



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 6 OF 1993

**IN THE MATTER OF THE ESTATE OF THE LATE JOHANA GITAI GACHORA alias
GITAI GACHORA alias GITAI GACHAHI-DECEASED**

Lawrence S. Muruthi GachoyaPetitioner/Applicant

Versus

Milka Wothaya Gitai.....Objector

RULING

The applicant herein seeks orders to review the ruling delivered on 13th February 2007 pursuant to the summons general dated 23rd February 2004 on grounds that on 13th February 2007, the court refused to grant the letters of administration on grounds that it was not clear that there were no pending objections in this cause, that currently there is no pending objection on record, that the deceased will in this cause cannot be executed because of the orders in question, that the delay in filing this application is excusable, the application is in the interests of justice and no party will suffer hardship if the orders are granted. The supporting affidavit has explained in detail the reasons why the applicant seeks the orders sought.

On 22th February 2016 I made a ruling that in view of the orders sought, all the beneficiaries to the deceased's estate be served with the application now under consideration. The applicant has since complied with the said order and the affidavit of service filed on 11th April 2016 shows that the beneficiaries were served, but none attended court or filed a reply to the application under consideration.

The substantive prayer in the application is totally unclear. It reads that "*this court be pleased to review the ruling delivered on 13th February 2007 and all subsequent orders of proceedings thereof in respect of prayer one of the summons general dated 23rd February 2004.*" The applicant has not specified the nature of the review sought and to me, reliefs or orders sought ought to be specific, clear and not ambiguous. But from the grounds and supporting affidavit, it is evident that the applicant seeks to review the orders granted on 13th February 2007 in which this court (Khamoni J) declined to allow orders granting letters of administration to the applicant.

I am alive to the fact that Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by Rule 63 of the Probate and Administration Rules.[\[1\]](#) Even though the applicant has not invoked the said rule, the application before me falls under the said provisions and cannot be defeated merely because the applicant has not cited the correct provisions. However, this being an application for review, the correct legal position is that it must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.[\[2\]](#) Thus, the crucial issue that falls for determination is whether or not the application meets the threshold to warrant this court to allow it.

This necessitates a close examination of Order 45 Rule 1 of the Civil Procedure Rules, 2010 which restricts the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds; **(a)** discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; **(b)** on account of some mistake or error apparent on the face of the record, or **(c)** for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

I find nothing in the material presented before me to show that there has been discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicants at the time the orders in question were made. Further, there is nothing to show that there is an error on the face on the record of the court which warrants to be corrected by this court.

The holding by the learned judge is very clear. It raised the question whether there was no other valid objection on record. Was this an error on the face of the record? I do not think so. A look at the record shows the following:-

- a. *The petition herein was filed on 13th January 1993 by **Gitahi Gachahi**, a son to the deceased.*
- b. *On 5th May 1993 **Linus Wangombe Gitahi** filed an objection through the firm of Lucy Mwai & Co advocates claiming interest as a son and a dependant of the deceased.*
- c. *On 19th May 1993 the petitioner filed a notice of amendment and substituted his name with that of a one **Lawrence S. Muriithi Gachoya** as the petitioner.*
- d. *On 17th May 1993, a one Milka Wothaya Gitahi applied for leave for extension of time to file an objection and she filed the objection on 18th November 1993. This is the objector who died and the court in the ruling delivered by Khamoni J ruled that her objection had abated.*

The applicant avers that since the original petitioner substituted his name with that of **Lawrence S. Muriithi Gachoya**, by the mere fact of the said substitution, the objection by **Linus Wangombe Gitahi** was spent. I do not agree with the said interpretation. In my view, the correct legal position would be for the applicant to take such steps as may be necessary to have the objection by **Linus Wangombe Gitahi** determined by the court either way. There is nothing on record to show that the said objection was determined. This must have been the objection Khamoni J had in mind when he rendered the ruling, now the subject of the present review application. Accordingly there is no error on record or grounds or reasons to warrant this court to entertain the application before me.

In conclusion, I find that the application dated 4th November 2015 has no merits and I hereby dismiss it with no orders as to costs since none of the persons served attended court or opposed it.

Right of appeal **30** days

Signed, Dated and Delivered at Nyeri this **14th** day of **June** 2016

John M. Mativo

Judge

[1] See W. M. Musyoka, Law of Succession, law Africa, at page 191.

[2] Ibid, at page 191

