



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

In re Estate of Mwangi Gathenya Wachira (Deceased) (Succession Cause 424 of 2012) [2023] KEHC 26312 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26312 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 424 OF 2012
SM MOHOCHI, J
NOVEMBER 23, 2023**

BETWEEN

JULIUS GATHENYA APPLICANT

AND

HANNAH WANJIRU GATHENYA 1ST RESPONDENT

ESTHER NYAWIRA GATHENYA 2ND RESPONDENT

JOHN NJOROGE GATHENYA 3RD RESPONDENT

GEORGE GATHENYA 4TH RESPONDENT

HARRISON KINYUA 5TH RESPONDENT

RULING

1. Before me are two applications the 1st one dated 28th February 2017 by Esther Nyawira Gathenya, (hereinafter the referred to as the 1st Application), seeking an account of the estate (for the period 10th December 2017 to-date), from the 1st, 3rd 4th, and 5th Respondents, that, the 3rd Respondent be replaced by herself and that an Agent be appointed for rent collection the 2nd Application is a Summons for annulment/ Revocation of grant, dated 1st February 2022 filed pursuant to Sections 40,76 (b) (c), and 84 of *Law of Succession Act* and Rules 44(1), 49 and 73 of the *Probate and Administration Rules* and is supported by a sworn Affidavit of Julius Gathenya dated 15th February 2022.
2. The 2nd Application dated 1st February 2022 seeks the following reliefs:
 - i. Spent
 - ii. That this Honorable Court be pleased to vary or set aside its own judgment issued on 1st February 2017.
 - iii. Spent



- iv. That the letter of Administration intestate, in respect of the deceased who died on 10th December 2007 be revoked and or annulled on the following reasons:
 - a. That the grant was obtained fraudulently by making of a false statement or concealment from the Court something material to the case.
 - b. That the grant was obtained by means of un-true allegation of a fact extremely essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
3. The 2nd Application dated 1st February 2022 is premised on the following grounds:
 - a. That the Administrators of the estate did jointly or severally concealed from this Honorable Court, a fact which was very essential point to justify equal distribution of the estate to all beneficiaries.
 - b. That the Orders issued by this Honorable Court on 31st January 2022. have adversely affected the 3rd family- The House of Margaret Gathenya (Deceased) and her heirs or successors.
 - c. That the matrimonial home of the 3rd house is in a property known as LR NO. 448/12 and the same has been Ordered that it be distributed in common, without factoring in the interests and the fact that it was the matrimonial home of the 3rd house- the house of Margaret Gathenya (Deceased) and her heirs or successors.
4. This Court directed that the two applications shall jointly be heard and all parties were afforded an opportunity to file written submissions and none of them complied, leaving the Court to render ruling on the basis of the two bare Applications, And;
 - a. The Supporting affidavits and replying Affidavits by Hannah Wanjiru Gathenya Dated 6th March 2018, 14th May 2018, and 19th September 2018,
 - b. The Applicant's (Esther Nyawira) further Affidavit Dated 6th June 2018,
 - c. The Court Orders dated 5th November 2018 and 8th November 2021,
 - d. The 2nd Respondent's (Esther Nyawira) replying Affidavit Dated 31st March 2022,
 - e. The Replying Affidavits by Hannah Wanjiru Gathenya (1st Respondent) Dated 30th March and 30th May 2022; and
 - f. The Replying Affidavits by George Gathenya (2nd Respondent) Dated 30th May 2022;
5. Without using too much ink to regurgitate what has been said in support or opposition it is important to all recall where we are coming from.
 - a. Final Judgment was entered on 1st February 2017 by Hon Justice A. K Ndungu this is almost seven (7) years ago. The judgment was never appealed.
 - b. Both Applications are thus filed long after judgment and the 1st Application curiously does not specify pursuant to what provisions of the law the same has been filed?
 - c. The 2nd Application is filed pursuant to Sections 40,76 (b) (c), and 84 of Law of Succession Act and Rules 44(1), 49 and 73 of the Probate and Administration Rules.



- d. The 1st Application was filed 27 days after judgment seeking replacement of a deceased administrator (John Njoroge Gathanya), accounting by the other administrators and an appointment of an agent to collect rent.
6. The jurisdiction to review of decisions of a probate Court is governed by Rule 63 of the *Probate and Administration Rules*, which provides as follows: -

“63. Application of *Civil Procedure Rules* and High Court (Practice and Procedure) Rules

- (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the Court or a registrar 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.
- (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

7. In the case of *John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another* [2016] eKLR, the Court had this to say with regards to Rule 63 of the *Probate and Administration Rules*:

“As stated above, the only provisions of the *Civil Procedure Rules* imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the *Civil Procedure Rules* imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the *Civil Procedure Rules*.”

8. A party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 (1) of the *Civil Procedure Rules* which provides that;

“1. Any person considering himself aggrieved—

- (1) (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”

9. Order 45 provides for three circumstances in which an order for review can successfully be made, the Applicant must satisfy and show-case to the Court any of the three circumstances:
 - i. there has been 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. A party may successfully apply for review,
 - ii. secondly, if he can demonstrate to the Court that there has been some mistake or error apparent on the face of the record.
 - iii. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.
10. It is trite law that an application for review should be made without unreasonable delay. I am of the view that, the 2nd Application fails on that front, as no reason whatsoever has been offered, as to why the Applicant who has all along been available and also has been represented as the 3rd house, by Harrison Kinyua and never moved Court in a timely manner for the last five (5) years. The delay is apparent and would thus require persuasive ventilation.
11. In *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR, the Court had occasion to deal with cases of apparent long delay in seeking review, by holding that:

“One thing is clear in this application. The delay of one year has not been explained. Perhaps, it’s important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads “... may apply for review of judgement to the Court which passed the decree or made the order without unreasonable delay.”

The logical question that follows is, was the present application made without unreasonable delay” Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in Court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay.

Such a long delay must be sufficiently explained.”
12. With regards to the 1st Application this Court finds that a continuing trust exists in the estate of the deceased warranting entertainment of the Application to facilitate the continuity of the Trust.
13. I wish to clarify that all parties are from the three houses of the deceased and as such any of the houses should be able to change its trustee and that the other houses must accept such a replacement so long as the house replacing the trustee, has so appointed the replacement. In other words, if a trustee is deceased the house of which he represented should proceed to replace him as a trustee by notifying the surviving trustees who should facilitate the new trustee as a new signatory to the joint bank accounts.
14. As for the prayer for accounting the issue had been dealt with by Order dated 5th November 2018 and 8th November 2021 no material has been laid to warrant such a relief once more.



15. This Court finds validity and merit in the prayer sought Substituting the John Njoroge Gathenya Deceased as a trustee with Applicant-Esther Nyawira Gathenya who shall now represent the 1st House as a trustee holding LR. NO.448/12 and signatory to the joint account managed by George Gathenya and Harrison Kinyua.
16. Accordingly, the Court partially allows the 1st Application, and disallows the 2nd Application in its entirety on the following terms: -
- i. The 2nd Application dated 1st February 2022 is hereby dismissed for want of merit.
 - ii. An Order is hereby issued, substituting John Njoroge Gathenya Deceased with Esther Nyawira Gathenya as a trustee.
 - iii. For avoidance of doubt, Esther Nyawira Gathenya joins George Gathenya and Harrison Kinyua as a trustee holding LR NO.448/12 and a Co-signatory to the joint account KCB Bank Eldama Ravine Branch A/C No1105473163
 - iv. This being a family matter parties shall bear their respective costs.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 23RD DAY OF NOVEMBER, 2023.

S. MOHOCHI

JUDGE

4

