



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 437 OF 2014

IN THE MATTER OF THE ESTATE OF KIROIRO GATIMU (DECEASED)

EDDAH NYAKIO KATHUNI.....APPLICANT

VERSUS

CECILY WAMBUI GATIMU.....PETITIONER/RESPONDENT

RULING

1. By a Chamber Summons application taken out by the 2nd Respondent Jane Wanjiru Kiri, widow of the deceased Kariro Gatimu on the 23/6/2020, under provisions of **Rule 49 and 73 of the Probate and Administration Rules (cap 160 Laws of Kenya)**. The applicant sought orders:-

1. Spent

2. That the Honourable Court be pleased to stay any further proceedings pending hearing of prayer No. 3,4 and 5 of the application.

3. That the Honourable court be pleased to order the office of Criminal Investigations to examine and determine the authenticity of the signatures and/or writing in the consent filed on 4/7/2018 and further the Sub-chief Kimandi Sub-location be summoned to appear before the court and/or swear an affidavit as to whether he oversaw the process of execution of the consent in his office.

4. That consequently the orders of 29/5/2020 be reviewed and/or set aside upon receipt of a report from the D.C.I. office.

5. That costs be provided.

2. An affidavit sworn by the applicant on the 22/6/2020 is filed in support of the application; UPON grounds that the consent is a forgery, the applicant stating that she never signed any consent on the distribution of the estate at the Chief's Office.

3. In opposing the application, the 1st, 3rd, 4th and 5th Respondents gave the 1st Respondent authority to swear the Replying Affidavit, which was sworn on the 21/7/2020 by Cecily Wambui Gatimu and filed on even date.

4. By a court order, all parties filed their respective submissions on the application. I have considered the application and all the affidavits in support and in opposition thereto.

5. This court is minded that there is a Judgment dated 29/5/2020 in respect of this cause wherein the applicant now, Jane Wanjiru Kiri and four others were the Respondents in an application for annulment and/or Revocation of the Grant dated 25/4/2019 brought by Ann Wambui Kiri and three others who are the children of the deceased. The 1st Respondent therein Jane Wanjiru Kairiro is a sister to the deceased while the 2nd Respondent is the wife of the deceased.

6. This is the Judgment that the applicant in the present application (dated 22/6/2020) seeks to have reviewed and or set aside if prayer 2 and 3 are granted.

7. A grant of Letters of Administration were issued to Cecily Wambui Gatimu, a sister to the deceased and confirmed on the 14/12/2016. The estate of the deceased comprised of one property Land Parcel No. Inoi/Kimandi/114. It was distribution equally among the beneficiaries which distribution was later contested by an application for Revocation.

8. The Court (Gitari –J) heard the application and delivered the Judgment dated the 29/5/2020 –dismissing the application having found that the grant was not obtained fraudulently.

9. Probate and Administration Rule 49 provides:-

“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.

Rule 73 provides for the saving of inherent powers of the Court to make such orders as maybe necessary for the ends of justice, or to prevent abuse of the process of the court.”

The present application falls under the above provisions.

The Applicant’s case is that she did not sign the consent filed on the 4/7/2018 on the distribution of the deceased’s estate at the Chief’s Office. She therefore urges for an order, directing the Criminal Investigations Office to Investigate the genuineness and or authenticity of the signature/writing, on grounds that she is illiterate save that she is able to write her name, and was at all material times under the mistaken brief that her children had engaged an Advocate to represent her and the children.

10. **The Respondent’s Case** by the Replying Affidavit is that this matter has been settled by the Judgement delivered on the 29/5/2020 (not 14/5/2020) wherein summons for revocation of the grant was dismissed and thus argues that this application seeks to re-open the case which order ought not be granted.

11. It is a further submission that it is the applicants children who had filed the summons for revocation, and enjoined their mother. The applicant did not testify or raise any concerns with the consent that she now faults as a forgery, yet she attended court when the grant was confirmed wherein she affirmed her consent, and the distribution.

It is further submitted that the applicant is trying to urge an appeal through the application as the said application does not meet the threshold for review and/or setting aside of the consent order or the Judgment.

12. **Applicant’s Submissions** are dated the 1/10/2020 drawn by the Law Firm of Philip Henry Associates, Advocates. The totality of the submissions is that the applicant did not sign any documents concerning the succession of the estate of her late husband; nor the consent form in which the distribution of the estate was agreed upon.

13. It is further submitted that the applicant never appeared nor signed any documents before the Chief nor had any matters explained to her by the said Chief. Citing the case ***In re Estate of Gathuku Gathuna (deceased) (2020) eKLR***, where forged documents were used to obtain the grant and distribution of the estate, the court proceeded to revoke the grant as it was obtained through fraud, and therefore urged for the orders sought.

14. **Respondents submissions** are dated 24/9/2020.

It is submitted that what the applicant seeks is to have this case re-opened and heard afresh, stating that all concerns raised by the applicant are well dealt with in the Judgment dated 29/5/2020.

15. It is further submitted that this court is ***functus officio*** having rendered itself on the issues raised, and delivered a Judgment and that the prayer for review is misplaced as the threshold stated under **Order 45 Civil Procedure Rules** has not been met.

16. **Analysis and determination.**

I have carefully considered the arguments tendered by both rival parties, as well as the Judgment dated 29/5/2020. I agree with the respondent that the judgment captures all the issues raised by the applicant.

17. I have also considered the proceedings on the hearing of the Revocation of Grant on the 10/12/2019. The applicant did not testify in support or in support to the revocation of grant. Her side of the case was averred in the affidavit of Cecily Wambui Gatimu sworn on the 4/7/2019 on behalf of the other respondents. The matter of forged consent and other documents were stated therein at Para 3 therein and at Para 4, **Jane Wanjiru Kiriro** was in court on the date the grant was confirmed and consented to the proposed mode of distribution. Had she not been aware of the mode of distribution, she would not have consented to the said distribution.

18. In any event, during the hearing of revocation of grant, she would have raised an objection that she never signed the consent, as averred by Cecily Wambui Gatimu that all beneficiaries signed the said consent at the Chief’s office after the said Chief explained to them the contents and wording of the consent – Par 3 of Cecily Wambui’s affidavit sworn on the 4/7/2019. To come to court at this stage, after Judgment was delivered, capturing all the issues she raises, is in my view but an afterthought.

19. I agree with the respondents that this application is an attempt to urge an **“appeal”** before a court of concurrent jurisdiction a situation that is not tenable in law.

A matter of Review or Appeal?

The threshold for an order of Review is stated under **Order 45 rule 1(1) of the Civil Procedure Rules**. The Cardinal rule is --- *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 order made, or on account of some mistake or error apparent on the face of the record, or for any other reason---*

20. The applicant has not demonstrated to the court of any discovery of new important matter. Indeed, the said consent and other succession documents were at all material times within the knowledge of all the parties hereto, and specifically the applicant. I need not repeat myself unnecessary. She attended court when the grant of confirmation was issued, she was present in court when the mode of distribution was agreed at; she did not raise any objection.

21. During the hearing of the summons for revocation of grant, the applicant was present in court. She knew of the consent. She had a chance to tell the court that she did not sign it. How and when then, did she discover that the consent was forged, that she did not attend the signing of the consent before the Chief?

22. For a material to qualify to be new and important evidence or matter, it must be of such a nature that it could have been discovered had the applicant exercised due diligence – **Republic –vs- Advocates Disciplinary Tribunal Exparte Apollo Mboya (2019)eKLR**. See also **Section 80 of the Civil Procedure Act**.

23. In Nyamogo & Nyamogo –v- Kogo (2001) EA 174, the Court of Appeal rendered that a wrong view by a court is certainly not a ground for a review, although it may be for an appeal. In Abasi Belinda –v- Fredrick Kagwamu & Another (1963) EA 557, the court held that:-

“a point which maybe a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review through it may be a good ground for appeal.”

By the present application, it is evident that the applicant was not satisfied with the court’s Judgment. The options available to her would have been an appeal as the threshold for a review has not been met.

24. The court cannot be urged to go back to its Judgment when the issues sought for re consideration are issues fully dealt with. To do so, the court would be sitting on appeal of its own Judgment.

25. The applicant has clearly failed to make out a case to persuade the court to grant prayers No. 2,3 or 4 of its application dated 22/6/2020.

Consequently, the application is dismissed.

Parties shall bear own costs on the application.

Dated, Signed and Delivered at Kerugoya this 15th day of October 2020.

J. N. MULWA

JUDGE

Parties

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