



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**HIGH COURT PROBATE AND ADMINISTRATION CAUSE NUMBER 114 OF 2017**

**MARGARET WANJA MWANGI.....1<sup>ST</sup> APPLICANT**

**LUCY WAMBUI MBUGUA.....2<sup>ND</sup> APPLICANT**

**HANNAH NJAI NJIHIA.....3<sup>RD</sup> APPLICANT**

**TERESIA MUMBI GITAU.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**TABITHA GAKUI CHEGE.....RESPONDENT(DECEASED)**

**-AND-**

**KAMORO CHEGE NDUGA.....1<sup>ST</sup> INTERESTED PARTY**

**JOHN JORA WAKIARIE.....2<sup>ND</sup> INTERESTED PARTY**

**JOSEPH NDICHU CIRA.....3<sup>RD</sup> INTERESTED PARTY**

**AND TABITHA GAKUI CHEGE**

**RULING**

1. For determination are 2 (two) applications, namely Summons for rectification of grant dated 15/11/2019 and application for review of a judgement via summons dated 7/7/20. **The first Application**; set Out the relieves thus, the grant issued on the 25/7/1994 to **Tabitha Gakui Chege** be reissued to **Margaret Wanja Mwangi, Hannah Njai Njihia** and **Teresia Mumbi Gitau**.
2. The certificate of confirmation of grant any such other or further orders as it may deem in execution of the will dated **30/6/1988** and the judgment delivered on **9/11/18** plus costs. It is supported by the affidavit of applicants sworn on 24/10/19 in summary same states; That **Tabitha Gakui Chege** the administratrix in this cause died on the 7/8/2019 before she could transfer the deceased's estate as ordered by the court.
3. The parties were on the 11/9/19 directed to agree on new administrators who are to substitute the deceased administratrix.
4. On the 17/9/19 the applicant wrote to the counsel for the interested parties proposing the intended administrators and complaining on the destruction of trees on the estate by the 1<sup>st</sup> Interested party. (annexed and marked "**MWM2**" is a copy of the letter).
5. The 1<sup>st</sup> interested party didn't respond to said letter and but instead continued to harvest trees from the estate and her intention was to delay the matter to enable her waste the estate. Thus the prayers sought.
6. No reply in opposition to the same application has been filed thus same appears to be unopposed. There are submissions by applicants in support of their application.
7. The application is brought under **Section 48 and 4 of the law of succession act cap 160 and rules 43,49 and 73** of the probate and

administration rules. **Section 48 of the of the cap 160** gives the court jurisdiction this Honourable Court exclusive jurisdiction to make all grants of representation while section 74 of the said Act gives this Honourable Court inherent powers to rectify and alter the names where a grant has already been confirmed or before.

**8. Rules 43 and 49 of the Probate and Administration Rules** provides for the procedure to be followed as in the case herein. The administratrix of the estate died on 7/8/19 before she could transfer the deceased property as was ordered by this Honourable Court vide the judgment delivered on 9/11/2018 and in relation to the will dated 30/6/1988.

9. As it stands, the estates remain administered. More so, despite directions by the court to substitute the deceased administratrix, the 1<sup>st</sup> defendant interested party herein has refused to co-operate but instead has now been cutting and destroying trees in the deceased estate thus putting it to waste. It is clear of her intention to delay the matter in order for her to continue wasting the estate.

10. The Applicants have capacity to apply for letters of administration and pursuant to section 60 of the law of succession act, several executors can be appointed simultaneously. Thus the application is granted as prayed.

11. The second application is dated 7/7/20 seeking the orders; -that the court's judgment delivered on 9<sup>th</sup> November, 2018 be reviewed and the 3<sup>rd</sup> interested party's **Title No. Nyandarua/Milangine/2438** be validated and reinstated forthwith. The 3<sup>rd</sup> interested party's Title No. **Nyandarua/Milangine /2438** be excluded from the schedule of the deceased's properties before distribution plus costs.

12. It is supported by grounds on the application namely: -The 3<sup>rd</sup> interested party's Title No. **Nyandarua/Milangine/2438** was acquired from one **Esther Wanjiku Macharia** who had previously purchased the same from the deceased respondent herein. The 3<sup>rd</sup> interested party was not served with the summons for revocation of grant pursuant to which his title deed was ordered cancelled.

13. The 3<sup>rd</sup> interested party was condemned unheard despite being a person affected by the outcome of the said application. The 3<sup>rd</sup> interested party's title was not liable to cancellation despite revocation of the grant issued to the deceased respondent. It is supported by Affidavit of **John Ndichu Cira** sworn on 7/7/20.

14. Which summarizes his case. He states that he purchased Title **No.Nyandarua/Milangine/2438** which measures two(2) acres from one **Esther Wanjiku Macharia** on 2<sup>nd</sup> March 2006. The said **ESTHER WANJIKU MACHARIA** had previously purchased the said land parcel from the deceased respondent herein on 16<sup>th</sup> September, 2003 and was duly issued with a title deed in respect thereof on 9<sup>th</sup> March, 2006.

15. That the application for revocation of grant filed herein, was never served upon him as a result of which his title deed was ordered cancelled without being heard. That he became aware of the instant proceedings when the applicants started cutting down trees growing on his land parcel claiming that title deed had been cancelled by the court as a result of which he requested his then advocates on record to obtain a certified extract of the land register which revealed existence of this cause to me.

16. The cancellation order was made in error after the court was misled that applicant had been served with the said application. The order of cancellation of title deed was made more than 12 years after it was issued and thus the applicants' claim was time barred by dint of the Limitation of Actions Act Cap 22 laws of Kenya.

17. The Respondent via Replying Affidavit of **Teresia Mumbi Gitau Sarah** sworn on 29/09/20 opposes same application with grounds summarized hereinafter. The summons dated 7/7/2020 is fatally defective, inept and an abuse of the court process.

18. The applicant was duly served with the pleadings filed in this suit but he decided to ignore and/or disregard the same and the judgment sought to be reviewed is a regular judgment. The applicant is not in possession/occupation of the deceased estate, he owns no structures, trees or developments thereon and he does not stand to be prejudiced if the judgment is not reviewed.

19. **Tabitha Gakui Chege**(Deceased) was to inherit a portion of 9.5 acres and respondents are willing to hive off a portion of 2 acres from her entitlement to be transferred to the applicant as he purchased the land from a party who had purchased from the deceased. There was no consent to the sale of the 2 acres of land to the applicant and the portion he is claiming for belongs to **Teresia Mumbi** on the ground and she shall be displaced if the title deed is to be reinstated.

20. The Applicant can be included in the certificate of confirmation of grant as a beneficiary of 2 acres to be excised from the portion reserved for **Tabitha Gakui Chege** (Deceased) and which proposal has been made to him but he has rejected the offer.

#### **Issues analysis and determination.**

21. Thus the issues herein are *whether this is an appropriate case for review if above in negative, what is the appropriate order and what is the order as to costs?*

#### **The law on review in succession matters.**

22. In the cases of **Edney Adaka Ismail v Equity Bank Limited [2014] eKLR, Re Estate of Lesinko Sorokote Kirayio (Deceased) [2014] eKLR and Wangechi Kimata & Another vs. Charan Singh (C.A No 80 of 1985)** (unreported) they are authorities for the proposition that under the "any other sufficient reason", the court could review its judgment.

23. That in the premises, this court is not functus officio to the extent that what was being sought was an order for review. I have considered

the affidavit and the submissions on record.

24. There are certain orders of the *Civil Procedure Rules that imported to matters of Succession and Order 45* is one of them. This is provided for under *Rule 63 of the Probate and Administration Rules. Order 45 Rule 1* provides that:-

**“(1) Any person considering himself aggrieved—**

**by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or 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”.**

25. For this court to exercise its jurisdiction under the said Order and grant a review, there must be discovery of new and important matter or evidence which was not within the knowledge or could not be produced at the time by an applicant; or on account of a mistake or error apparent on the record or any sufficient reason. In addition, the application must be made timeously.

26. The applicant claims that he was not served with the application which gave rise to the impugned order. However, the judge in making a judgement found that the applicant was duly served with the application but failed to oppose the same.

27. On the issue of review and which I think on the material before me is straight forward. *Order 45(1) of the Civil Procedure Act* and which is applicable to succession matters by virtue of rule 63 of the Probate and Administration rules clearly sets out the parameters for review:

**Discovery of new and important matter or evidence**

**Mistake or error apparent on the face of the record**

**Any other sufficient reasons.**

28. In our instant case, there is no discovery of new and important matter or evidence. Nor is there or shown to be a mistake or error apparent on the face of the record. There is no other sufficient reason given to warrant a review.

29. The prayer for review was a misplaced one and is not available to the applicants. This is because the judge considered all materials before her and arrived at the decision she did. Principally the applicant complains of not being accorded a hearing before orders affecting him being issued.

30. That being the case, he ought to have challenged service of the application and seek to be heard. Thus setting aside of the orders impugned should have been the way on the basis of absence of service of the application in issue.

31. Now onto the issue of setting aside the orders of court complained of. This prayer ought to be premised on disputed service on the applicant and an error on the part of his Advocates who were instructed by the applicant but failed to act.

32. The principles on which the Court acts to set aside ex-parte judgment are now well known and settled. Harris J in the case of **Shah V. Mbogo & Another, [1967] EA 116**.

33. However, court has noted the acknowledgement of respondents of recognition of applicant claim of the portion purchased 0.81 HA. Infact they are willing to accede 2 acres to him but he has been declining to take the same. That in the interest of just this court is prepared to order that he be included in the confirmation of grant and allocated share to the extent of what he bought but be allocated in unoccupied portion of the deceased estate to avoid conflict on the ground.

34. Thus the court makes the following orders;

**i. The application for rectification of grant filed on 15/11/019 is granted in terms of prayer 1**

**ii. The application dated 7/7/2020 is rejected.**

**iii. In the interest of justice, the court orders that the applicant in application dated 7/7/20 be included in the grants and be allocated 0.810HA of the un occupied part of the deceased land.**

**iv. No orders as to costs.**

**Dated, Signed and Delivered at Nyahururu this 17<sup>th</sup> day of December, 2020.**

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**CHARLES KARIUKI**

**JUDGE**

**PRESENT:**

Ms W. Muriithi for applicant/respondent

No appearance for interested party