REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 932 OF 2000

IN THE MATTER OF THE ESTATE OF GACHENGECHI

MUIRU alias DOUGLAS GACHENGECHI MUIRU- (DECEASED)

MARY NJOKI KAGICHA.....APPLICANT

ROSE WAMBUI MIRINGU.....APPLICANT

VERSUS

PATRICK KIARIE GACHENGECHI.....1ST RESPONDENT

FRANCIS MAINA KABIRU.....2ND RESPONDENT

JOSEPH MACHARIA WAMUNYU.....3RD RESPONDENT

MARGARET NJAMBI NDUNGU.....4TH RESPONDENT

RULING

1. The deceased Gachengechi Muiru alias Douglas Gachengechi Muiru died intestate on 27th June 1997. There is no dispute that he left the following beneficiaries:-

(a) Njeri Gachengechi – widow;

(b) John Muiru (son);

(c) Patrick Kiarie Gachengechi (administrator/1st respondent);

(d) Mary Njoki Kagicha (daughter in-law -1st applicant);

(e) Rose Wambui Miringu (daughter/2nd applicant);

(f) Veronica Wanjiru Gachengechi (daughter);

(g) Laban Kinyanjui Gachengechi (son/3rd house); and

(h) Leah Wanjiru Gachengechi (daughter).

2. A grant of letters of administration intestate was issued to Laban Kinyanjui Gachengechi by Chief Magistrate's Court at Thika, but was revoked on 12th May 2004 by this court. A fresh grant was issued to the 1st respondent. It was confirmed on 11th July 2005 following a judgment that was delivered by Justice Martha Koome (as she then was). The deceased had left parcel No. Ngenda/Ituru/285 measuring 42 acres. It was ordered that it be shared equally among the beneficiaries. He had also left plot No. Thika/Municipality Block 19/789 and two

plots Ngenda/Ituru/T.3 and T.4. It was ordered that they be sold and the proceeds shared equally among the beneficiaries.

3. In the application dated 22nd November 2012 the 1st applicant (the widow of Kagicha Gachengechi who was a son of the 1st house of the deceased) sought the review, variation and/or setting aside of the orders issued on 11th February 2005 to allow for the matter to be re-heard by way of *viva voce* evidence. Her case was that there were issues that had been left out that required to be considered. She stated that the deceased had before death divided his properties to the two houses in accordance with Kikuyu customary law as follows:-

(a) Mary Njoki – 6.5 acres;

(b) Wambui 5 aces;

(c) Muiru 4 acres;

(d) Nyokabi 13 acres

(e) Muiruri 8 acres; and

(f) Kiarie 6 acres.

The deceased had further shared the plots at Gatwanyaga Dairy Farmers, Mangu Investment and the one at Muthega in Gatundu. Some parcel of land had been given to AIPCEA Church. In all, each house had been given 21 acres, but that all this information had not been brought to the attention of the court. The application was supported by Mary Wanjiku Murai.

4. The application was opposed by the 1st respondent whose affidavit stated that the matter had been determined in accordance with the **Law of Succession Act**, and that each beneficiary had since got his/her share. The 1st respondent complained about the long time the 1st applicant had taken to bring the application.

5. In the application dated 4th April 2016 the said applicant blamed the 1st respondent for having caused LR No. Ngenda/Ituru/884 to be excised from LR No. Ngenda/Ituru/285 and given to the 2nd, 3rd and 4th respondents who were not beneficiaries of the estate of the deceased. She sought the revocation and/or withholding the title deed in LR No. Ngenda/Ituru/884, and the order to issue seeking the 1st respondent to account for the subdivision of the estate of the deceased.

6. The 1st respondent's response was that subsequent to the confirmation of the grant the parties had on 11th January 2013 met at the offices of Chief of Ituru Location and on 1st April 2015 at the offices of District Officer of Nganda Division and agreed to transfer the subject parcels to the 2nd and 4th respondents.

7. The remedy of review under **Order 45 rule 1** of the **Civil Procedure Rules** is available to an applicant who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence 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).** The application has to be brought without unreasonable delay.

8. The orders sought to be reviewed, varied and/or set aside were contained in the judgment delivered on 11th February 2005. The present application was brought on 22nd November 2012. It was brought over 7 years later. There was no explanation why the application was not brought earlier than that. This was a long and unexplained delay. The court cannot, in the circumstances, exercise its discretion in favour of the 1st applicant.

9. Secondly, the dispute proceeded on the basis that the deceased died intestate. The issue of his having a Will, written or oral, regarding how he wanted his estate shared upon death did not arise during the proceedings leading to the judgment. There was no claim that the deceased had shared his estate before death, and therefore that the court had no business sharing it to the beneficiaries. The 1st applicant took part in the proceedings and had the opportunity to raise the matter of distribution before death. She did not. I determine that what she now raises is an afterthought.

10. Further, the court determined that, the deceased having died in 1997, the law applicable was the **Law of Succession Act (Cap.160)**. The issue of Kikuyu customary law was not raised, and neither is it relevant now.

11. Regarding the application dated 4th April 2016, there is no dispute that the 2nd, 3rd and 4th respondents were not the beneficiaries of the deceased. They were not provided for in the shares contained in the judgment dated 11th February 2005. After the grant was confirmed, and a certificate issued showing how the estate of the deceased was going to be distributed, a departure from the adjudged distribution was not going to be allowed unless all the beneficiaries had consented to it, or there was another court order. The 1st respondent had no authority to unilaterally, or with some of the beneficiaries, amend the distribution or dispose any part of the estate without agreement or order of court.

12. The complaint by the 2nd applicant was that the 1st respondent had caused LR No. Ngenda/Ituru/884 to be excised out of LR No. Ngenda/Ituru/885 and sold to the 2nd, 3rd and 4th respondents. She went on to state that –

"5. Admittedly so I had entered into a Sale Agreement for the purchase of my property in the year 2004 and 2005 respectively but the said Agreement does not confer upon the Administration the right to transfer the right property to the purchasers without my agreement ……"

6. Further and in connection with the same the purchasers are yet to fully pay the purchase price of the property."

13. It is clear that the 2nd applicant had a change of mind, after agreeing to sell part of what she was entitled to in the estate to the 2nd, 3rd and 4th respondents, because they had not paid the full purchase price. In my considered view, the purchasers had a contractual obligation to pay the agreed purchase price. But, authority to the 1st respondent to sell the alleged parcel to them had been sought from the 2nd applicant and obtained. She cannot resile from that arrangement. In any case, the 2nd to 4th respondents were not served with the application for them to state their position on the dispute. They were interested as purchasers and no decision can be made affecting them without reference.

14. The result is that, the applications dated 22nd November 2015 and 4th April 2016 do not have merits and are each dismissed.

15. Given the facts of the case, each party shall bear own costs.

DATED and DELIVERED at NAIROBI this 20TH day of MAY 2019.

A.O. MUCHELULE

JUDGE