



IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 83 OF 2006

IN THE MATTER OF THE ESTATE OF STEPHEN MBAU GITICHA (DECEASED)

SUSAN NDURUKI MBAU.....ADMINISTRATIX/RESPONDENT

VERSUS

JONATHAN GITICHA MBAU.....APPLICANT/PROTESTOR

RULING

This is an application that relates to the administration of **Stephen Mbau Giticha's** (deceased) estate.

Upon an application dated 8th June 2009 filed by **Susan Nduruki Mbau**, one of the deceased's widows, Justice Maraga ordered that Title Numbers **Subukia/Subukia Block 9/4** and **Subukia/Subukia Block 9/8** registered in the name of **Rose Wairimu Mbau** be cancelled and the same be distributed to the heirs of the deceased in accordance with the certificate of Confirmation issued by this court on 23rd February 2009.

On 8th November 2010, another Notice of Motion was filed by **Jonathan Giticha**, pursuant to **Order 44 Rule 40 (6) and Order 50 Rule 1 and Section 47 of Laws of Succession Act**. The applicant prays that the court be pleased to review, vary or set aside the orders made by Justice Maraga on 2nd July 2010. The grounds upon which the orders are sought are that the application dated 8th June 2009 proceeded to hearing ex-parte, without the applicant's knowledge and the applicant disputes the mode of distribution and that since that order was made, the protestor's family has been threatened with eviction. The application was predicated on the affidavit of the protestor, Jonathan Giticha. He deponed that he had filed an application of protest through his advocate, **Mr. Tengekyon** on 26th June 2009. He did not hear from the advocate until 2nd November 2010, when his mother Rose Wairimu Mbau was informed by **Susan Nduriki Mbau**, that she should move out of Land parcel **Subukia/Subukia 9/4 and 9/8**. He enquired from the Advocate who was unaware that the court on 2nd July 2010, cancelled the titles which had been registered in the name of Rose Wairimu Mbau. He perused the court file and found that his counsel had not attended court on the hearing date and the court had made the ruling without some facts, to the effect that Rose Wairimu Mbau was a registered owner of the two parcels, as a member of Chinga Company as evidenced by the Company register and a letter from the chairman **JGM(a) and (b)**. He deponed that Rose Mbau paid for the plots (**JGM2**). He further deponed that his father had properties in Nyeri and Nakuru and whereas Susan Mbau knew about this, she preferred to pursue the land in Nakuru. He urged that if the court does not set aside the order of 2nd July 2010, him and the other beneficiaries of the deceased's estate will suffer irreparably. Ms Ndeda who has conduct of this matter on behalf of the applicant also submitted that although the Judge had on 27th July 2007 ordered that *viva voce* evidence be adduced to enable the court make a determination, that was not done. When the matter

came up for hearing, **Mr. Kirui** who held brief for Mr. Tengekyon did not raise any issue with the matter being heard by way of *viva voce* evidence.

Susan Mbau swore a replying affidavit on 19th November 2009 in which she deponed that when the matter came up for hearing on 23rd February 2009, the protestor's affidavit was dismissed after Mr. Tengekyon failed to adduce any *viva voce* evidence as directed by the court, but the court considered the applicant's affidavit of protest. The grant was subsequently confirmed on 29th February 2009 but the applicant has never sought to have it revoked. **Ms Gatei**, counsel for the Respondent argued that the application under challenge came up for hearing on 30th June 2010. There was no direction for calling of *viva voce* evidence on the application dated 8th November 2010 seeking to have the titles cancelled. Counsel urged that since the order of Justice Maraga was made, the titles registered in Rose Wairimu's names were cancelled and were the property shared equally between Rose and Susan Mbau? Counsel also submitted that the confirmed grant can only be set aside by an order of revocation and the orders sought are not available.

I have perused the court file and I do agree with Ms Gatei that the applicant herein had filed an affidavit in protest dated and filed in court on 19th July 2007. On 27th July 2007, the parties agreed by consent that the application be disposed ***of by way of viva voce*** evidence. By then, Mr. Tengekyon was on record for the protestor, the applicant. When the matter came up for hearing on 23rd February 2009, Mr. Tengekyon indicated that he had no witness to call and he based his submissions on the affidavit filed by the protestor. After hearing both parties in the affidavits, the court dismissed the protest. I therefore agree with Ms Gatei that the order to adduce *viva voce* evidence was in respect of the affidavit of protest dated 19th July 2007 and after that affidavit was dismissed, the grant was confirmed on 29th February 2009. When Justice Maraga heard the application dated 8th November 2009 on 30th June 2010, there were no directions taken that that application be determined by way of *viva voce* evidence.

The record also shows that on 30/6/2010, Mr. Tengekyon was absent but was represented by Mr. Kirui who replied to the application and it is untrue for the applicant to allege that the application proceeded *ex parte*. For an order of review to issue, the applicant must demonstrate that there has been discovery of new and important matter which was not within his knowledge or could not be produced by him at the time the decree was passed, or it will issue on account of mistake or error apparent on the face of the record or any other sufficient reason.

The applicant did not demonstrate that he has discovered any new or important matter or that there was a mistake or error apparent on the face of the record. In absence of the above, he should have shown any other reasons to warrant the review of the court's order. The applicant has failed to fulfill the conditions precedent to the issuance of an order of review. The grant having been confirmed by the order of 29th February 2009, the court's orders can only be set aside or reviewed upon the grant being revoked.

I will agree with **Mrs Gatei** that the only mode of challenging the orders made by Justice Maraga on 2nd July 2010, is by applying for revocation of the grant issued. In the result, I find that the application does not merit the orders sought and it is hereby dismissed with costs.

DATED and **DELIVERED** this 20th day of 2011.

R. P. V. WENDOH
JUDGE

PRESENT:

.....for Applicant
.....for Respondent
Kennedy – Court Clerk