



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. APPL NO. 190 OF 2012

BETWEEN

REPUBLIC APPLICANT

AND

THE PRINCIPAL MAGISTRATE

AT KIAMBU RESPONDENT

AND

WILFRED MBURU GACHUNGA INTERESTED PARTY

EXPARTE

FRANCIS NGUGI

JUDGMENT

Introduction

1. The issue for consideration in this matter is whether the court should grant orders of judicial review to set aside a judgment of the magistrate's court in a succession matter on account of the death of one of the administrators during the course of the proceedings and before judgment was delivered.

Ex-parte applicant's Case

2. The *ex-parte* applicant ("applicant") has moved the court through a Notice of Motion dated 22nd May 2012 seeking the order that; "*the Honourable Court do make an Order calling for, and removing to it, the decision of the first respondent in favour of the Interested Party against the Applicant in Kiambu Succession Cause No. 138 of 1990: In the Estate of Gachunga Gachamba alias Gachunga Gachomba delivered on 1st March 2012.*"
3. This matter stems from the decision of the Principal Magistrate at Kiambu delivered on 1st March 2012 in **Succession Cause No. 138 of 1990, In the matter of the Estate of Gachunga Gachamba**

Alias Gachunga Gacomba (Deceased).

4. The subject of the succession cause was plot number **Kabete Muthumu/T.61** and the issue for determination was whether the deceased had sold the land to the applicant or whether he had transferred it to his son, Wilfred Mburu Gachunga, the interested party, as a gift.
5. Elizabeth Wanjiru Gachunga (“Elizabeth”) was one of the administrators of the estate of the late Gachunga Gachamba and had applied for the grant of letters of administration of the estate of the deceased husband in relation to the plot. The grant of letters of administration was confirmed on 7th January 1998 in favour of the interested party herein.
6. The applicant challenges the decision arrived at in the succession cause on the grounds that part of the proceedings took place after Elizabeth had died on 10th May 2011. He submits that the judgment dated 1st March 2012 was delivered when there was no legal representative of the deceased appointed as required under **Order 24 Rule 3** of the **Civil Procedure Rules** and that the decision ought to be set aside as it breached the rules of natural justice.

The Response

7. The interested party opposed the application. He contended that the substantive proceedings in the matter took place when the deceased was alive and that both the objector and protestor closed their cases when the deceased was still alive and the matter was merely pending judgment; as such the rules of natural justice were observed. The interested party further contended that the Elizabeth was one of the three administrators of the estate of the deceased and therefore her demise did not leave the Estate without administrators. The interested party submitted that the court was not informed of Elizabeth’s death despite the fact that she was represented by an advocate throughout the proceedings upto the time of the judgment.
8. The Attorney General supported the interested party and added that there was an alternative avenue for redress before the Magistrates Court in the form of review and as such, the applicant had not exhausted all available remedies before invoking judicial review procedures.

Determination

9. The applicant seeks to rely on the provisions **Order 24 rule 3** of the **Civil Procedure Rules** to show that the decision delivered by the magistrate was delivered contrary to the rules of natural justice. **Order 24 rule 3** provides that; “*where one or two plaintiffs alone, or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.*”
10. It is not in dispute that the matter before the magistrate’s court was governed by the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** and the **Probate and Administration Rules. Rule 63(1)** of the **Probate and Administration Rules** deals with the application of the **Civil Procedure Rules**. It provides;

63. (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.
11. **Order 24** is not one of the rules of the **Civil Procedure Rules** that applies to succession matters under **Probate and Administration Rules** therefore it is inapplicable to the circumstances of the case. Even if **Order 24 rule 3** was applicable to the proceedings before the magistrate, an order for substitution is to be made ‘*on an application made in that behalf*’. No such application was

made before the magistrate's court.

12.The issue before the court is a matter dealt within the rubric of the ***Law of Succession Act***. Judicial review proceedings are not appropriate for settling matters of succession particularly this matter where the issue ought to have been raised by the parties and dealt with by the magistrate. In my view, the magistrate's court could not take cognisance of the death of an administrator unless the issue was brought to its attention through an appropriate application. Furthermore, the High Court has jurisdiction under the ***Probate and Administration Rules*** to hear appeals or revoke the grant as the case may be.

13.Judicial review is a discretionary remedy and there being an appropriate procedure for dealing with succession disputes, I decline to exercise the court's discretion in the applicant's favour.

14.For these reasons, I find that the Notice of Motion dated 22nd May 2012 lacks merits and it is hereby dismissed. The *ex-parte* applicant shall pay the costs of the interested party.

DATED and DELIVERED at NAIROBI this 30th day of August 2013.

D.S. MAJANJA

JUDGE

Mr Mugu instructed by E.N. Mugu and Company Advocates for the applicant.

Mr Gatumuta instructed by Gatumuta and Company Advocates for the interested party

Ms Cheruiyot, Litigation counsel, instructed by the State Law Office for the respondent.