REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 137 of 1998

MURIITHI KAHIUHIO ONESMUS……....……PETITIONER

VERSUS

WASHINGTON MWANGI KAHIUHIO

WAHOME KAHIUHIO

KANJA KAHIUHIO…….....OBJECTORS

R U L I N G

Washington Mwangi Kahiuhio and **Wahome Kahiuhio** hereinafter referred to as the applicants are dissatisfied with the order of this court made on 26th June, 2007 confirming the grant issued herein on the 14th May, 2003. They have therefore by their application dated 3rd July, 2007 and filed in court the following day sought that this court be pleased to review that order and that the applicants be allowed to file an affidavit of protest against the mode of distribution as proposed by the respondent in his application dated 11th November, 2006. The applicants also pray that the costs of the application be provided for.

The application is premised on the grounds that the application for the confirmation of the grant indicated a parcel of land unknown to the applicants. That the applicants attended court on 26th June, 2007 and raised the issue of the unknown parcel of land. That the respondents counsel made oral application to amend the application for confirmation of grant and they came to learn later that the grant had been confirmed with the details of land parcel amended. That it is fair in the circumstances that the said order be reviewed and the applicants be given a chance to file affidavit of protest.

The application was further supported by an affidavit sworn by the 1st applicant. In the main he deponed that he had been appointed a joint administrator with the respondent of the estate of the deceased. That though he had not been contacted by the respondent before he filed the application for confirmation of grant dated 11th November, 2006 he was nonetheless served with the application and upon perusal of the same he realized that the same was referring to a land parcel number **Aguthi/Gaki/1688**. However since the deceased land was **Aguthi/Gaki/688** he did not bother to file any papers as he was not aware of the parcel of land referred to in the application. That he raised the issue on 26th June, 2007 but later on came to learn upon inquiry at the registry that the respondent's advocate had applied to amend the application and was allowed by the court and the grant was confirmed. That he was personally not satisfied by the mode of distribution and had he been served with an application indicating

the deceased land, he could have sought for legal advice on how to oppose the mode of distribution. Finally the applicants deponed that the respondent will not be prejudiced or suffer irreparable damage if orders sought are granted.

The application was opposed. In a replying affidavit dated 19th October, 2007 and filed in court on 22nd October, 2007, **Onesmus Muriithi Kaihuhio**, hereinafter referred to as the respondent depones that the application is misconceived, incompetent, bad in law, totally defective, and gross abuse of the process of the court. That in any event the application does not meet the requirements of granting an order for review. That the objectors are not truthful as they were served with the application on 19th January, 2007 personally at Kangaita. That the applicants all along knew the land the subject matter of the succession cause and which belonged to the estate of **Makaburu Wamukuyu** – deceased. Finally the respondent deponed that the respondents were given a chance to respond to the application but chose to be arrogant to the court.

In his oral submissions in support of the application, **Mr. Mugo**, learned counsel for the applicants stated that the application was premised on "*sufficient reason.*" That the applicants were served with an application for confirmation of grant which cited wrong parcel of land and which did not form part of the estate of the deceased. That the applicants appeared in court and upon amendments being made, they had no time to respond to the application upon the amendments being made orally by the applicants.

On his part**, Mr. wahome**, learned counsel for the respondent submitted that the applicants had not met conditions set out under order 44 of the Civil Procedure Rules for the granting of such an application. That sufficient cause cannot be what the applicants are alleging. The applicants were given a chance to respond to the application even after the amendments but they never seized the opportunity. Counsel took issue with the averments in paragraph 13 of the supporting affidavit. To counsel they were false and were calculated to cast unnecessary aspersions to the integrity of the court. A false allegation cannot amount to a sufficient cause. It is not believable for the applicants to claim that they could not challenge the application as the land referred to, was unknown to them.

I have carefully considered the application, the supporting and replying affidavit as well as oral submissions made by respective counsel. I have perused the authorities cited by the respondent and wish to make the following observations.

As stated by the court of appeal in the case of **Muriithi Gachuhi & Anor V Mutugi Mwaniki alias Gichuhi Mwaniki, civil appeal number 23 of 1994 (NYR)** (unreported), an application for review can only be allowed on any or all of the three legal grounds set out in order 44 rule 1 of the Civil Procedure Rules; namely the discovery of new and important mat
ter or evidence which was not available to the applicant at the time the order was made, some mistake or error apparent on the face of the record or any other sufficient reason. Where a judge is of the view that the materials made available to him by the applicant does not satisfy any of these three grounds, then the judge should have no option but to dismiss the application. This is the exact position obtaining herein.

In his submission in support of the application, **Mr. Mugo** stated that the application was premised on sufficient reason. What is the sufficient reason put forth by the applicants in seeking a review? As far as I can discern from the record the "*sufficient reason*" claimed is the alleged oral amendment of the land parcel **Aguthi/Gaki/688** in the application which got the applicants by surprise giving them no time at all to respond. That is in so far as their oral submission in support of the application goes. However in their grounds in support of the application they allege that they canvassed before court the issue of the wrong citation of the land parcel in the application. However, they had no legal knowledge on how to oppose the application since they were unrepresented. Yet again they claimed that they were not allowed to respond to the respondent's oral application to amend the application and only came to learn later that the grant had been confirmed. This is in so far as the grounds of opposition are concerned.

How about the supporting affidavit? They depone that whilst in court on the day of the confirmation of grant they informed the court that they were not aware of the parcel of land indicated in the respondent's application. That later on they learned upon inquiry at the registry that the respondent's

advocate applied to amend the application and was allowed by the court and the grant was confirmed. That had the respondent served them with the application on time and with an application indicating the proper land parcel they could have sought for legal advice on how to oppose the mode of distribution.

With all these contradictory positions taken by the applicants it is difficult to discern what "*sufficient reason*" is to warrant this court to exercise its discretion and allow the application. Was the "*sufficient reason*" the fact that the applicants were denied opportunity to address the court when counsel for the respondent made an oral application to amend the land reference number or was it that following the amendment, the applicants were not given an opportunity to have a lawyer to advice them on how to oppose the mode of distribution? Or is that the oral amendment was made in their absence and only came to know about it when they made enquiries in the registry later! Whichever way one looks at it, what is being touted as "*sufficient reasons*" are no reasons at all to warrant the reviewing and setting aside of the order made herein on the 26th June, 2007.

There is no doubt at all that this court gave the applicant a chance to respond to the application even after the amendments. The applicants categorically stated that they had no objection to the confirmation of the grant. It was on that basis that the grant was confirmed. For the applicants to turn ground now and claim that they were not given a chance to express themselves after the amendment to the application was made smacks of lack of candour and honesty. And as correctly pointed out by **Mr. Wahome,** counsel for the respondent, it is a false statement that is meant to cast unnecessary aspersions to the integrity of this court. The statement seems to suggest that this court is run like a kangaroo court. Nothing can be far from the truth. A false allegation cannot amount to a sufficient cause. It behoves litigants who seek court's exercise of discretion in their favour to be truthful and candid. Unfortunately, the applicants have not acquitted themselves very well on this account.

I do not buy the suggestion that the only reason why the applicants did not oppose the application for the confirmation of the grant was because a wrong land parcel number had been cited in the application. If that be the case, why then did they find it necessary to come to court on that day. The only parcel of land constituting the estate of the deceased was and still is **Aguthi/Gaki/688.** The amendment was to remove digit 1 so as to reflect the correct land parcel that the applicants were aware of since in the supporting affidavit the land parcel had been inadvertently referred to as **Aguthi/Gaki/1688**.

It is instructive that the 1st applicant was appointed jointly with the respondent as co-administrators of the estate of the deceased. He does not deny that he was served with the application for the confirmation of the grant in good time. Indeed he noticed the misdiscription of the parcel of land in good time as well. Ordinarily one would have expected that he would have taken up the issue with his co-administrator, if for anything, to know whether they were reading from the same script. He chose not to raise the issue at all with his a co-administrator for no apparent reasons. He was contended with the fact that the suit premises had been misdiscribed. None the less he came to court just in case. So what was he coming to court to do. He never bothered to file an affidavit of protest. He also had ample time to consult a lawyer with regard to the application for the confirmation of the grant, the misdiscription of suit premises notwithstanding. The lawyer would have advised him on what to do. The applicants cannot therefore claim that they were got by the surprise with the amendment. They were in court, were given opportunity to respond and or object to the amendment and had no objection. Had they objected to the confirmation of the grant following the amendments, this court would certainly have listened to their plea considering that land in this part of the world is a fairly sensitive issue. They did not. They cannot also be heard to say that if the respondent had served them with the application in good time indicating the correct parcel of land they could have sought for legal advice on how to oppose the mode of distribution. The applicants were served with the application for confirmation of grant way back on 19th January, 2007 going by affidavit of service on record. They had six months or so to respond to the application. They did not on the pretext that the land parcel cited therein was wrong. To my mind and as already stated, the applicants are not being truthful on this aspect of the matter.

In conclusion, I should point out that this matter has been pending in court since July, 1998. I think that it is in the interest of all that it be brought to a rest. I would reiterate here what the court of appeal said in the case of **Muriithi Gachuhi** (supra)

"…..**time has now come when this court must tell these two in no uncertain terms that all the legal tricks in the book will never make them win this dispute….**"

Accordingly the application is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 26th day of March, 2008.

M.S.A. MAKHANDIA

JUDGE