



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 291 OF 2020

IN THE MATTER OF THE ESTATE OF DAVID GATHUKU WANYEE (DECEASED)

TERESIA NYAMBURA.....1ST APPLICANT
STEPHEN WANYEE GATHUKU.....2ND APPLICANT
FRANCIS KIRAGU GATHUKU.....3RD APPLICANT
VINCENT MUIGAI GATHUKU.....4TH APPLICANT

VERSUS

VIRGINIA WAITHERA GATHUKU.....1ST RESPONDENT
SUSAN MUTHONI GATHUKU.....2ND RESPONDENT
KIBATHI GATHUKU.....3RD RESPONDENT
ROSEMARY WANJIKU.....4TH RESPONDENT
TERESIA NYAMBURA.....5TH RESPONDENT
DORCAS WACHEKE WANYEE.....6TH RESPONDENT

RULING

1. On 13th May 2020 Justice Ali-Aroni delivered the following ruling:-

“(1) The applicants namely Teresiah Nyambura, Stephen Wanyee Gathuku, Francis Wanyee Gathuku and Vincent Muigai Gathuku are children of the deceased herein, David Gathuku Wanyee from his second wife.

2. Previously the applicants and the 1st house comprising Vrginia Waithera Gathuku, Susan Muthoni Gathuku, Kibathi Gathuku, Rosemary Wanjiku, Teresia Nyambura and Dorcas Wacheke Wanyee had protracted cause being Succession Cause No. 30 of 1979. It therefore is necessary that all parties are made aware of the intended petition for grant of letters of administration *ad colligenda bona* by the applicants.

3. Having stated the above and in view of the fact that the deceased died intestate on 4th July 1975 and considering the history behind the matter, it would be efficacious for the applicants to petition for a full grant as opposed to the current application.

4. For the above reasons the application is declined.”

2. The ruling followed an application dated 23rd April 2020 by the applicants Teresia Nyambura, Stephen Wanyee Githuku, Francis Kiragu GATHuku and Vincent Muigai Gathuku who sought to be issued with a grant of letters of administration *ad litem* in respect of the estate of the deceased David Gathuku Wanyee who had died intestate on 4th July 1975. They asked that the grant be limited to them filing a suit in Environment and Land Court under **section 13** of the **Environment and Land Court Act** and **Article 162(2)(b)** of the Constitution on behalf of the estate of the deceased. Their case was that the deceased owned land parcel Dagoretti/Riruta/61 but after his death the parcel had been subdivided illegally and transferred. They stated that they were the children of the deceased.

3. For completion of the record, the applicants in High Court at Milimani **Succession Cause No. 30 of 1979** had applied for the revocation of the grant, as well as the certificate of confirmation. They were saying that was the estate of the deceased herein through which the parcel was subdivided and portions transferred and some sold. The respondents in the application and present application are Virginia Waithera Gathuku, Susan Muthoni Gathuku, Kibathi Gathuku, Rosemary Wanjiku, Teresia Nyambura and Dorcas Wacheke Wanyee. It turned out that **Cause No. 30 of 1979** did not relate to the estate of the deceased, but related to the estate of one Kilonzo Makau, and that no certificate of confirmation had ever been issued in respect of the estate of the deceased. The respondents took out a preliminary objection which was decided in their favour. The applicants were advised to pursue whatever claim they had over the present owners of the deceased's parcel of land, and its subdivisions, in the ELC Court. It was because of the advice that they made the application whose ruling is the subject of the present application which was brought under **section 3, 3A, and 80** of the **Civil Procedure Act** and **Order 45 rules 2(1) and (2) and 3(2)** of the **Civil Procedure Rules** for the following prayers: -

“1) THAT the Ruling delivered by Justice Ali-Aroni on 13th May 2020 be reviewed in view of the fact that the learned judge erred on the face of the record by: -

(a) Referring to the Applicants herein as children of the deceased from his second wife at paragraph 1 whereas the Applicants are children of the deceased with his 1st wife;

(b) Referring to Francis Kiragu Gathuku as Francis Wanyee Gathuku;

(c) Referring to the Respondents as the 1st house at paragraph 2 whereas the Respondents are children of the deceased with his 2nd wife;

(d) Relying on an application, to wit, petition for grant of letters of administration *ad colligenda bona* at paragraph 2 whereas the Applicants' Application is for letters of Administration *Ad Litem*;

(e) Failing to consider the letter and spirit of the Applicants' Petition for letters of Administration *Ad Litem* dated 23rd April 2020; and

2) THAT the cost of this application be provided for.”

4. The respondents filed a replying affidavit to oppose the application.

5. The ruling by Justice Ali-Aroni indicated that what the applicants had sought was grant of letters of administration *ad colligenda bona*. That was, I am certain, an inadvertent mistake as what the grant sought was letters of administration *ad litem* to enable the filing of a suit. Secondly, the court had referred to the applicants as the children of the deceased by his second wife. The affidavit and annexures in support of the application had deponed that the applicants were the children of the deceased by his first wife, the late Hellen Wanjiku Gathuku. Thirdly, the application had indicated that the respondents constituted the second family of the deceased by his wife Virginia Waithira Gathuku (1st respondent). The court indicated that this was the first house, another inadvertent mistake.

6. The application seeks the review of the ruling to correct these mistakes. **Order 45 rule 1(1)** of the **Civil Procedure Rules** provides that: -

“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 the 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 or made the order without unreasonable delay.”

7. In the Court of Appeal case of **National Bank of Kenya Ltd –v- Ndungu Njau [1997]eKLR** it was indicated that:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established”

8. It is clear to me that the mistakes by the judge in the ruling dated 13th May 2020 are apparent on the face of the record, are self-evident and require correction by review.

9. The applicants required a grant of letters of administration *ad litem* to enable them to sue in the ELC Court over the deceased's land. They claim that they had an interest in the estate of the deceased because they were his child. Whether or not they belonged to the family of the deceased is not for this court to decide. Whether or not their mother was married to the deceased is a matter that will be determined in the suit they propose to file. The replying affidavit claimed that the applicants and their mother were not known to the respondents, and that they were not related to the deceased or the estate. To enter this discussion would be to anticipate the proposed suit.

10. The result is that I allow the application and review the ruling dated 13th May 2020. I grant the applicants letters of administration *ad litem* limited only to suing in regard to the estate of the deceased David Githuku Wanyee. It is important to point out that this grant does not mean that the applicants have proved that they have any claim to the estate of the deceased.

11. Because the mistakes pointed out were on the part of the court, neither party will be condemned to pay costs.

DATED and DELIVERED at NAIROBI this 3RD DECEMBER 2020.

A.O. MUCHELULE

JUDGE