



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 327 OF 1994

IN THE MATTER OF THE ESTATE OF HUDSON GITHAIGA GITHINJI – (DECEASED)

RULING

1. The application for determination is dated 31st March 2014. It seeks in the main stay of the judgment delivered on 8th November 2013 as well as a review of the same.
2. The grounds upon which the application is premised are set out in the affidavit of the applicant, Anne Wambui Githaiga, sworn on 24th March 2014. Review is sought on the grounds that there are mistakes or errors apparent on the face of the record. The errors and mistakes alleged to be on the face of the record are listed in paragraphs 13 to 19 of the said affidavit as follows:-
 - a. That the court granted orders that had not been sought in the revocation application;
 - b. That the court had erred in ordering the removal of some heirs as beneficiaries even though the objectors had not sought such orders;
 - c. That court did not evaluate the oral evidence, but relied solely on affidavits, annexures and fraudulent consents;
 - d. That the court failed to consider the fact that there was no marriage between the deceased and the mother of the applicant;
 - e. That the court erred in holding that the applicant and his sister were children of the deceased without documentary evidence;
 - f. That the court erred in not considering that the mother of the applicant and her sister never gave evidence nor swore affidavits to aver that she was ever married to the deceased; and
 - g. That the court erred in holding that the sister was an heir when she never swore an affidavit nor applied to be joined nor gave any oral evidence.
3. In the said affidavit in support of the review application the applicant renounces the “*consent letter*” filed together with the petition on record on 24th February 1994. She avers that she was unaware of its existence
4. The record is silent on whether the application dated 31st March 2014 was served on the person named in the application as respondent, one Stephen Maina Githaiga. I would presume that the respondent was indeed served with the papers for he attended court on 25th June 2014 when the matter came up for hearing. He did not file a reply to the application.
5. It was directed on 23rd June 2014 that the said application be disposed of by way of written

submissions.

6. The applicant filed her written submissions on 11th July 2014. The respondent did not file any. The written submissions essentially summarise the arguments set out in the affidavit sworn on 24th March 2014 in support of the application.

7. The Motion dated 31st March 2014 is premised on Orders 45 and 51 (1) of the Civil Procedure Rules. Order 45 provides for review of orders or judgments, while Order 51 makes provisions on applications. The application is also premised on Sections 3, 3A and 63 (e) of the Civil Procedure Act.

8. The Law of Succession Act and the Probate and Administration Rules do not have provisions for review of orders and judgments. Rule 63 of the Probate and Administration Rules, however does import the review provisions from the Civil Procedure Rules. A decision of the probate court is therefore reviewable under the provisions of the Civil Procedure Rules. The Motion dated 31st March 2014 is therefore properly before me.

9. The grounds for review of a court order or judgment are set out in Order 45(1) of the Civil Procedure Rules. There may be review where there is discovery of new and important matter or evidence which was not within the knowledge of the parties at the time the case was presented, or an account of a mistake or error apparent on the face of the record, or for any other sufficient reason.

10. The Motion dated 31st March 2014 is apparently grounded on mistakes or errors apparent on the face of the record. The alleged errors are particularised in paragraphs 13 to 19 of the affidavit sworn in support of the application.

11. I have carefully perused through the grounds set out in support of the review application. It is my view that the said grounds do not bring out any errors or mistakes on the face of the record. Instead, they reveal that the judgment on record is being faulted on its merits. The court is being faulted for arriving at decisions which in the opinion of the applicant, it ought not to have arrived at. That cannot be an error or mistake on the face of record. The court might come to a conclusion which in the opinion of the application is not supported by the facts on record, but that does not constitute the circumstances a mistake or error on the face of the record. In my view the judgment of 8th November 2013 is not reviewable on the grounds of errors or mistakes apparent on the face of the record.

12. The applicant has not cited discovery of new and important matter. From the matters raised in the affidavit in support of the application, there is nothing to show that there was any such discovery. Consequently, I cannot review the said judgment on the basis of that ground.

13. The third ground for review is a broad one – any other sufficient reason. The applicant has not sought to bring herself within this ground, but the court has discretion to review a decision on the basis of this ground should there be sufficient material to support review on this ground. I will consider the judgement on record as against this ground.

14. The applicant argues that the court granted orders that had not been sought in the revocation application. She has cited the various orders that she says were made without the applicant in the revocation application seeking them.

15. The court is given discretion by Rule 73 of the Probate and Administration Rules to make orders that met the ends of justice. Rule 73 states as follows:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

16. There is the complaint that the court erred in ordering removal of heirs as beneficiaries even though

the objectors had not sought such order. This relates to the order made on the grandchildren of the children, that is to say, the children of the applicant herein, Anne Wambui. I concluded that they were not entitled to a share in the estate for as long as their own parent was alive and taking a share of the estate. I also considered that they were not dependants of the deceased as no orders had been obtained under Section 26 of the Law of Succession Act declaring them to be dependants. This is the legal position and the court pronounced itself clearly on the matter. It has not been demonstrated that I fell into error, and that there exist sufficient reasons for me to interfere with my earlier finding on the subject.

17. The applicant also states that the court did not evaluate the oral evidence, but relied solely on affidavit evidence and on what she refers to as “*fraudulent consents.*” The matter for determination in the judgment was brought by way of an application, a summons for revocation of the grant. The application is supported by affidavits, with annexures. The reply to the application takes the form an affidavit. Applications by their very nature are founded on affidavit evidence, and are disposed of on the basis of such evidence. In certain circumstances oral evidence may be adduced. Such oral evidence would be supplemental to the affidavit evidence. It usually takes the form of the cross-examination of the deponents of the affidavits on record on the contents of their affidavits. Oral evidence would serve, in cases of applications, only to explain or expound on the affidavit evidence. The mere fact than the court has given more weight to the affidavit evidence than the oral evidence does not constitute an error apparent on the face of the record nor does it undermine the integrity of the decision.

18. A court of law arrives at its decisions on the basis of the entirety of the record. The court ought not turn a blind eye to what is on record. The impugned judgment was arrived at after scrutiny of all the documents on record, including the handwritten record headed “*consent letter.*” The applicant has dismissed it as a fraudulent consent and a forgery. The document is part of the record. The court is obliged to have to regard to it. The court has no way of establishing the authenticity of the document, unless it is challenged and evidence is adduced to impeach its integrity. Kenya’s system of justice is adversarial. He who alleges fraud and forgery must prove it. The duty to establish that the alleged consent was a fraud or forged fell on the applicant and not the court. Fraud and forgery are criminal offences, there must be concrete evidence to prove indeed that the said document is a fraud and a forgery.

19. The applicant avers that the impugned document was not brought to her attention by the court and that she does not know how it found its way into the court file. This cause commenced on 24th February 1994, by way of a petition filed by in court Jemimah Wambui Githaiga and Anne Wambui, the applicant herein, of P.O. Box Mutitu, PEFA, 824, Karatina. The petition is supported by an affidavit sworn on 15th February 1994 by Jemimah Wairimu Githaiga and Anne Wambui of P.O. Box 824, Karatina. Also in the bundle are the following documents:-

- a. The affidavit of justification of proposed administrator sworn on 15th February 1994 by Jemimah Wairimu Githaiga and Anne Wambui;
- b. The affidavit of justification of proposed sureties sworn on 15th February 1994 by Stephen Mwangi Wanjohi (ID No. 10259311/4822506/67) and Joseph Kamau Maina (ID No. 3406578/66)
- c. Guarantee by personal sureties sealed on 15th February 1999 by Stephen Mwangi Wanjohi (ID No. 10259311/4822506/67) and Josphat Kamau Maina (ID No. 3406578/66);
- d. Consent letter which is undated, but has November 1993 written on its top right hand corner and bearing the official stamp of Lucy Njiru, advocate, of P.O. Box 75219, Nairobi, with a signature affixed next to the stamp; and
- e. Certificate of death No.264422 of 27th April 1992 in respect of Hundson Githaiga Githenji who died on 30th January 1993.

20. As will be seen from the above, the impugned “*consent letter*” formed part of the bundle or package of documents that the applicant and the late Jemimah Wairimu Githaiga lodged in court on 24th February 1994. It is surprising that she should turn around now and allege that she knows nothing about it, and accuse the court of not bringing it to her notice.

21. The “*consent letter*” states as follows:-

***“We the below named have no objection if Jemimah Wairimu Githaiga and Anne Wambui are granted letters of administration of our late father’s estate.*”**

1. ***Maina Githaiga (son) – 20 years***
2. ***Keziah Njeri (daughter) – 19 years***
3. ***Ruth Nyacomba (mother) – 90 years***
4. ***S M(grandson) – 11 years***
5. ***M W(grandson) – 8 years***
6. ***H N (grandson) – 14 years***
7. ***W K (grandson) – 4 years***

There are signatures against the names of Maina Githaiga, Keziah Njeri and Ruth Nyacomba.”

22. The persons named in the “*consent letter*” as the survivors of the deceased are also names in the petition filed in court on 24th February 1994 by Jemimah Wambui Githaiga and Anne Wambui. These names appear in the affidavit in support of petition for letters of administration sworn on 15th February 1994 by Jemimah Wairimu Githaiga and Anne Wambui. Paragraph 4 of the said affidavit says as follows:-

“The deceased died intestate and left the following surviving him/her:

- a. Jemimah Wairimu Githaiga –widow
- b. Anne Wambui – daughter – 32 years
- c. Maina Githaiga – son – 20 years
- d. Keziah Njeri – daughter – 19 years
- e. Ruth Nyacomba – mother – 90 years
- f. S M– grandson – 11 years
- g. M W- grandson – 8 years
- h. H N - grandson – 14 years
- i. W K – grandson – 4 years”

23. Quite clearly the contents of the “*consent letter*” tally with the contents of the affidavit sworn in support of the petition on 15th February 1994 by Jemimah Wairimu Githaiga and Anne Wambui. The parties identified as the survivors of the deceased in that consent are also the same persons listed in the said affidavit.

24. The applicant in the application dated 31st March 2014 and the deponent of the affidavit sworn in support of the application on 24th March 2014 is also one of the deponents of the affidavit in support of the petition sworn on 15th February 1994. Whereas she disowns the “*consent letter*” and its contents, she does not disown her affidavit of 15th February 1994 and its contents.

25. It is averred in the applicant’s affidavit of 24th March 2014 that I declared Stephen Maina Githaiga and Keziah Njeri to be heirs and survivors of the deceased without documentary proof. I find this surprising. The deponent of the affidavit of 24th March 2014 swore an affidavit ten (10) years ago on 15th February 1994 where she identified Maina Githaiga and Keziah Njeri as survivors of the deceased in their respective capacities as son and daughter respectively. This was a statement that she made on oath before a Commissioner for Oaths, Lucy G. Njiru, of Post Office Box number 75219 Nairobi. It is inconceivable that the deponent can now turn around, having stated on oath that these two were children of the deceased, to state that there was no basis for my coming to the conclusion that there was no evidence that they were not the children of the deceased.

26. It is instructive that the grant of letters of administration intestate made on 13th July 1994 to Jemimah Wambui Githaiga and Anne Wambui of P.O. Box 824 Karatina was made on the basis of the information in the petition filed by the applicant and her mother on 24th February 1994 and their affidavit in support

of the petition sworn on 15th February 1994, where Maina Githaiga and Lucy Njeri are named as heirs and survivors. To turn around and deny the two is to admit that the grant made on 13th July 1994 was given on basis of false information. The applicant is speaking from both sides of her mouth when she says in her affidavit of 15th February 1994 that the two are children of the deceased and in her affidavit of 24th March 2014 that the two are not children of the deceased.

27. In view of everything that I have said in the foregoing paragraphs I do not find any other sufficient reason upon which I can review the judgment of 8th November 2013. There is no merit in the application 31st March 2014 and I do hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 30th DAY OF January 2015.

W. MUSYOKA

JUDGE