



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 1 OF 1999**

**IN THE MATTER OF THE ESTATE OF PERMINUS MWANGI GITHENGI (DECEASED)**

**GITHENGI P. MWANGI.....APPLICANT**

**VERSUS**

**PHYLIS MUTHONI MWANGI..... 1<sup>ST</sup> RESPONDENT**

**JUDY MUTHONI MWANGI.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. The application before me is the Summons dated 18<sup>th</sup> June, 2018 and supported by the Affidavit of Githengi P. Mwangi the applicant, sworn on even date.

He seeks orders;

1. ***THAT*** this matter be certified urgent and be dispensed with on priority basis.
2. ***THAT*** there be stay of the ruling of the Honourable Court issued on the 10<sup>th</sup> January, 2018 and all the consequential orders thereto pending the hearing and determination of this application.
3. ***THAT*** this Honourable Court be pleased to review, vacate and/or set aside its orders of 10<sup>th</sup> January, 2018 in this matter.
4. ***THAT*** this Honourable Court be pleased to hear the instant cause on merits by way of viva voce evidence.
5. ***THAT*** costs of this application be provided for.

On the grounds:-

- a. ***THAT*** on 23<sup>rd</sup> January, 2018 the Honourable Court dismissed the Applicant's application dated 28<sup>th</sup> July, 2006 seeking to revoke the Grant in respect of the Estate herein.
- b. ***THAT*** the applicant had been lead by an individual who purported to be an advocate at Hari Gakinya by the name Mr. Maina that he would file his application and would include all his intentions in the application.
- c. ***THAT*** despite having stated all his reasons for seeking to have the grant revoked, the same were not included in the application.
- d. ***THAT*** it is the applicant's stand and the grant was fraudulently obtained as the signature contained in the petition as his is not actually his but the same was forged.
- e. ***THAT*** it is also the applicant's concern on how substitution was done if any when none of the beneficiaries were involved.
- f. ***THAT*** some of the properties of the Estate were intentionally left out as the purported administrators have laid interest

on the same and are selling them.

g. **THAT** the administrators have since transferred most of the properties to their names and have even sold some to detriment of other beneficiaries.

h. **THAT** the Honourable Court was invited to pass its judgment on issues that the Applicant claims did not form part of grounds for seeking to have the Grant revoked.

i. **THAT** in the interest of justice and fairness it would be prudent to review the orders of 23<sup>rd</sup> January, 2018 and the court be pleased to vary and/or discharge them.

He also relies on the supporting affidavit which reiterates and elaborates the grounds on the face of the application.

The application is opposed vide the Replying Affidavit of Judy Muthoni Mwangi sworn on 21<sup>st</sup> January, 2019 which states inter alia;

3. **THAT** the applicant's allegation that substitution was done irregularly is just but a mere afterthought. The applicant knew the existence of the petition for grant of letters of administration and did not raise the issue at that time. It is even mischievous that he did not even raise the issue of substitution at the hearing of the application for revocation of grant.

4. **THAT** the contents of the application hold no water and are just but detraction to real issues causing delay of justice hence detrimental to best interest of the estate of the deceased as the main issue of distribution of the property of the deceased were well determined in the ruling of this Honourable Court.

5. **THAT** the applicant is basically using the review application as the basis for producing supplementary evidence whereas he has not demonstrated that the same was unavailable at the hearing of the petition and summons for revocation of grant.

6. **THAT** apart from the applicant, all other beneficiaries of the estate of the deceased are satisfied with the shares granted to them, as such granting orders sought in the applicants application will only set back the family.

7. **THAT** apart from the applicant, all other beneficiaries of the estate of the deceased are satisfied with the shares granted to them, as such granting orders sought in the applicants application will only set back the family.

2. Parties agreed to proceed by way of written submissions, which I have considered.

3. The issue is whether the application meets the threshold of **Order 45 rule 1** of the **Civil Procedure Rules which provides for Application for review of decree or order thus;**

(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).....

(3).....

When court may grant or reject application.

3. (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

*Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.”*

4. The question is, whatever the applicant is placing before the court now, can that be considered, **new and important matter** or **new evidence**? Has the applicant demonstrated that all this was not available to him before the ruling of 10<sup>th</sup> January, 2018? Is there any mistake or error on the face of the record? Has he demonstrated any other sufficient reason, to invoke the discretion of this court?

5. The applicant’s position is that he instructed a counsel who did not present his case as he had wished.

6. I have perused his application dated 28<sup>th</sup> July, 2016 and the supporting affidavit sworn by himself. All the documents are self-drawn. Hence it is the applicant misleading the court that his papers were drawn and filed by counsel and he was not aware of what was happening in this case. The current application is predicated on four main issues;

1) *His alleged forged signature in the petition.*

2) *The manner in which the administrators have dealt with the estate since the Grant was confirmed, to the detriment of other beneficiaries including himself.*

3) *The fact that one of the properties was bequeathed to him in 1984 by the deceased.*

4) *That one of the administrators Phylis Muthoni is not of sound mind.*

7. **Paragraph 22** of the **ruling of 10<sup>th</sup> January, 2018** captures the reason for the applicants application of 2016.

*“22. The mainstay of the Applicant’s case is that grant was obtained fraudulently by failure to include all the beneficiaries of the deceased and that the Petitioners were not the only dependants of the deceased. It is further alleged that the Respondents distributed the estate to themselves.”*

This is not very different from the issues raised by the applicant in this application.

8. Regarding the manner in which the administrators have dealt with the estate, the ruling dealt with that at paragraph 23 and 28 where the court pointed out that the applicant had not demonstrated any authority from any other beneficiary to raise these issues on her behalf. At paragraph 27 the ruling states clearly that discontent with the distribution ought to have been confronted with a protest. I would say the same now about the applicant’s issues. They ought to have been raised through a protest. It is within the protest that he would also canvass the issue of his alleged gift *intervivos* way back in 1984.

9. With regard to soundness of the mind of one of the administrators, the applicant placed no evidence before this court to support the same. In any event, the grant was confirmed and the estate determined to be held in trust by the administrators in equal shares for each house. He has not demonstrated how, if at all, the alleged unsoundness of mind of the said administrator has affected the estate in this matter to warrant any orders against her.

10. Hence, the finding of the Court that the Grant was regular has not been confronted with any new evidence or material to warrant the orders sought. I would agree with the respondents that the applicant does not have anything new to present to this court to warrant the orders sought. If he is truly disgruntled with the manner in which the estate is being administered, the law provides the route to follow, but this one is not available to him.

11. In the circumstances, the application is not merited. The same is dismissed with costs to respondent.

**Dated, delivered and signed at Nakuru this 27<sup>th</sup> day of February, 2020.**

**Mumbua T. Matheka**

**Judge**

In the presence of:

Court Assistant Edna

Ms Ruto for Obinu for Respondent

Ms Githae for applicant