

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 209 OF 2013

IN THE MATTER OF THE ESTATE OF JULIUS GATHEMIA KIHARA (DECEASED)

SAMUEL NJIHIA NJONGORO.....CREDITOR/RESPONDENT

VERSUS

CHRISTINE NJOKI GATHEMIA....PETITIONER/ADMINISTRATOR/APPLICANT

RULING

1. The applicant is the administrator of the estate of the deceased Julius Gathemia Kihara who died intestate on 7th June 2012. She is the widow of the deceased, and letters of administration intestate were granted to her on 22nd May 2013. The grant was confirmed on 17th May 2017. The respondent had challenged the application for the confirmation of the grant on the basis that he was a creditor to the estate of the deceased who had not been provided for. He had on 30th September 2010 bought a portion of land measuring 0.25 acres of Dagoretti/Mutuini/640 belonging to the deceased. The transaction was before the deceased died. His case was that the applicant was aware of the transaction but had omitted him in the proposed distribution. The purchase price was Kshs.3,000,000/= He had paid Kshs.2,000,000/= and the balance of Kshs.1,000,000/= was put in the advocate's account to be held on stakeholder basis pending the handover by vacant possession of the property to the purchaser.

2. By the time the deceased died, a consent had been obtained to subdivide the land to allow for separate title for the 0.25 acres. The subdivision was set to be done. Consent for the transfer was going to be sought after the subdivision.

3. In my judgment delivered on 17th May 2017, I determined that, without the consent either from the City Council of Nairobi or the Land Control Board or both, the transaction became null and void. What the respondent was entitled to was the refund of the purchase price. I directed that the Kshs.2,000,000/= be refunded by the applicant, and this was to be with interest at the rate of 5% per annum above the prevailing interest rate at Barclays Bank from 2011 to date.

4. The applicant was aggrieved by the order to pay interest and sought review by her application dated 18th December 2018 and filed on the same date. Her case was that the interest rate as ordered in the judgment was a stipulation of the sale agreement that the court in the same judgment had declared to be null and void due to lack of consent from either the City council of Nairobi or the Land Control Board.

5. The respondent opposed the application on the basis that the error or mistake alluded to was not apparent or self-evident and that it required examination and argument to establish it; and that the applicant had not laid a basis for review. Secondly, that there had been unexplained inordinate delay in bringing the application for review.

6. I agree that there was delay in bringing the application. The judgment was on 17th May 2017, and the application was brought about 1½ years later. There was no explanation for the delay, although during the intervening period the parties were litigating the respondent's application to execute the judgment. A ruling was delivered on 18th July 2018 on the application. I consider that the delay to bring the present application would be attributed to the dispute over execution.

7. I accept that the payment of interest was entrenched in the sale agreement signed between the respondent and the deceased. I agree that since I declared the sale agreement null and void all and any of its clauses became null and void. The court therefore fell into error when it ordered the payment of interest. The clause regarding the payment of interest had been declared null and void.

8. Consequently, I allow the application. The refund of Kshs.2,000,000/= by the applicant shall not carry interest.

9. Since the error was on the part of the court, I will not make an order for costs.

DATED and DELIVERED at NAIROBI this 23RD day of SEPTEMBER, 2019.

A.O. MUCHELULE

JUDGE