

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 107 OF 1991

IN THE MATTER OF THE ESTATE OF JAMES MBAI GATHURI alias GATHURI (DECEASED)

MONICAH WAIRIMU KAMAU.....APPLICANT

VERSUS

LOISE WANJIKU MBAI.....RESPONDENT

RULING

1. The deceased James Mbai Gathuri alias Gathuri died intestate on 17th February 1990. He had six sons and four daughters. The joint grant of letters of administration intestate was on 5th February 2016 issued to his two daughters, Loise Wanjiku Mbai (the respondent) and Jane Wambui Mbai and daughter in-law Monicah Wairimu Kamau (the applicant). The deceased's estate comprised Dagoretti/Uthiru/83 measuring 0.95 acres and Dagoretti/Uthiru /88 measuring 1.8 acres. On 31st May 2018 the court confirmed the grant. Parcel 83 was to be shared between the respondent (0.035Ha) and Adrian Mbai Kungu (0.0164Ha) and parcel 88 was to be shared among the seven other beneficiaries of the estate.

2. However, the court made a mistake by reversing the two parcels in the final order.

3. The respondent successfully applied for the review of the order to correct the mistake in her application filed on 13th August 2018. A ruling was delivered on 17th July 2019. The applicant had opposed the application.

4. The applicant has filed a notice of appeal against the ruling. In the instant application, he seeks that the execution of the orders in the ruling (as contained in the certificate of confirmation that was issued) be stayed until the appeal is heard and determined. The application was brought under **Order 42 rule 6** of the **Civil Procedure Rules**. The request in the application to have the firm of Maina Wairimu & Associates Advocates to come on record for the applicant in place of L.N. Muchira & Co. Advocates was not opposed and is hereby granted.

5. The applicant states that the effect of the ruling would be to remove her from a permanent residence that she has occupied for over 30 years. That would occasion her substantial and irreparable loss. The respondent's case is that the applicant seeks to benefit from an error that the court fell into when it reversed the parcels. She stated that all the beneficiaries, and not only the applicant, will move to the respective portions allocated in the distribution; and that this is an old matter that has been outstanding since 1991.

6. The applicant has the right to challenge the ruling of this court by going to the Court of Appeal. The court should not render the appeal nugatory by allowing execution to proceed on the basis of the ruling. At the same time the respondent has a decision which she is entitled to execute. Infact, the estate has many other beneficiaries whose lives must go on after the distribution.

7. There is no indication that there was any delay in bringing the application. The applicant states that she is willing to abide by any order as to security that the court may make.

8. I consider that the deceased died in 1991. The dispute has been outstanding since then. When one looks at the distribution of 31st May 2018, the court was saying in effect that the applicant wanted to benefit more than the rest of the beneficiaries which was going to go against the provisions of **section 35(5)** of the **Law of Succession Act (Cap. 160)**; that all the beneficiaries were 9 and the parcels were two; of the two, parcel 83 was the smaller one; parcel 88 was the bigger one; the court gave parcel 88 to seven beneficiaries and parcel 83 to two beneficiaries, the applicant included. Given these facts, I do not consider that, under **Order 42 rule 6** of the **Civil Procedure Rules**, the applicant will suffer substantial, or any, loss if stay is not granted.

9. I will consequently exercise my discretion in dismissing the application.

10. This is family dispute. Each side shall bear own costs.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 7TH day of MAY 2020.

A.O. MUCHELULE

JUDGE