REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1518 OF 2000

IN THE MATTER OF THE ESTATE OF JOHN GITAU MUCHUNU (DECEASED)

NOAH KIMANI GITAU.....APPLICANT

VERSUS

JOYCE WAIRIMU KIHUGU.....1ST RESPONDENT

CHRISTINE WANJA MUHINJA.....2ND RESPONDENT

HOTTENSSIAH WAITHIRA IRARI.....3RD RESPONDENT

FLORENCE NDUTA KABOGO.....4TH RESPONDENT

HELLEN WAMBUI WAIRAGU.....5TH RESPONDENT

JUSTINE WAIRIMU NDUNGI.....6TH RESPONDENT

RULING

1. The deceased John Gitau Muchunu died intestate on 23rd April 2000. He was survived by two widows Susan Njeri Gitau (now deceased) and Hannah Njeri Gitau, and the following children:-

(a) Noah Kimani Gitau (applicant);

(b) Joyce Wairimu Kihugu (1st respondent);

(c) Christine Wanja Muhinja (2nd respondent);

(d) John Kimani Gitau;

(e) Rose Mwihaki Gitau;

(f) James Mungai Gitau;

(g) Stephen Ndungi Gitau;

(h) Irene Wairimu Gitau;

(i) Simon Ngure Gitau;

(j) Hottensiah Waithira Irari (3rd respondent);

(k) Florence Nduta Kabogo (4th respondent);

(l) Hellen Wambui Wairagu (5th respondent); and

(m) Caroline Waithira Gitau

2. Hannah Njeri Gitau and the applicant petitioned the court for the grant of letters of administration. They were issued with the grant on 7th November 2000. The grant was confirmed on 3rd June 2002.

3. On 1st April 2016 the respondent filed an application for the revocation of the grant. Their case was that they were not involved in the proceedings leading to the confirmation of the grant.

4. On the basis that the application was not opposed, by the filing of replying affidavit or at all, the court allowed the same. The grant and the confirmed grant were revoked by the ruling dated 16th July 2018.

5. On 26th July 2018 the applicant filed the present application seeking the review and/or setting aside of the ruling and orders issued on 16th July 2018. The supporting affidavit was sworn by Miller Kiptoo Tenai Mworia an advocate in the firm of M/s Mbuthia Kinyanjui & Co. Advocates who had the conduct of the case for the applicant. Counsel swore that on 8th May 2018 the application of the respondents came for hearing. By the time the applicant had not filed a response. The court noted that the applicant was no longer interested in the matter as he had not filed response and had been causing adjournments. It was directed that the application be heard by way of written submissions. Mention was to be on 25th June 2018 to confirm the filing of submissions. On 25th June 2018 the matter went before Judge Muigai. Judge Musyoka was the one who had handled it on 8th May 2018. On 25th June 2018 both counsel were present. The court adjourned to go and peruse the file, and asked that there be mention on 3rd July 2018. Nothing happened to the file until 16th July 2018 when the ruling in question was delivered. Counsel swore that on 28th June 2018 they filed the applicant's replying affidavit together with written submissions. He annexed copies of the two. He stated that since he knew the matter would be mentioned on 3rd July 2018 his documents would be placed on record. On 28th June 20187 when he bought the documents he was informed the judge had the file in chambers. This is why his documents were not placed in the file. When nothing happened on 3rd July 2018, he went to the Deputy Registrar who told him that the judge still held the file. She informed him that the matter would be mentioned on 10th July 2018. So on 10th July 2018 he went back to the Deputy Registrar. The file was still with the judge. She asked that they do a letter, which they did on same day. A copy was annexed. They were surprised when they were informed that a ruling had been delivered on 6th July 2018. It was the applicant's case that the ruling was done without consideration of the replying affidavit and written submissions; that, if the ruling and orders are allowed to stay he will be prejudiced in a material way without the benefit of having been afforded a hearing.

6. The averments by counsel were not contested as there was no replying affidavit filed in response. Instead, the respondents filed grounds of objection in which it was stated that the applicant had not filed a replying affidavit to their application for revocation. Grounds of objection are not evidence.

7. Applications for review of judgments, decrees or orders are usually brought under **Order 45 rule 1** of the **Civil Procedure Rules**. Review is available to an applicant who is aggrieved by an order or decree which is appelable but from which no appeal has been preferred or from which an appeal is allowed, and who from the discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review **(Yani Haryanto –v- E.D. & F. Man (Sugar) Limited, Civil Appeal No. 122 of 1992).**

8. From the evidence tendered by the applicant, his replying affidavit and written submissions were filed at the registry as early as 28th June 2018. He expected that by 3rd July 2018 when the matter was slated for mention, his documents would be placed in the file. The file was with the Judge, and not at the registry during the material period. When there was no mention on 3rd July 2018 he sought audience with the Deputy Registrar. At no time was it indicated that the Judge was preparing the ruling. The substance of the replying affidavit was that the respondents had provided their written consent to the confirmation of the grant.

9. It is clear that owing to the ruling, the grant issued to him and the distribution in the certificate of confirmation have all been revoked and set aside. The titles issued as a result of the confirmation have been cancelled. All these have happened without him being afforded a hearing. The controversy in this case was between the respondents and the applicant. The respondents sought the revocation of the grant on the basis that they had not been at all involved before the grant was confirmed. The applicant's response, although brought after a long delay, was that infact he had sought and obtained the respondents' consent before the grant was confirmed. The merits aside, the court was duty bound to hear both parties **(Savings & the Loan Kenya Ltd –v- Odongo & Others [1987]KLR 294).** Natural justice commands that no man shall be judge in his own cause, and that no man shall be condemned unheard **(Musiara Ltd –v- Ntimama [2004]2KLR 172).**

10. An error apparent on the face of the record, in my view, is occasioned when the court reaches a decision without hearing one of the parties to the dispute **(Moses Wachira –v- Niels Bruel & Others, HC Milimani Commercial & Admiralty C.C No. 16 of 2006),** especially, like in this case, when the parties evidence was already on record.

11. In conclusion, I find that the application dated 25th July 2018 and filed on 26th July 2018 by the applicant is merited. The ruling delivered on 16th July 2018 and all consequent orders are reviewed and set aside.

12. The respondents' application dated 22nd March 2016, and filed on 1st April 2016, is reinstated, and shall, together with the replying affidavit, be heard on **27th May 2019**. Either side is hereby given leave of 30 days to file any further affidavit and/or written submissions.

13. Given the particular circumstance of this matter, I ask that costs shall be in the cause.

DATED and **SIGNED** at Nairobi this **11th day of MARCH 2019**

A.O. MUCHELULE

JUDGE

DATED and **DELIVERED** at Nairobi this **13TH day of MARCH 2019**

ALI-ARONI

JUDGE