



REPUBLIC OF KENYA



**In re Estate of Jason Wagikuri Giticha (Deceased) (Succession Cause
95 of 2013) [2024] KEHC 15034 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15034 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
SUCCESSION CAUSE 95 OF 2013
CW GITHUA, J
NOVEMBER 28, 2024
IN THE MATTER OF THE ESTATE OF JASON WAGIKURI GITICHA**

BETWEEN

JESSE MURACHIA GIKURI APPLICANT

AND

MARTHA MUKAMI GIKURI RESPONDENT

RULING

1. By his Notice of Motion dated 18th February 2020, the applicant, Jesse Macharia Muraya moved this court seeking review of orders made by this court (Hon. Kimondo J) in a Judgment delivered on 29th March 2019.
2. The applicant was aggrieved by the aforesaid Judgment in which Kimondo J declined to revoke the grant of letters of administration issued on 14th February 1985 to the respondent and her sister Rahab Wanjiru Gikuri (now deceased) in respect of the Estate of Jason Wagikuri Giticha which were confirmed by the Resident Magistrate's court at Murang'a on 13th November 1986.

The court record shows that the deceased was the respondents father while the applicant was his grandson. He was the son of the deceased's late son Cornelius Muraya. The applicant was also the administrator of his late father's Estate.
3. In the grounds premising the Motion and in depositions made in his supporting affidavit, the applicant contended that the reason the court declined to revoke the grant as prayed was because of its finding that the applicant's late father Cornelius Muraya (hereinafter Cornelius) and his Uncle Festus Muracha (hereinafter Festus) had each been gifted with a parcel of land by the deceased in his life time being land title No Loc 19/Gacharageini/816 and Loc. 19/Gacharageini/817 respectively; that the respondent's claim that the deceased had gifted his two sons with the said parcels of land as gifts



- inter vivos was made when the respondent was giving evidence viva voce during the hearing and he did not therefore have an opportunity to produce evidence to rebut the claim.
4. It was the applicants case that after the hearing, he made several visits to the Murang'a Land Registry and it was only on 6th February 2020 that he obtained copies of green cards showing that Festus and Cornelius were the first registered owners of the aforesaid parcels of land; that with the exercise of due diligence, he could not have produced those copies of green cards as evidence during hearing of the summons for revocation of grant in the year 2013.
 5. Further, the applicant averred that no evidence was adduced before the court in the form of a deed, instrument in writing or a declaration of trust to prove that his late father and uncle received the aforesaid parcels of land from the deceased as gifts inter vivos; that the evidence he wanted to introduce amounted to proof that there were no such gifts; that had such evidence been placed before the court, it would have arrived at a different conclusion.
 6. The application was contested by the respondent vide her replying affidavit sworn and filed on 18th October 2023. The respondent averred that the applicants' summons for revocation of grant was dismissed on merit given the evidence that was placed before the court. She invited the court to note that during demarcation and adjudication of lands in Kenya, land was not being registered in the names of women and that was how her two brothers became the first registered owners of the two parcels of land; that the application was a belated effort to take this court for a ride and should be dismissed with costs.
 7. In response to the respondents replying affidavit, the applicant filed a further affidavit dated 13th March 2024 in which he claimed that the replying affidavit was incurably defective for being undated and ought to be struck out. He further averred that his father (Cornelius) acquired Loc. 19/ Gacharageini/816 (hereinafter the suit property) on his own and it was thus unlawful and unjust for him to be locked out of his inheritance on the wrongful assumption that he had inherited the suit land as a gift inter vivos; that unless the orders sought were granted, his father's Estate will suffer a violation of its proprietary rights which would amount to irreparable loss and harm; that it was in the interest of justice that the application be allowed as allowed.
 8. The respondent in response filed a further affidavit on 25th May 2024 without leave of the court. The affidavit was patently defective since it was not dated nor attested by a Commissioner for Oaths as required by the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya. For the above two reasons, the affidavit is hereby struck out.
 9. The application was prosecuted before me on 27th May 2024 by way of oral submissions. At the hearing, the applicant was represented by his learned counsel Mr Onani while the respondent argued her case in person.
 10. Having considered the application and the oral submissions made by both parties, I find that only one key issue emerges for my determination which is whether the applicant had demonstrated that he was deserving of the orders of review of this courts Judgment dated 29th November 2019 as sought.

But before addressing this issue, I wish to first deal with the preliminary point raised by the applicant to the effect that the replying affidavit filed by the respondent was incurably defective for being undated and ought to be struck out.
 11. I have perused the said replying affidavit and whereas it is true that the same was not dated, the same is duly executed by the respondent and attested to by a Commissioner for Oaths. It is not lost on me that under Section 5 of the *Oaths and Statutory Declarations Act*, a Commissioner for Oaths before



whom any oath or affidavit was taken was required to state in the Jurat or attestation the place and date the oath or affidavit was taken or made.

12. That said, it was my considered view that the mere omission of a date on which an otherwise duly executed and commissioned affidavit was made cannot by itself make such an affidavit incurably defective as to warrant the drastic action of striking it out. The omission of a date in an affidavit cannot affect the authenticity of the deponent or the credibility of depositions made therein.
13. In *the Constitution* of Kenya 2020 at Article 159 (2)(d), courts are directed to rise above strict adherence to rules of procedure and legal technicalities and are instead encouraged to dispense substantive justice. In my opinion, striking out the replying affidavit for the reason cited by the applicant will be elevating matters of form to a higher pedestal than substantive justice. It would in effect sacrifice substantive justice at the alter of procedural or legal technicalities.
14. To buttress my finding above, I wish to rely on the Court of Appeal's decision in *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 6 others* [2013] which when emphasizing the need to dispense substantive justice stated as follows:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

In view of the foregoing, I decline to accept the applicant's invitation to strike out the replying affidavit filed by the respondent.

15. Turning now to the crux of the application which is whether this court should vary its orders of 29th November 2019 to enable the applicant introduce further evidence, I wish to start by observing that although not all Rules of Procedure codified in the *Civil Procedure Rules* (CPR) are applicable to succession causes, Rule 63 of the Probate and Administration Rules (P&A Rules) explicitly provides that Order 45 of the CPR which govern review of court orders and decrees was applicable to succession proceedings:

See: Rule 63 of the P & A Rules; *John Mundia Njoroge & 9 others V Cecilia Muthoni Njoroge & Another* [2016] 6254(KLR).

16. Order 45 Rule I provides as follows:

“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.”

17. From the above provision, it is evident that in order to succeed in application seeking review of a decree or a court order, the applicant must demonstrate to the satisfaction of the court any of the following conditions;
 - i. That he had discovered a 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 the decree was passed or order made.
 - ii. That there was some mistake or error apparent on the face of the court record; or
 - iii. That he had any other sufficient reason which would entitle him or her to the review sought.
18. In this case, the applicant’s application is based on grounds that he had discovered new and important evidence which with the exercise of due diligence could not have been produced by him during hearing of the application for revocation of grant. The new evidence he wanted to be allowed to produce were copies of green cards in respect of the suit properties showing that Cornelius and Festus were the first registered owners of the parcels of land in question.
19. The applicant has claimed that he did not have an opportunity to seek and obtain the copy of said green cards and have them produced during the hearing because the respondent only made her claim that the suit properties had been bequeathed to Cornelius and Festus as gifts inter vivos when she was giving her evidence during the hearing; that he did not therefore have time or opportunity to adduce evidence to rebut her claim.
20. A perusal of the replying affidavit filed by the respondent on 26th November 2013 in response to the applicants summons for revocation of grant however shows that the applicant’s claim was not truthful. At paragraph 11 thereof, the respondent clearly articulated her position that the summons filed by the applicant was not merited since the deceased had in his lifetime gifted her brothers Cornelius and Festus with the suit properties which was supposed to be their inheritance.
21. As stated earlier, the affidavit was filed on 26th November 2013. The court record shows that hearing of the summons for revocation of grant kicked off on 3rd June 2019, about six years later. Even before hearing commenced, the court record shows that as early as 25th July 2016, Mr. Mbutia, learned counsel then on record for the applicant when seeking directions on mode of disposal of the summons, made reference to the replying affidavit and the respondent’s claim that Cornelius had already received his inheritance. It cannot therefore be true that the applicant only learnt of the respondent’s claim for the first time during her testimony.
22. The applicant was therefore aware of the claim of the alleged gift inter vivos since November 2013 and had he exercised due diligence, he would have been able to obtain the copy of green cards he wished to introduce at this late hour well before date fixed for hearing of his summons for revocation of grant.
23. Moreover, a perusal of copies of the aforesaid green cards shows that they were opened way back on 11th March 1963, over 50 before the hearing date. They were therefore available for all those years for issuance to anyone who applied for them. In the circumstances, the applicant cannot be heard to say that he could not have obtained them with the exercise of due or reasonable diligence prior to the hearing date.
24. For the above reasons, I have come to the conclusion that the copies of green cards relied on by the applicant in support of his application do not qualify to be new and important evidence which the



applicant could not have obtained and produced at the hearing with the exercise of due diligence. It is therefore my finding that this application lacks merit and it is hereby dismissed with costs to the respondent.

25. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 28TH DAY OF NOVEMBER, 2024.

HON. C.W. GITHUA

JUDGE

In the presence of:

The applicant present in person

Mr. Onani for the Applicant absent.

The respondent present in person

Ms. Susan Waiganjo, Court Assistant

