



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 537 OF 2004**

**IN THE MATTER OF THE ESTATE OF JARED GITAU GICHUHI (DECEASED)**

**PAULINE WANJIKU KAMAU.....APPLICANT/ADMINISTRATOR**

**VERSUS**

**NIXON MBURU.....RESPONDENT/ADMINISTRATOR**

**RULING**

1. The deceased herein died intestate on 28<sup>th</sup> September 2003. He left a widow and six children namely Robinson Gichuhi, Pauline Gichuhi, Edwin Gichuhi, Hellen Gichuhi, Nixon Mburu and Edward Mburu. A grant of letters of administration intestate was on 26<sup>th</sup> April 2004 made to his widow Eddah Njeri Gichuhi as the sole administratrix. The said grant was confirmed on 26<sup>th</sup> January 2009 thereby devolving the entire estate to the administratrix.

2. Before completing administration of the estate, the administratrix died on 13<sup>th</sup> April 2011 leaving part of the estate unadministered.

3. Due to lack of an administrator to complete the administration of the estate, one of the sons Nixon Mburu moved the court vide an application dated 13<sup>th</sup> May 2019 seeking annulment or revocation of the grant on grounds that it had become useless or in-operative by virtue of the sole administratrix's death. That application was vehemently opposed by his sister Pauline Wanjiku vide her replying affidavit sworn on 1<sup>st</sup> October 2012 claiming that the properties had devolved to their mother and that they had filed a succession case in Kikuyu Law Courts.

4. After considering the application for revocation, the court found that part of the estate had not been transferred into the deceased administratrix's name. Among the properties that had not fully devolved is LR No. Dagoretti/Thogoto/1494 which the court directed that the unadministered property be redistributed afresh amongst the surviving beneficiaries.

5. Accordingly, the court made the following orders:

**(a) The grant issued to the deceased herein on 26<sup>th</sup> April 2004 and confirmed on 26<sup>th</sup> January 2009 is hereby revoked on account of being in-operative and useless.**

**(b) In place of the deceased administratrix and applying this court's discretion, Pauline Wanjiku Kamau and Nixon Mburu Gichuhi are hereby appointed as joint administrators for purposes of completing administration of the remaining part of the estate.**

**(c) The appointed administrators in consultation with the other beneficiaries to agree on how to redistribute the remaining property i.e. L.R. Dagoretti/Thogoto/1494 and file a consent on the agreed mode of distribution within 30 days.**

**(d) In the event they are not able to agree, one of them can move the court with the consent of all beneficiaries to redistribute the said property.**

**(e) Each party to bear own costs.**

6. Contrary to the court's directions, Pauline Wanjiku Kamau one of the estate administrators filed a Chamber Summons dated 7<sup>th</sup> September 2020 jointly with Edwin, Hellen, Robinson and Edward her siblings seeking orders that;

**(1) Spent.**

**(2) That there be a stay of the orders made in the ruling of this honourable court dated 30<sup>th</sup> June 2020 pending the hearing and determination of this application.**

**(3) That the ruling delivered on 30<sup>th</sup> June 2020 be reviewed and Pauline Wanjiku Kamau be appointed the sole administrator of the estate of Jared Gitau Gichuhi.**

**(4) That Nixon Mburu be and is hereby discharged as an administrator to the estate of Jared Gitau Gichuhi.**

**(5) That the honourable court be pleased to issue an order of temporary injunction to restrain the respondent, himself, his agents, servants, employees and/or proxies from alienating, leasing, moving onto, laying claim to, interfering, wasting, developing, fencing, carrying out any works on, constructing or in any other manner dealing or intermeddling with title number Dagoretti/Thogoto/1494 pending hearing and determination of this cause.**

**(6) That this honourable court be pleased to issue an order of mandatory injunction to compel the 1<sup>st</sup> respondent himself, his agents, servants, employees and/or proxies to forthwith cease intermeddling with the deceased's properties and in particular the property known as Dagoretti/Thogoto/1494.**

**(7) That the OCS Kikuyu Police Station be and is hereby ordered to investigate authenticity of signatures affixed on the consent dated 7<sup>th</sup> July 2020 and that the orders issued by this honourable court are fully complied with.**

**(8) That in the alternative, the honourable court do make such other interlocutory orders as it may deem just and expedient pending the hearing and determination of this application.**

7. The application is premised upon grounds stated on the face of it and an affidavit sworn by Pauline Wanjiku Kamau. According to the applicant, Nixon Mburu is not of sound mind hence not fit to administer the estate. To prove that allegation, Pauline attached a letter from Chief Inspector of Schools Ministry of Education dated 24<sup>th</sup> June 1991 and Doctor W.J. Muya's medical report dated 22<sup>nd</sup> May 1991 in which the doctor said he had assessed the respondent and made a diagnosis of academic under achievement due to mental subnormality (See annexure MWK5).

8. She further averred that due to Nixon's mental illness, some people have taken advantage of him and proceeded to illegally lease out the main house without consent of the applicant. A copy of the alleged lease agreement marked PWK6 between Nixon Mburu and Stephen Macharia Maina dated 2<sup>nd</sup> July 2020 in which Nixon was named as lessor of all that property known as Dagoretti/Thogoto/1494 being 6 bedroomed house at Kshs.120,000/= rent for the 1<sup>st</sup> year of the lease was attached (See annexure PWK-6).

9. She further stated that the said Nixon is not capable of even signing any document hence the feeling that 3<sup>rd</sup> parties will take advantage of him. She prayed that Nixon be subjected to medical mental assessment to determine his mental status.

10. In response, Nixon filed a replying affidavit sworn on 28<sup>th</sup> September 2020 stating that he is mentally fit. He challenged the applicant to produce evidence that he was mentally unfit. He averred that he was the one who was taking care of his parents by driving them to hospital when they were sick.

11. He further averred that, the allegation that he cannot read or write is false as he operates a smart phone which he uses to make calls and send text messages; that he has a wife with four children and the allegation that he has one child is not true; that the applicants have filed the application in bad faith with the intention of disinheriting him; and that the prayer that his share be registered in trust for his minor child is illegal with the sole purpose of disinheriting him.

12. He admitted leasing the property in question claiming that the property was granted to him and his parents had sold three plots to educate the applicants abroad while he obtained local education and driving skills as he took care of his parents.

13. He averred that he ought to get a bigger share of the estate. He acknowledged that it was an oversight for the lawyer who drew the lease to have indicated that he was the sole beneficial owner. That Pauline Wanjiku is married and to seek equal share is purely greed.

14. When the matter came up for hearing, Mr. Njoroge for the applicants basically adopted the averments contained in the affidavit in support of the application. He emphasized on the fact that the respondent is a person of unsound mind and that the act of leasing the property is illegal.

15. Mr. Nduku appearing for the respondent also adopted the content contained in the replying affidavit urging that the respondent had a right to lease the property he has been occupying and that what he did was in good faith. He submitted that his client is a slow learner but he manages his affairs well.

#### **Determination**

16. I have considered the application herein, response thereto and oral submissions by both counsel. Issues that emerge for determination are:

**(a) Whether the applicants have met the threshold for review orders to apply.**

**(b) Whether the respondent's act of leasing out the property known as Dagoretti/Thogoto/1494 was legal and regular.**

17. There is no dispute that on 30<sup>th</sup> June 2020 this court appointed Pauline Wanjiku and Nixon Mburu as joint-administrators for purposes of completing administration of the unadministered part of the estate and in particular LR Dagoretti/Thogoto/ 1494 in which a residential house stands.

18. The applicants are alleging that the respondent their brother is of unsound mind hence incapable of administering the estate and therefore a ground to review the orders of 30<sup>th</sup> June 2020 appointing him as co-administrator.

19. The application herein is brought under Section 45, 47 and 56 (1) (a) of the Law of Succession Act. Section 45 deals with intermeddling of the estate while Sections 47 and 56 of the Law of Succession Act deal with issues relating to gifts.

20. However, the provision governing review orders under the law of Succession is Order 45 originally Order 44 of the Civil Procedures Rules pursuant to rule 63 of the Law of Succession Act.

21. Therefore, Order 45 rule 1 of the Civil Procedure rules provides;

Sub rule (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 review of the judgment to the court which passed the decree or made the order without unreasonable delay.

22. In the instant case, there is no appeal preferred. The only new issue being raised is the mental status of the respondent. To issue or not to issue a review order is a matter of discretion by the court adjudicating the matter subject to the attainment of substantive justice. In the case of **Francis Njoroge vs Stephen Maina Kamore (2018) eKLR** the court had this to say:

**“therefore, Order 45 of the Civil Procedure rules, 2010 is very explicit that a court can only review its orders if the following grounds exist.**

**(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or order made; or**

**(b) There was a mistake or error apparent on the face of the record; or**

**(c) There were other sufficient reasons; and**

**(d) The application must have been made without unreasonable delay”.**

23. In this case, the application was made in less than 3 months from the time the impugned ruling was made. There is no doubt the application was filed within reasonable time. Is there a mistake or error apparent on the face of the record? None was alleged or proved.

24. What new evidence or discovery of new matter that was not within the knowledge of the applicants before the impugned ruling was made has been revealed? The applicants are alleging mental infirmity on the respondent’s part. They attached Dr. W.J. Muya’s medical note in respect of the respondent addressed to the Inspector of Schools who had requested for the respondent’s mental assessment to ascertain his mental capacity in rendering his teaching services.

25. The doctor made the following assessment and observation.

**“The above who was born in 1976 presented to us and he made allegations of educational under-achievement due to mental sub-normality. He however can integrate in the environment easily. Kindly assess this patient and prescribe what you may deem necessary. I will see the patient and the parents periodically. I would also appreciate your report and advice”.**

26. The said medical note was addressed to the in charge Kenya Institute of Special Education who had requested for the mental assessment. From the report, it is clear that it was made the year 1991. Since then, it is now 30 years. There is no recent medical report to confirm the respondent’s current medical status. 30 years down the line, many things have happened and changed. We cannot rely on a medical report of 1991 to make a reasonable conclusion that the respondent is currently mentally unfit. How come the applicants did not raise this issue when Nixon (respondent) applied for revocation of the grant which gave rise to his appointment as an administrator? The applicants knew the mental status of the respondent herein when he applied for revocation yet nobody raised it. This cannot be discovery of new evidence or matter that was not within their knowledge if the medical report of 1991 is anything to goby.

27. I do agree with the respondent that the issue of his mental incapacity is an afterthought. It is admitted by the respondent that he is a slow learner which the doctor confirmed and his employer Kenya Institute of Special Education. To be a slow learner is not synonymous to being mentally unfit.

28. The respondent has been swearing affidavits and executing several pleadings without any question. The allegation that the respondent signs differently as proof of his mental incapacity was countered by the respondent who stated that he has several signatures which is a normal occurrence in day to day transaction of business by many people. I do not find this to be sufficient evidence to confirm that the respondent is mentally incapacitated to the extent of not understanding or differentiating bad and good. To demand that Nixon be subjected to mental examination will amount to intrusion to his right on privacy as there is nothing manifestly demonstrating mental incapacity on his part.

29. For the above reasons stated, I do not find good ground to review my orders of 30<sup>th</sup> June 2020. In any event, the court gave the administrators 30 days to file an application with consent from other beneficiaries to redistribute the property in question. This was to be done jointly or by any one of them in the event the other administrator became uncooperative. Neither Pauline Wanjiku nor Nixon has moved the court for distribution of that property. Had they complied, the property would have been distributed long time ago and this application would not have arisen.

30. It would appear that Pauline does not want to administer the estate jointly with her brother. Under Section 66 of the Law of Succession Act, the order of priority in administering the estate starts with the spouse/spouses and in their absence their children. The two administrators are on equal footing under Section 66 of the Succession Act in taking out letters of administration in the absence of a spouse. To that extent, Pauline Wanjiku has no superior right in order of ranking over Nixon the respondent who is her brother.

31. Regarding the aspect of intermeddling with the estate, Section 45 (1) of the Law of Succession is clear. That section provides that:

**“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”.**

Sub Section (2) provides that intermeddling is a criminal offence and anybody found liable is fined to 10,000/= in default serve one year imprisonment or both.

32. The respondent has admitted that he did lease the property unilaterally without consulting his co-administrator or other beneficiaries. It is even illegal for the lessee to have entered into a lease agreement with the respondent alone without the knowledge of his co-administrator. Nixon does not have a confirmed grant conferring exclusive ownership rights to him over that property.

33. To claim that his siblings were educated to higher level of education and that he got basic education is immaterial. That is not a ground to allocate himself the entire property and even rent it to his own exclusive benefit without court's authority nor consent of the other beneficiaries.

34. At paragraph 6 of the affidavit in support, the applicants admit that at the time of their mother's demise, she had not concluded transmission of Title No. Dagoretti/Thogoto/1494. It is also admitted that the property is still registered in the name of the deceased. Unfortunately, the property belongs to the estate and unless distributed, nobody has superior rights over the other beneficiaries.

35. What the respondent did was absolutely illegal and an act of intermeddling with the estate. See **In the estate of M'Ngarithi M'Miriti (2017) eKLR** where the court stated:

**“Courts have said time and again that any person who without authority of the Law of Succession Act or any other written law or grant of representation, takes possession or disposes of, or otherwise intermeddles with the free property of the deceased is guilty of a criminal offence and is answerable to the rightful executor or administrator of the estate of the assets he has intermeddled with”.**

36. The respondent has deliberately admitted that he intermeddled with the estate by leasing it out. He has actually committed a criminal offence to which he should be charged. To that extent he is not fit to continue administering the estate.

37. Accordingly, I am inclined to remove the respondent Nixon Mburu from the position of being a co-administrator and do direct that a fresh grant do issue in the name of Pauline Wanjiku Kamau as the sole administratrix. In the same spirit, the lease agreement illegally entered by Nixon with Stephen Maina Macharia on 2<sup>nd</sup> July 2020 is hereby declared null and void abinitio and in case of any money paid to Nixon in advance by the lessee the same should be refunded by the respondent (lessor). The lessee in occupation shall leave the premises immediately unless agreed by consent by all beneficiaries under new terms.

38. Further, the administratrix one Pauline Wanjiku should file an application immediately proposing on how the unadministered portion of the estate should be distributed amongst the beneficiaries.

39. As regards costs, each party shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> JANUARY 2021.**

**J.N. ONYIEGO**

**(JUDGE)**