



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 1106 OF 2010

IN THE MATTER OF THE ESTATE OF GITAU GITHINJI (DECEASED)

JOHANA GITHENJI WACHIRA.....APPLICANT

VERSUS

HELLEN WAMBUI MWANGI.....RESPONDENT

RULING

Brief facts

1. The applicant has brought this application dated 17th May 2019, under **Section 4 of the Law of Succession Act, Rule 63 and 73 of the Probate and Administration Rules and Order 45 of the Civil Procedure Rules** seeking for orders to set aside or review orders made by this court on 26th April 2019. It is the applicant's contention that the proposed mode of distribution to the house of Joseph Wachira Gitau excluded his three children.
2. In opposition of the said application, the respondent has filed a replying affidavit dated 8th June 2021.
3. The applicant filed a further affidavit dated 14th October 2019.
4. Parties elected to rely on their affidavits as their evidence.

The Applicant's Case

5. The applicant says he is the grandson to the deceased. His father, Joseph Gachira Gitau died on 10th April 2014 and was the son of the deceased. The applicant's father had two wives, including the applicants mother Milcah Cheruto who was his first wife. The couple was blessed with three children namely Lucy Nyawera Wachira, Idid Gateo Wachira and the applicant herein.
6. The applicant states that the family lived in Lomolo in Nakuru County where his parents had put up their matrimonial home. The family stayed together at Lomolo until 1995 when his father left and married the respondent. He adds that his mother died in 2006 and their father was not consistent in visiting them but informed them that he would pursue his inheritance from the applicant's grandfather to which he informed his children that they were entitled to get shares.
7. The applicant contends that he came to learn of Land Parcel No. Othaya/Itemeni/153 which was his father's estate and was allocated to the respondent as the sole beneficiary in this cause. The applicant adds that the respondent deliberately and maliciously concealed that their father was married to two wives thus denying the children of the first house their right of inheritance.
8. The applicant prays that the court reviews its orders and includes him and his siblings as beneficiaries of the estate of Gitau Thinji by virtue of being the children of Joseph Gachira Gitau.
9. The applicant filed a further affidavit dated 14th October 2019 in which he states that he had annexed a birth certificate stating that his father was Richard Gitau Gachira. He prays that the said birth certificates to be expunged from the record because the same has a clerical error from the offices of Registrar of Births and Deaths. He deposes in the supporting affidavit that his father's name was Joseph Wachira Gitau.

The Respondent's Case

10. It is the respondent's case that she is the wife to the late Joseph Gachira Gitau whom she married in 1988 and they have three children namely Lilian Njambi Gachira, Gideon Mwangi Gachira and Stephen Gitau Gachira. The respondent further states that her late husband died on 12th April 2014 and she and her husband lived in Soweto Nairobi and ran a business since she got married until the death of her husband.

11. The respondent contends that he was buried in his father's land, the deceased herein, in Itemeine, Othaya in Nyeri County. That the late Milka Cheruto Wachira was not married to her husband as she would also have been laid to rest in the same parcel of land. Further, the applicant has not produced any evidence in court of the matrimonial home in Lomolo whereby his mother and the deceased Joseph used to live. She further adds that the three children of the said Milka Cheruto Wachira bear the name Wachira and not Gachira like those of the respondent.

12. The respondent states that she did not experience any problem with her late husband's share in the deceased's estate till the protestor herein, Richard Gitau Mutiria, brought in the applicant as an avenue to frustrate and delay the distribution of the estate herein.

13. It is the respondent's contention that the application herein is scandalous, frivolous, vexatious, and there are no new ground brought forth by the applicant that warrant the court herein to vary its orders. She urges the court to dismiss this application.

Issues for determination

14. The main issue for determination before the court is whether the orders issued on 26th April 2019 should be set aside, varied or reviewed.

The Law

15. In making a decision whether or not to allow an application seeking to set aside an order issued by the court, the court is exercising discretion. This was well highlighted in the case of **Mbogoh vs Shah [1968] EA 93:-**

“A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifestation from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.”

16. Similarly in **United India Insurance Co. Ltd & 2 Others vs East African Underwriters (Kenya) Ltd [1985] eKLR** Madan JA (as he then was) rephrased it as follows:-

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from. The Court of Appeal is only entitled to interfere if one or more of the following matters are established; first, the Judge misdirected himself in law; Secondly, that he misapprehended the facts; Thirdly, that he took account of considerations of which he should not have taken into account; Fourthly, that he failed to take into account of considerations of which he should have taken account, or Fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

17. This discretion is not exercised capriciously or with a view to rewarding an indolent party. It is exercised to meet the end of justice. Koome J (as she then was) in **Alloys Kaveen Chepkwony vs Development Bank of Kenya & 2 Others Nairobi HCCC No. 387 of 2008 Milimani** cited with approval the decision in **Patel vs Cargo Handling Services Ltd [1975] EA 75:-**

“The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. Shah vs Mbogo [1967] EA 116. In exercising the discretion the court should consider among other things, the facts and circumstances both prior and subsequent, and all the respective parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by setting aside the judgment should be considered and it should always be remembered that to deny a person a hearing should be the last resort of the court.”

18. It is also important to consider whether by setting aside the ruling herein, justice will be done to all the parties in this matter.

19. It is also noted that the applicant has not applied for revocation of grant but for review of the said grant.

20. The applicant's main contention is that the respondent left him and his siblings out of the succession of the grandfather's estate. His deceased Joseph Wachira is entitled to a share in Land parcel No. Othaya/Itemeini/153 which was the only asset of the deceased in this case.

21. On the other hand, the respondent states that she and her children are the sole beneficiaries of the estate of Joseph Gachira Gitau. Further, that she was his only spouse during his lifetime and was not aware of any other family that her late husband had. On perusal of the amxtures to the applicant's application, he annexed two birth certificates for Lucy Nyawera and himself which both indicate that the name of their father is Richard Gitau Gachira. However, in the application and in the replying affidavit, the deceased's son was Joseph Wachira Gitau. The applicant further deponed that the certificate of himself and Lucy Nyawera contained erroneous names and asked the court to expunge the document from the record. However, he did not attach any affidavit of any officer from the office of Registration of Births and Deaths to support his contention that there was an error in the names. This puts the authenticity of the birth certificate in question and casts doubt on whether the applicant really knew the man he calls his late father.

22. Without prejudice to the foregoing, the applicant has relied on order 45 of the Civil Procedure Code seeking review orders. **Order 45 of the Civil Procedure Act and Rules** provides:

1. Any person considering himself aggrieved;

a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree made the order without unreasonable delay.

23. From the foregoing, it is clear that for review orders to be granted the following has to be considered:-

a) There must be discovery of new and important matter

b) The new matter was not within the applicant's knowledge

c) The new matter could not have been produced at the time the decree or order was passed exercising due diligence

d) There is an error apparent on the face of the record

e) There are shown sufficient reasons.

24. The applicant claims that he came to learn that his alleged father was entitled to a share of the suit property which devolved to the respondent absolutely. I am not satisfied that the applicant has raised any new and important matters in this application as required by the law. In his affidavit he states that his deceased father told him that he was pursuing the deceased's estate herein. Although he stated that he came to know from James Kariuki that his alleged father was entitled to a share of the suit property, has not annexed any affidavit to support his contention. Thus it is my humble opinion that the applicant and his siblings knew all along that their alleged father was pursuing his inheritance from the deceased's estate. The applicant did not state why it took him so long particularly from 2014 when his father died to 2019 when he filed this application.

25. Based on the above reasons it is my considered view that the applicant has not laid out any satisfactory reasons to warrant a review of the orders made on 26th April 2019.

Conclusion

26. It is my finding that the applicant has not demonstrated that the orders issued on 26/04/2019 ought to be reviewed.

27. I find no merit in this application and dismiss it accordingly.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 1st DAY OF JULY 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 1ST DAY OF JULY 2021