



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
SUCCESSION CAUSE NO.1058 OF 2005
IN THE MATTER OF THE ESTATE OF CECILIA WANJIRU KIBICHE – (DECEASED)

JANE WANJIRU GAKUHA.....APPLICANT

VERSUS

ALICE WAMAITHA.....1ST RESPONDENT
HARRIET WANJIRU GITHINJI.....2ND RESPONDENT

R U L I N G

On 31st March 2009, Gacheche J delivered a ruling in respect of an application in which the applicant had sought to revoke the grant that was earlier issued to the respondents on 4th August 2005. In the material part of the ruling, the learned judge had this to say:

“There is no doubt that the applicant was married to the only child of the deceased. There is also ample evidence that the applicant and her husband, who predeceased his mother by four years, had separated long before the death of the deceased. I have considered the pleadings and the submissions of both counsel and Section 29 of the Law of Succession Act wherein the meaning of a dependant is provided, and unfortunately the applicant has failed to convince me that she was a dependant of the deceased. That being the case then, she cannot be categorized as “a dependant’ within the categories provided for under the law.”

The judge then proceeded to dismiss the applicant’s application seeking to revoke the grant. The court however noted that the applicant’s children were entitled to a share of the estate of the deceased “*unless they were married*”.

The applicant was aggrieved by this decision. By notice of motion made pursuant to the then **Order XLIV (now Order 45) Rule 1** of the **Civil Procedure Rules**, the applicant sought orders of the court to review the said decision by Gacheche J. It is imperative at this juncture to note that Gacheche J has been transferred from the Family Division of the High Court to another Division of the same court. According to the rules, if she was sitting in this Division, the learned judge would have been the one mandated to hear and determine this application. This court therefore is considering this application on account of the above transfer of the judge who made the decision that is sought to be reviewed. In her application for review, the applicant conceded that she no longer wishes to challenge the appointment of the respondents as the administrators of the estate of the deceased. She was however of the view that the learned judge erred when she made the categorical finding that she (the applicant) was not a dependant of the estate of

the deceased yet the applicant had not been given an opportunity to prove her interest in the estate as a protestor. The application is supported by the annexed affidavit of the applicant. The application is opposed. Alice Wamaitha, the 1st respondent, swore a replying affidavit in opposition to the application.

Prior to the hearing of the application, written submissions were filed by the parties in support of their respective opposing positions. At the hearing of the application, this court heard oral rival submissions made by Mr. Njoroge for the applicant and by Miss Wachanga for the respondents. Having carefully considered the said submissions, the issue for determination by this court is whether the applicant established a case to enable this court review the decision of Gacheche J. **Rule 63(1)** of the **Probate and Administration Rules** grants this court jurisdiction to apply the **Civil Procedure Rules** of review in succession cases. Under **Order 45 Rule 1(1)** of the **Civil Procedure Rules**, this court can review any decree or order if there is discovery of a new and important matter of evidence which was not produced at the time the decree was passed or if there is some mistake or error apparent on the face of the record or for any sufficient reason.

In the present application, it was clear that the issue for determination in the earlier application before the court was whether the grant issued to the respondents should be revoked on the ground that the respondent had concealed material facts from the court. The court held that the applicant had not presented a case to entitle the court make a finding in her favour. The court dismissed the applicant's application in that regard. The applicant is satisfied with this decision. However, she was aggrieved by the subsequent ruling in regard to the issue of dependancy. This court agrees with the submission made by the applicant that the decision on whether the applicant was a dependant of the deceased was prematurely made in view of the fact that the issue before the said court was the determination of the question who was entitled to administer the estate of the deceased.

The issue regarding who is a dependant of the deceased and their respective entitlement to the properties that comprised the estate of the deceased as provided under **Section 26** of the **Law of Succession Act** is an issue that will be determined when the court shall consider the distribution of the estate of the deceased during the confirmation of grant. The applicant has therefore made a case for this court to review the said decision delivered on 31st March 2009. There are sufficient reasons for this court to review the said decision. One of the reasons is that the applicant and her children will be prevented from putting forward their case on dependancy under **Section 26** of the **Law of Succession Act** if that decision is not reviewed. It would occasion an injustice to the applicant and her children who have been acknowledged to be the grandchildren of the deceased.

In the premises therefore, that part of the ruling that made the finding that the applicant was not a dependant of the deceased in accordance with **Section 29** of the **Law of Succession Act** is reviewed and set aside. The applicant and her children will have the opportunity to establish their case on dependancy during the hearing of the application for confirmation of grant or earlier if the applicant makes an appropriate application. As regard the application made on 15th March 2010 by Faith Nyambura Gakuha, the same shall await the determination of the dispute in regard to dependancy. This court will not make a decision in that regard at this point in time. Costs shall be in the cause.

DATED AT NAIROBI THIS 8TH DAY OF APRIL, 2011

L. KIMARU
JUDGE