



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**MISC. APPLICATION NO. 37 OF 2013**

**IN THE MATTER OF THE ESTATE OF JOSPHAT KABIBI alia JOSPETER KABIBII (DECEASED)**

**VENESIA GITIRI MBOGO.....APPLICANT/RESPONDENT**

**VERSUS**

**GEDION MUGO PETER.....PETITIONER/RESPONDENT**

**JOHN GICOVI GATUMU.....INTERESTED PARTY/APPLICANT**

**R U L I N G**

**A. Introduction**

1. This is a ruling for the application dated 27/2/2018 in which the interested party seeks for orders for review or setting aside its ruling and orders made on 31/10/2017 to facilitate the hearing of his application for revocation of grant dated 20/3/2013 be heard *de novo* so as to give the interested party an opportunity to be heard.

2. It is the interested party's case that he was never served with notice for hearing of the application for revocation of grant dated 20/3/2013 despite him being the holder of title number Ngandori/Ngovio/905 and being in actual occupation of the aforementioned property. It was the interested party's case that he stood to suffer irreparable loss and damage if the review orders were not granted.

**B. Interested Party's Submissions.**

3. It is submitted that the interested party is in actual occupation of the suit property which he had extensively developed since 1995 and that despite being identified as an interested party in revocation proceedings dated 20/3/2013, he was not served with any document to attend court or take part therein to his detriment. It was submitted that this satisfied the grounds for review as expounded in the case of **Nyeri Succession Cause No. 76 of 2005 In the Matter of the Estate of the Late Kibira Mutero – Josiah Mwangi Mutero v Rachael Wagithi Mutero** where the court held that the discovery of new and important matters or evidence necessitated a review.

4. It was further submitted the ruling delivered on 31/10/2017 made orders adverse to the interested party without giving him the chance to be heard against the rules of natural justice. It was thus submitted that the summons dated 20/3/2013 ought to be reopened to give the interested party an opportunity to be heard.

**C. Petitioner/Respondent's Submissions**

5. It was submitted that the interested party had always been aware of the proceedings and that in any event since his title was obtained from defective proceedings, the same cannot stand. Further, it was submitted that the applicant/respondent was not a beneficiary to the deceased's estate so as to sanctify her dealings over the suit property herein.

6. It was also submitted that if the instant application was allowed, it would amount to sanctioning of an illegality. The petitioner/respondent relied on the case of **Monica Adhiambo v Maurice Odero Koko [2016] eKLR** where the court held inter alia that a thief acquired no transferable right in stolen property.

**D. Analysis and Determination**

7. 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—**

**(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”.**

8. 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.

9. Firstly, the applicant made the present application more than four months after the judgment was delivered. He explains that he did not come to know of the ruling of this court until he was informed by one of the parties.

10. As to the ground for review, the interested party contends that the applicant never gave him notice of the revocation proceedings and that he only became aware of the said proceedings after the applicant told him that a ruling adverse to his interests had been rendered by the court. The existence of the interested party does not in my view amount to “*new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the court when the decree was passed.*”

11. I have perused the ruling of the court on the application dated 20/03/2013 that was delivered on 31/1/2017. It states in part: -

***“Thirdly, that the sole aim of the summons for revocation is to benefit one John Gichovi Gatumu the interested party who purportedly bought land from the late John Nyaga Kabibii. He was given the land in Kerugoya PMCC Succession Cause No. 148 of 1996. The grant was later revoked and the land Ngandori/Nguvio/905 reverted to the estate of the deceased.”***

12. The ruling touched briefly on the case of the interested party who was said to have obtained land through a defective grant in Kerugoya Succession Cause No. 148 of 1996 that was later revoked by Etyang, J. as he then was in Embu HC Misc. Application No. 45 of 1996.

13. The applicant has not presented any evidence that the ruling of the judge was overturned that revoked the grant. This position still obtains at this time that the applicant seeks to be given a hearing by this court. He has presented no new facts or information that was not given by the parties in the previous application. The applicant has since 1996 known that the grant was revoked and that his acquisition of the deceased’s land was tainted with illegality.

14. It is my finding that the applicant has not satisfied the requirements of Order 45 Rule 1 to justify review. Even if review orders were to be granted, the same would not aid the applicant since he obtained the land through an illegality as was established by the High Court.

15. I find no merit in the application and it is hereby dismissed with costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 25<sup>TH</sup> DAY OF JULY, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muriuki for Ithiga for Interested Party**

**Ms. Muthoni for Fatuma for Applicant/Respondent**

**Ms. Kungu for Andande for Petitioner**