REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2815 OF 1997

IN THE MATTER OF THE ESTATE OF FREDRICK GITAU GITHUMBI (DECEASED)

ALICE WAMBUI GITAU.....APPLICANT

VERSUS

PRISCILLAH WANJIRU GITHUMBI.....RESPONDENT

RULING

Background

1. The deceased whose estate these proceedings relate one Fredrick Gitau Githumbi was a son to the late William Githumbi alias Gitau Githumbi who died intestate sometime 1988 and succession cause No. 339/1990 instituted in respect of his estate. In that succession cause, several properties were listed as comprising the estate. Conspicuously missing was L.R. Gatamaiyu/Kagwe/201 because it was by then registered in the name of Fredrick Gitau Githumbi.

2. On 19th May 1997, the said Fredrick Gitau Githumbi passed on living behind the following as survivors:

(a) Priscillah Wanjiru Githumbi (widow)

(b) William Muroki Githumbi (son)

(c) David Muchiri Githumbi (son)

(d) Daniel Gitau Githumbi (son)

(e) Beth Nduta Githumbi (daughter)

(f) Frasier Muthoni Githumbi (daughter)

(g) Josephine Njeri Githumbi (daughter)

3. Among the properties listed as comprising the estate was L.R. Gatamaiyu/Kagwe/201. According to the certificate of confirmation of grant issued by J. Aluoch on 22nd day of April 2002, L.R. Gatamaiyu/Kagwe/201was shared out as follows:

(a) Samuel Kariuki Mori – 2.5 Acres

(b) Fulisiah Muthoni Gitau as a trustee to Pricilla Wanjiru Githumbi and Alice Wambui Gitau – 3.5 Acres

(c) William Githumbi – 3 Acres

(d) David Muroki Githumbi – 3 Acres

(e) Daniel Gitau Githumbi – 3 Acres

4. Subsequently, an application for review of the confirmed grant was filed on 28th January 2009 by Priscillah Wanjiru Githumbi wife to the deceased seeking provision for her two children namely; Frasier Muthoni Githumbi and Josephine Njeri Githumbi who were left out during

the distribution of the estate. Secondly, that no provision be made to Fulasiah Muthoni Gitau (mother to deceased) and Alice Gitau (sister to the deceased).

5. In contention in the said review application was the determination by the court as to who was properly entitled to get the 3.5 acres out of the said land (Gatamaiyu/Kagwe/201. After hearing the review application, Justice Nambuye delivered her ruling on 21st April 2011 making the following orders:

> **(a) That the inheritance of 3.5 Acres by one Fulasiah Muthoni on account of the portion being inherited by reason of land parcel Gatamaiyu/Kagwe/201 having been purchased by her deceased husband stands faulted because the issue was not adjudicated upon in cause No. 339/1990 (Estate of the late William Gitau Githumbi her husband).**
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> **(b) Likewise, the inheritance of Alice Wambui Gitau of the same portion whose inheritance stems from the inheritance of Fulasiah Muthoni Gitau stand faulted on the same ground, on the one hand, and on the other hand there has been no deponent that she was a dependant of the deceased subject of these proceedings and that she needed to be provided for from the estate of the subject of these proceedings. Thirdly she is not among the persons entitled to inherit or benefit from the estate of the deceased person survived by a wife and children under Section 35 of the Law of Succession Act.**
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> **(c) That Fulasiah Muthoni Gitau was to have life interest only on the 3.5 acres by virtue of picking tea leaves only.**
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> **(d) That it was demonstrated that the deceased (Fredrick) subject of these proceedings dealt with land parcel No. Gatamaiyu/Kagwe/201 as his own. As such, there were no grounds to infer the existence of a trust to oust this court's finding in number 1 and 2.**
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> **(e) That the creation of a trust in favour of Priscillah stands faulted.**

6. Finally, the court reviewed the grant and gave the contested 3.5 acres to Priscillah Wanjiru Githumbi (widow to the deceased) to hold in trust for herself and her daughters Beth Nduta Githumbi, Frasier Muthoni Githumbi and Josephine Njeri Githumbi to be shared equally among themselves upon Priscillar's death. Pursuant to Section 47 of the Law of Succession Act Cap 160, rules 49 and 73 of the Probate and Administration rules and Order 45 rule 1 of the Civil Procedure rules, Alice Wambui Gitau a sister to the deceased moved to this court vide summons dated 26th February 2018 and filed the same day seeking orders as follows:

> **(1) Spent.**
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> **(2) That the court be pleased to review the orders issued by Lady Justice R.N. Nambuye on 21st April 2011 to the extent that it involves former land parcel Gatamaiyu/Kagwe/201 and the portion jointly held by Fulasiah Muthoni Gitau now registered as Gatamaiyu/Kagwe/2962.**
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> **(3) That an order do issue restraining the administrators, and or their agents, and/or servants and/or other beneficiaries from disposing, damaging, wasting, partitioning, utilizing, evicting or intermeddling with land portion of Gatamaiyu/Kagwe/1962 measuring 3.5 acres in compliance with the certificate of confirmation of grant dated 22nd April 2002.**
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> **(4) That an order do issue to the administrators compelling the cancellation of the entry in the register of land parcel Gatamaiyu/Kagwe/1962 and compelling registration of the said parcel of land in compliance with the certificate of confirmation of grant dated 22nd April 2002.**
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> **(5) That the cost of this application be provided for.**

7. The application is predicated upon grounds stipulated on the face of it and an affidavit in support sworn by the applicant on the 26th February 2018.

8. It is the applicant's claim that she was not involved and did not participate in the proceedings that led to orders of Justice Aluoch being reviewed and her judgment set aside. It was contended that the nature of the claim over the land parcel required a hearing by way of viva voce evidence which opportunity she was not accorded.

9. It was alleged that the administrators sub-divided the land and that the land parcel that was occupied by Fulaciah Muthoni Gitau was given number Gatamaiyu/Kagwe/1962 and registered in the name of Priscillah Wanjiru Githumbi. That the said Priscilllah Wanjiru Githumbi has now entered into the said land and started cultivating and harvesting tea leaves thereon to the detriment and exclusion of the applicant.

10. In response to the application, Priscillah Wanjiru Githumbi filed a replying affidavit sworn on 14th August 2018 challenging the averments contained in the supporting affidavit to the application. She stated that the applicant is seeking to review Nambuye J's orders of 21st April 2011 seven years down the line. She claimed that the application has not been filed within reasonable time and that the same is inviting this court to sit as an appellate court over a colleague's judgment.

11. She claimed that LR No. Gatamaiyu/Kagwe/201 was bought by her father- in-law and was registered in her late husband's name (deceased) and that her mother-in-law Fulaciah Muthoni was allowed by J Nambuye J to continue picking tea and work on 3.5 acres of land in the said parcel but not to own it. That Nambuye J found the deceased Gitau Gichuki Githumbi as the legitimate owner of the land and that

her mother-in-law and the applicant being a sister to the deceased had no right of ownership over that property.

12. When the matter came up for hearing on 24th July 2018 parties agreed to canvass the application by way of written submissions. The firm of L.G. Kimani appearing for the applicant filed their submissions on 31st August 2018. Equally the firm of Kalwa and Company Advocates representing the respondents filed theirs on 14th August 2018.

Applicant's Submissions

13. Mr. Kimani for the applicant gave a brief history on the circumstance leading to the filing of the application herein. He basically adopted and reiterated the averments contained in the affidavit in support of the application.

14. Regarding infringement of the applicant's rights, counsel submitted that she was never informed of the proceedings before lady Justice Nambuye hence she was condemned unheard and her share in a portion of 3.5 acres out of L.R. Gatamaiyu/Kagwe/201 which her mother held in trust for her benefit taken away. Mr. Kimani relied on the authority in the case of **Partriotic Guards Ltd vs James Kipchirchir Sambu (2018) eKLR** where the court held that:

> **"The applicant has also contended that the judgment of the court which directly affected it, was in breach, not only of the law, but also of the constitution in so far as it condemned him without an opportunity to be heard and in breach of the right to a fair hearing guaranteed by Article 50 (1) …The right to a fair trial remains at the heart of any judicial determination and courts should endeavour to protect and uphold the same. It is a cardinal rule and it emanates from the principle of natural justice".**

15. Counsel quoted several other authorities espousing on the same principle interalia **MK vs MWM and another (2015) eKLR Onyango vs AG (1986 – 1989) EA 456** and **Mbaki and Others vs Macharia and Another (2005) 2 EA 206**.

16. As to whether the land reference No. Gatamaiyu/Kagwe/201 was held in trust by the deceased for the applicants and others. Counsel opined that, there were errors on the face of the record. He urged the court to find that there was an implied resulting trust that the deceased was registered as the registered owner of the property in question by his late father to hold in trust for the family. That Nambuye's holding was erroneous as it dismissed the element of trusteeship. To support his position counsel referred the court to the case of **Joseph Githinji Gathiba vs Charles Kingori Gathiba (2001)eKLR** where J. Khamoni recognized Kikuyu Customary practices as capable of creating a trust in respect to property held in trust of the other family members. Touching on costs, counsel prayed for the same in favour of his client.

Respondent's Submissions

17. Mr. Kalwa appearing for the respondent also reiterated the averments contained in the replying affidavit to the application. He also reduced the issues for determination into two:

> **(a) Whether the review is merited.**
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> **(b) Whether the matter is resjudicata and the principle of functus officio and estoppel applies.**

18. Concerning whether review is merited, Mr. Kalwa urged the court to consider whether; the applicant has satisfied the criteria set out under Order 45 (2) &(6) of Civil Procedure rules for grant of review of orders.

19. Mr. Kalwa opined that the applicant was all through aware of the proceedings before Nambuye J between her mother and the respondent. Counsel referred the court to Paragraph 6 of the supporting affidavit in support of the instant application sworn on 26th February 2018 where she admitted that she was informed by her mother that she (mother) had challenged the above sub-division since she wanted a title deed to be issued for 3.5 acres in her name as per the orders of Justice Aluoch. Based on this admission, Mr. Kalwa urged the court to find that the applicant was all along aware of the existence of the proceedings before J. Nambuye but decided to keep silent hence the issue of being condemned unheard should not arise. That the claim of the property through her mother as the beneficiary on account of trust can not apply.

20. Learned counsel stated that no sufficient reason has been advanced to justify the court to exercise its discretion in favour of the applicant. To justify his submission, counsel referred the court to the case of **Salama Mohamed Saad vs Kikas Investments Ltd and another (2014 eKLR quoting** a decision from the case of **Nuh Nassir Abdi vs Ali Wario and 2 others (2013) eKLR** where the court held that: **"A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose''**

21. Further, Mr. Kalwa stated that the delay of 7 years in filing review application is unreasonable. The court was referred to the case of **Godfrey Ajuang Okumu vs Nicholas Odera Opinya Kisumu High Court Civil Case No. 337/1996** where a delay of 3 months was found excessive in the absence of any explanation.

22. Regarding resjudicata, Mr. Kalwa urged the court to find that the court having determined ownership of 3.5 acres the same is final and therefore a matter already determined by a competent court on merit with finality hence should be left to rest. To strengthen his submission,counsel referred the court to the case of **POP- in (Kenya) Ltd and 3 others vs Habib Bank AG Zurich Civil Appeal No. 80/1998**.

23. Based on resjudicata principle, Mr. Kalwa urged the court to find that the court has become functus officio. Counsel referred the court to

the case of **Telkom Kenya Ltd vs John Ochanda (2014) eKLR where the court quoting** from the case of **Raila Odinga vs IEBC (2013) eKLR** where the court stated that:

> **"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may as a general rule, exercise those powers only once in relation to the same matter. The principle is that once a decision has been given, it is (subject to any right of appeal to superior body as a functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker".**

Determination

24. Having considered the application herein, supporting affidavit, affidavit in reply and rival submissions by both counsel, issues that crop up for determination are:

(a) Whether the applicant has met the threshold for grant of review orders.

(b) Whether the matter amounts to resjudicata and

(c) Whether the court is functus officio and;

(d) Whether the applicant has met the threshold for review.

25. The law governing issuance of review orders in succession cases is order 45 of the Civil Procedure rules which comes to play courtesy of rule 63 of the Law of Succession. For a litigant to succeed in getting review orders, one must meet the criteria set under Order 45 (1) which provides that any person who is aggrieved by a decree or order from which an appeal is allowed, but for which no appeal has been preferred or from which no appeal is 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 order was passed or the order made or an account of some mistake or error apparent in the face of the record or any other sufficient reason, may apply for review of judgment or decree. Order 45 (6) provides that no application to review an order made or an application for review of a decree or order passed or made on a review shall be entertained.

26. It is common ground that the orders sought to be reviewed were made sometime on 21st April 2011. The application is purely challenging the review orders made pursuant to an application for review of the orders of J. Aluoch made on 22nd April 2002. According to the applicant, she was not served with the application for review giving rise to J. Nambuye's decision. However, in paragraph 6 of her affidavit in support of the instant application, she deponed that she came to run from her mother of a case she had with Priscillah for review of the orders confirming the grant. From that statement, it is common knowledge that, the applicant was all along aware of the proceedings between her mother and her sister-in-law which proceedings had a direct link and impact on her beneficial interest to the estate. The issues in controversy in that review application are the same ones that she has raised in this case.

27. On that admission therefore, she cannot purport not to have known of the existence of these proceedings. Although the record is not clear as to whether she was served with the application, she has acknowledged that she was aware of these proceedings through her mother. If she was really concern with her rights under Article 50 of the constitution on the right to be heard, then, she should have taken part in the proceedings.

28. Considering the period it has taken for the applicant to take action in challenging the decision made the year 2011, one would simply be tempted to state that that period is unreasonable by all standards. Seven years since the impugned decision was made is to say the least exceptionally unreasonable (See **Godfrey Ajuang Okumu vs Nicholas Odera Opinya (Supra)** where the court found three months to be unreasonable delay.

29. Concerning the requisite elements considered in granting a review order, the applicant was not a party to the proceedings between the mother and the sister-in-law. It is therefore apparent that from the nature of the proceedings. She has not been able to state any discovery of new or material evidence or information nor mistake or error apparent on the face of the record. Equally there is no proof or any sufficient cause or reason to set aside the orders of the court.

30. The grounds cited challenging the merits of the decision based on the principle of trusteeship is an issue which can only be ventilated on appeal and not review. For me to determine on whether the learned Judge properly interpreted the law in determining ownership of land and who deserves which share out of L.R. Gatamaiyu/Kagwe/201 will amount to sitting on an appeal of my colleague's judgment. The applicant's mother ought to have appealed the decision. The applicant also ought to have participated in the proceedings the moment she discovered the existence of the review application proceedings.

31. I am alive to the fact that to grant or not to grant review application order is indeed a matter of discretion by the presiding judge or court. The same should however be exercised judicially and or reasonably for the ends of justice to be met. This is not a proper case to exercise review powers. This court cannot review the decision of the court which is based on merit.

32. Further, under order 45 (6) of the CPRS, a court cannot grant review orders seeking to review orders arising from a review order. The application before me cannot stand the test of that rule which is couched in mandatory terms. The decision by J. Nambuye can only be challenged on appeal which is long overdue.

33. Regarding the issue of being resjudicata or functus officio, Section 7 of the Civil Procedure Act is clear. The said provision provides as

follows:

> **"no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court".**

34. In the instant case, the litigation between the applicant's mother and the sister-in-law was over the same title and a decision has been made on merit by a court of competent jurisdiction. What that means, the applicant is indirectly affected by a decision made concerning parties affecting a title to which she is also litigating on.

35. I do agree with Mr. Kalwa that the matter is now resjudicata and this court cannot reopen it as it is functus officio. Indeed, this is an old matter of 1997. The file is extremely tattered due to numerous litigation. We cannot reopen a file that rested the year 2011. Litigation must come to an end. In exercise of this court's discretion the scales of justice tilts in favour of the respondent hence the application herein is dismissed with no order as to costs.

DATED, DELIVERED AND SIGNED, AT NAIROBI ON THIS 24TH DAY OF APRIL, 2019.

J.N. ONYIEGO

(JUDGE)