



IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 109 OF 2019

IN THE MATTER OF THE ESTATE OF

MARTHA NJERI GITAU (DECEASED)

BETWEEN

JOSEPH GITAU NJUGUNA 1ST APPELLANT

DAVID GATUHI GITAU2ND APPELLANT

AND

PETER NJOGU GITAU RESPONDENT

(Being an appeal from the Ruling and Order of Hon. A. M. Maina, SPM dated 18th June 2019 at the Thika Magistrates Court in Succession Cause No. 416 of 2017)

JUDGMENT

1. This is an appeal against the ruling and order of the trial court dismissing the appellants' application for review made under **Order 45 rule 1** of the **Civil Procedure Rules**.
2. This matter concerns the estate of Martha Njeri Gitau ("the deceased") of Ngabuya Location, Gatakaini Sub-location, Muranga County who died on 8th July 2014. According to Form P & 5, the deceased left behind the following children; Rachel Wanjiku Njogu, Joseph Gitau Njuguna, Simon Mwangi Gitau, David Gatuhi Gitau, Alice Nyakinyua Gitau, Peter Njogu Gitau, Hanah Wambui Gitau and George Kariuki Githi. The deceased left behind a piece of land; LOC 16/KIARUTARA/1020 ("Plot 1020") and Kshs. 50,000/- in her Unaitas Sacco Account.
3. The deceased's son Peter Njogu Gitau ("Peter") applied for and was granted letters of administration on 27th December 2017. In due course, Joseph Gitau Njuguna ("Joseph") and David Gatuhi Githi ("David") applied for revocation of the grant of letter of administration issued to Peter under **section 76** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** on the grounds that Peter forged their signatures and those of the other beneficiaries on the consent filed with the petition and that he did not in fact obtain their consent before filing the case. They deponed that the matter had been reported to the police at Kirwara Police Station.
4. Peter opposed the application through the replying affidavit sworn on 23rd May 2018 denying the allegation and stating that he followed all the steps in applying for the petition. Joseph and David filed a further affidavit sworn on 28th August 2018. The application for revocation was canvassed by written submissions on 22nd January 2019, the trial magistrate dismissed the application with costs and directed that, "*The administrator should proceed to file summons for confirmation of the said grant and the applicants herein have a right to oppose the same.*"
5. Dissatisfied with the ruling of the trial magistrate dismissing the application for revocation, Joseph and David filed the Notice of Motion dated 12th February 2019 made under **Order 45 rule 1** of the **Civil Procedure Rules** seeking an order for review of the order of 22nd January 2019. The ground set out in their joint deposition was that the issue of forgery had been reported to Kirwara Police Station and that the investigation took longer than expected hence the forensic document examiners report was only available on 8th February 2019. The application was opposed by Peter through his deposition dated 9th April 2019. Joseph and David filed a further affidavit sworn on 12th April 2019.

6. The application for review was canvassed by written submissions and by a ruling dated 18th June 2019, the trial magistrate dismissed the application on the ground that the applicants had not met the conditions for review under **Order 45** of the **Civil Procedure Rules**.

7. The thrust of the appellants' appeal is set out in the memorandum of appeal dated 17th July 2019 and it is that the court erred by failing to exercise discretion in favour of the appellants by disregarding the evidence produced, concluding without evidence that the respondent was not involved in the offence and dismissing the application without conclusively hearing the matter.

8. The parties agreed to canvass this application by way of written submissions which I have considered. The central issue is whether the appellants met the conditions for an order of review under **Order 45(1)** of the **Civil Procedure Rules** which provides as follows;

45 (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.

9. The issue as I see it is whether the document examiner's report was new and important evidence that was not available at the time the application was heard despite the exercise of due diligence. In the original application, the trial magistrate considered the evidence on record and found the report to the police did not make reference to the petition for grant of letters of administration. The court found that the parties had held family meetings where it was agreed that Peter would apply for grant of letters of administration. In the circumstances, the trial magistrate could not understand why the appellants would turn around and state that they had not agreed to have Peter as the administrator. The court observed that, in any case, all the beneficiaries were disclosed.

10. In these circumstances, I doubt that the forensic document examiners report was new and important evidence for purposes of determining the application for revocation. The document would not overcome the finding that the parties had a meeting and that the respondent was nominated to petition the court on behalf of the other beneficiaries.

11. Having read the court record, it appears that at the heart of the dispute between the parties is the sale of part of Plot 1020 to one Kenneth Ng'ang'a Kibe who, it is alleged, is now harvesting tea and enjoying the proceeds thereof to the detriment of the other beneficiaries. There is an application dated 20th September 2019 seeking interim relief to that effect on record.

12. There is no dispute that the persons named in Form P & A 5 are beneficiaries and that the deceased left one asset, Plot 1020. All claims will now be decided at the confirmation hearing at which the purported purchaser will be entitled to be heard on his claim. The appellants have already filed an affidavit of protest. I doubt that the application for review will serve any purpose in terms of winding up and distributing the deceased's estate. That is not to say that the issue of forgery can be wished away. It is a police matter and the police should investigate it to the fullest extent and let the criminal law take its course.

13. For the reasons I have set out, I dismiss the appeal. The subordinate court should now proceed with the hearing of the summons for confirmation as directed by the trial magistrate on 22nd January 2019.

14. Since this is a family matter, there shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 29th day of MAY 2020.

D. S. MAJANJA

JUDGE

Waweru Nyambura and Company Advocates for appellants

Beth Ndongoro and Company Advocates for the respondent.