction, the *locus classicus* case of **The Owners of Motor Vessel "LILIAN "S" -vs- Caltex Oil Kenya Ltd (1989) 1 KLR 1** settles it all in the words of Nyarangi, JA. at page 14 that: -

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

11. Further the Court of Appeal in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction:-

"So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain."

12. That being the legal position, this Court must satisfy itself that it is vested with jurisdiction before it deals with any other issue. The instant application is brought under **Order 45** of the **Civil Procedure Rules, 2010** (hereinafter referred to as '**the Rules**') as read with **Sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act**. As reiterated elsewhere above, the instant application seeks to review the orders made on 27/02/2017 by **Omondi, J.** who is no longer attached to this station. **Order 45 Rule 2(2)** of the Rules settles the issue as follows: -

"2(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."

13. The first objection therefore fails. On the competency of the instant application, I got the Respondent to say that the Law of Succession Act (hereinafter referred to as '**the Act**') is a complete self-regulating regime and has no room for the application of the Civil Procedure Act and the Rules. The answer to that lies in **Rule 63** of the **Probate and Administration Rules** which provides as follows: -

"63(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a register in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules , namely Orders V, X, XI, XV, XVIII,XXV, XLIV and XLIX (Cap.21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap.8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules."

14. Suffice to mention that the Probate and Administration Rules are yet to be amended as to conform with the amended Civil Procedure Act and the Rules. To that end it appears that **Rule 63** of the Probate and Administration Rules does not mention the current **Order 45** of the Rules which was **Order XLIV** before the said amendments in 2010. To me, Rule 63 of the Probate and Administration Rules should be applied while considering the amendments in the Rules accordingly. Whereas I agree with the submission by Mr. Abisai to the extent that the Act provides a complete self-regulating regime, I add that

the very Act makes provision for the application of part of the Rules including the review of decrees and orders. The instant application is hence not incompetent.

15. Having disposed of the preliminary issues, I will now turn to the merits or otherwise of the instant application. A reading of the impugned ruling reveals that the Court dealt with the stay application and the application for the revocation of the grant altogether and delivered itself. Infact the stay application was deemed as the response to the application for the revocation of the grant. The record however has it that it was the stay application which was for consideration and not the application for the revocation of the grant. That position is supported by the reading of the written submissions filed by the parties. Therefore, the application for the revocation of the grant was yet for the Court's consideration. The Applicant is hence right in raising a red flag that he was not heard on the application for the revocation of the grant. That right is constitutionally guaranteed in **Article 50 (1)** of the **Constitution** which is tailored as follows: -

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.”

16. One of the tenets of the right to be fairly heard enshrines an opportunity to present one's case in a matter before Court or any Tribunal or body as by law established regardless of the possible outcome. That right cannot be taken away under any circumstances whatsoever. **Article 25** of the **Constitution** expressly provides for that position. Needless to say, there is a chain of concurrent decisions on this cardinal issue.

17. With tremendous respect to the Learned Judge and my Sister, I have to find that indeed there is an error on the face of the record. For clarity purposes, the error is that the Court dealt with the twin applications instead of only dealing with the stay application which was the one scheduled for hearing and on which the parties had made submissions on. I further find that the error can be rightly remedied by way of review and not necessarily by an appeal.

18. The instant application is hence merited. I however add that there is every reason to have an early determination of the issues at hand moreso given that they are hinged on the emotive subject on land. Consequently, in striking a balance on the best way forward, the following final orders hereby issue: -

- a) **The ruling of this Honourable Court delivered on 27/02/2017 be and is hereby set aside.**
- b) **The Grant issued to JOHNES GATI O'BOKE on 25/11/2005 and subsequently confirmed on 08/09/2006 be and is hereby reinstated and the registration of the parcel of land known as BUGUMBE/MASABA/111 in the name of JOHNES GATI O'BOKE is reinstated.**
- c) **Parties shall now take directions on the hearing of the twin applications before this Court today.**

DELIVERED, DATED and SIGNED at MIGORI this 29th day of June 2017

A. C. MRIMA

JUDGE



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