



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. APPLICATION SUCCESSION CAUSE NO. 5 OF 2017

IN THE MATTER OF THE ESTATE OF TIMOTHEO GACHERU - (DECEASED)

JACINTA WANJIKU KIBUCHI)

JOSEPHINE KARIMI NYAMU).....APPLICANTS

V E R S U S

ELIZABETH GACUI KIRIGO).....RESPONDENT

RULING

1. The applicant filed an application dated 02/03/2017 seeking the following;

- a) The Court be pleased to review and/or set aside the orders of 29/06/2006.
- b) The certificate of confirmation of grant issued on 04/09/2013 be set aside, the names of the beneficiaries be cancelled from **Mutira/Kaguyu/187** and the land to revert in the names of the deceased.
- c) The certificate of confirmation of grant given on 28/01/2005 be reinstated.

Applicant's case

The applicant states that the deceased died sometime in 1960 when births and deaths were not being registered. He was survived by a wife (deceased) and 6 children one of whom Kinyua Timotheo (his father) passed away. That at the time of his death, all daughters had married except for Loise Wanjira but who married sometime in 1978 and according to kikuyu customary laws, married daughters do not inherit their father's properties. However, as a family, they have agreed that the daughters get ½ acre as per the certificate of grant confirmation on 28/01/2005.

The deceased's wife failed to register the grant in the land's office and in 2005 Jacinta Wanjiku and Josephine Karima applied for revocation of grant proposing that the estate be shared equally by all children of the deceased. The deceased's wife was not opposed to the said distribution and on 04/09/2013 an amended certificate of confirmation of grant was issued whereby the estate was shared equally. That no one will be prejudiced since the only people in occupation are children of Kinyua Timothy who have developed 3 acres and the remaining 3 acres meant for the deceased's wife and daughters is not develop.

In addition, one of the names is erroneously indicated as Joseph Karimi instead of Josephine Karima.

3rd respondent's case

In response, she stated that the applicant has no locus since he withdrew his application to be substituted on behalf of Kinyua Timotheo. That the court has no powers for setting aside certificate of confirmation of grant and the procedure known is for revocation of grants. That the Law of Succession Act has no procedure for cancellation of title deeds and he ought to file his claims in ELC.

She refuted that the daughters had agreed to get ½ acres each and the Constitution outlaws discrimination on grounds of gender. That the estate was distributed during the lifetime of their mother and all children got an equal share.

In addition, the fact that the name of Josephine Karima was misspelt is not ground for interfering with the grant.

2nd respondent's case

She stated that Kinyua Timotheo was her brother and was given 7 acres of land by the clan on which he settled with his family and where he is buried together with his wife. That the applicant was involved in the succession proceedings and after the grant was confirmed he placed a caution but was summoned by court and ordered to lift the caution to which he obeyed.

2. The Applicant submits that a summons of revocation of grant filed by the daughters of the deceased namely Jacinta Wanjiku and Josephine Karimi. The application came up for hearing on 17.3.2006. They never went before the Judge for directions as to how the application was to be heard and was to be served. That the beneficiaries ought to have been served with the said summons since the application was to affect them directly.

That there is an error applicant on the face of the record in that no direction were issued for interested parties to be served.

3. On 29.6.06 the application was argued and the judge found that there was no need to revoke the grant and directed that an amendment be made on the certificate of the confirmation of grant. That there after Justice Wanjiru Karanja directed that all the beneficiaries sign a consent and this was not complied with.

4. He further submits that Rule 63 of the Probate and Administration Rules incorporates review in the Law of Succession Act and the court can review the orders issued in a Succession cause. That no person will be prejudiced by the order for review.

5. For the respondent, he submits that the application is devoid of merits and brought improcedurally. That once a certificate for confirmation of grant is issued it can only be challenged by means of summons for revocation of grant. That the applicant is seeking revocation of grand under the guise of an application for review.

6. That the applicant is seeking to have the grant issued on 4.9.13 set aside and one issued on 28.1.05 reinstated but fails to realise that the grant was issued to persons who are now deceased. That the application to cancel title deeds would affect parties who are not parties to this case.

7. It is further submitted that the applicant has not established grounds to warrant this court to order a review. That there was inordinate delay in filing the application, there are no sufficient reasons for review and there is no error apparent on the face of the record. That there has been no discovery of a new and important matter or evidence which after the exercise of due diligence was not within his knowledge.

8. In response the applicant submits that the orders they are seeking are clear as demonstrated under prayers c, e, f and g. That this court is empowered to under **Section 76 of the Law of Succession Act (the Act)** to revoke a grant. That the deceased administratrix had died and the proceedings to substitute the administratrix were wrong. That the court can of its own motion revoke the grant.

9. I have considered the application the submissions.

Issues arising;

1. Review

There are certain provisions of the Civil Procedure Rules that are imported to the Law of Succession *Order 45* is one of them. This is provided for under **Rule 63 of the Probate and Administration Rules**. *Order 45* of the Civil Procedure Rules deals with review.

For this court to exercise its jurisdiction under the said *Order* and grant a review, there must be:

- i) Discovery of new and important matter of evidence which, after 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
- ii) Mistake or error apparent on the face of the record
- iii) Any other sufficient reason which may make the court to review its order.

Order 45 rule 1 Civil Procedure Rules provides:

(1) No person in executing any process under this Act directing or authorizing seizure of movable property shall enter any dwelling house after sunset and before sunrise.

What I have to consider as whether the applicant has demonstrated grounds to warrant this court to order a review of the order of 29.6.2006.

10. The 1st ground is discovery of new and important matter of evidence. In his submissions, the applicant has not raised any issue of discovery of new important matter. In deed in his affidavit the applicant has not deponed that he has discovered any new matter of evidence.

11. The applicant asserts that the deceased Timotheo Gacheru was the registered proprietor of land parcel No. Mutira/Kaguyu/187 and he died sometime in 1960. His two children moved the court to have the grant revoked. However, the judge in her wisdom directed that the grant be amended. This owing to the fact that the administratrix who was the respondent informed the court that she had no objection to all her children being included in the sharing of the estate equally.

12. On 29.6.2006 Justice Khaminwa ordered that there was no need to revoke the grant and since there was no objection the correct order was to amend the certificate by including all the beneficiaries to share the estate equally as intended by the administrator their mother. She directed that amended affidavit be filed to include the applicants and there after a certificate to issue.

13. This in my view were direction given by the judge and the determination to the issue which was at hand. The Law of Succession Act gives the court wide powers while dealing in succession matter. The court is empowered to give orders on its own motion.

Section 47 of the Law of Succession Act provides:

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.

The judge had powers to give the direction which she gave on the application for revocation of grant as the application was not opposed. Kinyua Timotheo filed an application for review of the orders of 29.6.06 but did not prosecute the application. The fact that the unmarried daughters were included in the distribution is not a new matter. They were not strangers and there was a consent for them to get an equal share with other children of the deceased. I find that these were not new matters. Discovery must relate to a matter which was not brought to the attention of the court and if it had, the court would not have issued the orders.

The matters were before the judge when she made the order and there was nothing new. The discovery must relate to matter of evidence. Where they relate to matter of law, a party must move the court by way of an appeal but not review.

Refer to Pancras T. Swai v Kenya Breweries Limited [2014] eKLR

The Court of Appeal in dismissing the application held;

It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus officio and have no appellate jurisdiction.

In addition, it held that;

The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to.

The applicant has not proved that there was discovery of new and important matter of evidence which after due diligence was not within his knowledge and could not be produced at that time.

14. The applicant was also to prove that there was some mistake or error apparent on the face of the record.

The error must not be matter of argument, or allegation or implied, it must be apparent on the face of the record. It must be obvious on the face of the record. From the record there is no dispute that Jacinta Wanjiku and Josephine Karima were left out. The court found that indeed they were beneficiaries and ordered an amendment as I have pointed out. The fact that the court ordered the estate be re-distributed and the two daughters be included was not an error. They were beneficiaries. The applicant at paragraph 8 of the supporting affidavit deposes that they have agreed that each of the daughters get ½ an acre. This amounts to an admission that they were entitled to a share of the estate. The judge had power to determine who the rightful beneficiaries were and their share. The other beneficiaries signed a consent and an amended affidavit was filed.

15. I note that Timotheo Kinyua did not sign the consent. He also failed to prosecute the application for review after the order of the judge was complied with. What has come up is the fact that he was not entitled to the estate as he has been given seven acres of land by the clan where he settled and was buried there. The fact that he did not pursue the application for review which he filed on 18.6.09 seems to put credence on the averment that he was given land elsewhere. Be thus as it may, in the amended grant, Kinyua Timotheo got an equal share of the estate like the other beneficiaries.

16. It is deposed by the respondents that Kinyua Timotheo used to attend court. After the grant was confirmed he cautioned the land. The court ordered him to remove the caution and he complied. The amended grant is a result of the directions given by the judge which ensured that the estate was distributed equitably. There was no error which is apparent on the face of the record.

As submitted by the counsel for the respondents I lack the jurisdiction to sit an appeal on the orders of my sister judge.

We rely on the case of ***Nairobi City Council -Vs- Thabiti Enterprises Ltd 251 (CAK) 1995 – 98 2a (CAK)***

“In the instance care it is plain that the matters in dispute had been fully canvassed before the Learned Judge it is plain from his

ruling that he made a conscious decision on the matter in controversy and correctly exercised his discretion in favour of the Respondents if he had reached a wrong conclusion of Law it could be good ground for appeal but not review”.

Further the Court of appeal in *Francis Origo & Another – vs Joseph Kimani Mungala (2005) eKLR* stated:

“our parting shot is that an erroneous conclusion of law or evidence is not a ground of review but may be a good ground of appeal once the appellants took the option of review rather than appeal they were proceedings in the view of direction they have now come to a dead end”.

17. The other consideration is whether the applicants have shown a sufficient reason to warrant a review.

It is indeed surprising that in the current constitutional dispensation a party can still hold on to a position that is discriminatory on account of gender and submit that married daughters cannot inherit their fathers land. A party seeking justice must be ready to do justice. The constitution outlaws any form of discrimination and no court can issue orders which are discriminatory. In any case though the deceased died in 1960 Section 2 (2) of the Law of Succession Act provides:

“The estates of persons dying before the commencement of this Act are subject to the written Laws and Customs applying at the date of death, but nevertheless the administrator of their estate shall commence or proceed so far as possible in accordance with this Act”.

The provision gives the court a lee way to order the estates be administered in accordance with the Act. It is therefore wrong for a party to advance a reason for review which will lead to an injustice and result in discriminating some beneficiaries. The Act advocates for equal distribution of the estate among the children who are beneficiaries. There is no sufficient reason advanced.

18. The other consideration is that an application for review must be filed without unreasonable delay. In the case of *Francis Origo* which I have cited above, the Court of Appeal stated:

“And most importantly, the applicant must make the application for review without unreasonable delay”

The order which the applicant seeks to review was issued in the year 2006. The deceased Kinyua Timotheo died on 12.8.2013. The applicant seeks to substitute the deceased.

Order 24 rule 3 Civil Procedure Rules requires that an application to substitute a party be made within a period of one year. The applicant is seeking to substitute his father four years after his death and to seek review of an order which was made over eighteen years ago. The application can only be an afterthought and actuated by other motives. It is clear that there was delay in filing the application. The delay was unreasonable and has not been explained. The application has not been brought as required of application for review. I find that the applicant has not satisfied any of the grounds which are required to be established in order for the application for review to succeed. The prayers must fail.

The applicant has not proved any grounds to warrant the setting aside of the grant.

19. In his submissions he applicant has urged the court to revoke the grant. It is trite that a party is bound by his own pleadings. The applicant was seeking review of the order made on 29.6.06. It was brought under Rule 63 (1) of the probate and administration rules. He cannot abandon that prayer and seek to introduce an application for revocation of grant in his submissions. That is what is called submission from bar which is not pleaded. The application for review and that of revocation of grant are governed by different provisions and a party cannot rely on ground of review to revoke a grant and vice versa. The submission is misplaced.

Finally, it is submitted that the court could not order the substitution of an administratrix, and therefore the proceedings that led to the appointment of the administrator were wrong. The counsel for the applicant relied on the decision of this court in *John Muriithi Gatogo -V- Lawrence Munene Ndambiri & Another* which relied on binding decisions of the Court of Appeal in *Florence Okutu Nandwa and another -V- John Atemba Kogwa among others* where the Court held that there is absolutely no room for substitution of the deceased administrator under the Law of Succession Act. This holding is true. This is a pure point of law. The Court of Appeal in the case of *Pancras T. Swai v Kenya Breweries Ltd* which I have cited above stated that where a party faults the court for not applying the law correctly, that is a good ground of appeal and not for an application for review. I still reiterated that what is before me is an application for review and not revocation of grant. There is no room for me to order revocation of grant. The point of law raised could only be considered on appeal.

In conclusion, I find that this application lacks merits I order as follows: -

- 1) The application lacks merits and is dismissed.
- 2) Costs to the respondent.

Dated this 24th day of October, 2019

L. W. GITARI

JUDGE