



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)

LOISE WANJIKU MBAI.....APPLICANT

VERSUS

MONICAH WAIRIMU KAMAU.....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 issued on 5th February 2016 to his two daughters Loise Wanjiku Mbai (applicant) and Jane Wambui Mbai and his daughter-in-law Monicah Wairimu Kamau (respondent). It was confirmed on 31st May 2018.
2. The deceased's estate comprised Dagoretti/Uthiru 83 measuring about 0.95 acres and Dagoretti/Uthiru/88 measuring about 1.8 acres.
3. The deceased's three sons John Gitau Mbai, Samwel Kamau Mbai and Robert Edward Kungu died, each leaving a family. The respondent is the widow of the late Samuel Kamau Mbai.
4. The application for the confirmation of the grant was made by the applicant and Jane Wambui Mbai. They proposed that the deceased's sons Paul Kihara Mbai and James Muchene Mbai do equally share 0.95 acres comprised in Dagoretti/Uthiru/83 and that the rest of the family shares Dagoretti/Uthiru/88. The respondent protested. She alleged that she had been under-provided; the children of the late James Muchene Mbai had not been provided for; and some other beneficiaries had not been provided for. It should be pointed out the deceased's parcels Dagoretti/Uthiru/83 and 88 had been surveyed by M/s Earth Scope Survey Services who had proposed that Dagoretti/Uthiru/88 be subdivided into 10 equal portions to be given to 10 beneficiaries, each having a portion. The respondent agreed with this proposal. The applicant and Jane Wambui Mbai had also based their proposal in respect of Dagoretti/Uthiru/88 on this survey. It is notable that the survey had been ordered by the court on 2nd May 2017. The report was filed on 20th June 2017.
5. On 31st May 2018 the court confirmed the grant, after hearing the application, and ordered:-

“(a) that Dagoretti/Uthiru/88 shall be distributed as follows:-

- (i) 0.035Ha to Monicah Wairimu Kamau during life interest and thereafter to the children in equal shares, and
- (ii) 0.0164 Ha to Adrian Mbai Kungu to be held in trust by the administrators during his minority;

(b) that Dagoretti/Uthiru/83 to be shared equally between:-

- i) Paul Kahara Kariuki,
- ii) James Muchene Mbai;
- iii) Noah Njau Mbai,

iv) Lois Wanjiku Mbai,

v) Jane Wambui Mbai,

vi) The estate of John Gitau Mbai, to be shared equally by his children: Christopher Mbai, Ronald Muchene Gitau and Liza Wanjiru, and

vii) the estate of Robert Edward Kungu to be held in trust by the administrators for his son Adrian Mbai Kungu during his minority;

(c) that the grant shall be confirmed in those terms.....

(d)

(e)"

6. On 13th August 2018 the applicant filed the present application dated 9th August 2018 seeking the review of the ruling delivered on 31st May 2018 in paragraph 17(a) by amending "Dagoretti/Uthiru 88" and replacing it with "Dagoretti/Uthiru 83", and in paragraph 17(b) by amending "Dagoretti/Uthiru/83" and replacing it with "Dagoretti/Uthiru/88". In the supporting affidavit, she stated that the court intended that Dagoretti/Uthiru/83 be shared between two beneficiaries and that Dagoretti/Uthiru/88 be shared into 7 equal portions; and that Dagoretti/Uthiru/83 was the smaller of the two portions and Dagoretti/Uthiru/88 was bigger of the two portions. Her case was that Dagoretti/Uthiru/83 was too small to be shared among seven families. She stated that the interchange of the two parcels was a mistake and an error on the part of the court which should be corrected by review.

7. The respondent opposed the application. She denied that there was a mistake or error on the part of the court; that the court had heard the dispute; that it was possible to share Dagoretti/Uthiru/83 into seven equal portions; that the 0.035Ha given to her is where her late husband left her and her children and that they were residing thereon; and that, if the portions are interchanged, she and her children would be displaced.

8. I point out that Susan Wahu Mbai and Hannah Wangui Ngui (two of the daughters of the deceased) had, prior to the confirmation, renounced their inheritance. That meant that the estate was going to be shared into 9 portions (9 children of the deceased and/or the families they had left).

9. **Order 45 rule 1** of the **Civil Procedure Rules** provides as follows:-

"1. (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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

10. The applicant's case is that there was error apparent on the face of the court as it had ordered for the subdivision of Dagoretti/Uthiru/83 into seven equal portions when what was intended was Dagoretti/Uthiru/88. The Court of Appeal in **Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) –v- Kariuki Marega & Another [2018] eKLR** in defining what constituted a mistake or an error on the face of the record referred to the case of **Muyodi –v- Industrial and Commercial Development Corporation & Another (2006) IEA 243** where it was explained as follows:-

"In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a plausible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for review although it may for an appeal."

11. I have indicated in the foregoing that, in the application for the confirmation of the grant, both the applicant and the respondent were agreed to having Dagoretti/Uthiru 83 being shared between two beneficiaries and Dagoretti/Uthiru/88 being shared among seven beneficiaries. They both agreed with the survey by Earth Scope Survey Services that Dagoretti/Uthiru/83 was the smaller portion, and that Dagoretti/Uthiru/88 was the bigger portion. In paragraph 15 of the ruling dated 31st May 2018 this is what the court observed:

“The estate in issue comprised of Dagoretti/Uthiru/83 measuring 0.051Ha and Dagoretti/Uthiru/88. By an order dated 2nd May 2017, this court directed Earth Scope Surveys to complete survey work on the two. The surveyors conducted the survey and filed a report dated 20th June 2017. In the report it is noted that Dagoretti/Uthiru/83 was too small to be subdivided and shared by the ten beneficiaries listed in the proposed mode of distribution. They recommended that the parcel be subdivided formally. With regard to Dagoretti/Uthiru/88 it was proposed that the same be subdivided into ten (10) equal sub-plots to be shared amongst family members of the deceased.”

The court then went on to distribute the estate in paragraph 17 of the ruling. However, it gave Dagoretti/Uthiru/88 to two beneficiaries and Dagoretti/Uthiru/83 to the larger number of beneficiaries.

12. Given all the evidence, and all that the court said prior to paragraph 17 of the ruling, I determine that the reference to Dagoretti/Uthiru/88 in paragraph 17(a) was done inadvertently. Similarly, the reference to Dagoretti/Uthiru/83 in paragraph 17(b) was inadvertent. The court intended that paragraph 17(a) be in reference to Dagoretti/Uthiru/83 and paragraph 17(b) be Dagoretti/Uthiru/88.

13. Consequently, I allow the application for the review of the ruling dated 31st May 2018 in its paragraph 17. Paragraph 17(a) is reviewed and corrected to read “Dagoretti/Uthiru/83” in place of “Dagoretti/Uthiru/88”, and paragraph 17(b) is reviewed and corrected to read “Dagoretti/Uthiru/88” in place of “Dagoretti/Uthiru/83.”

14. The certificate of confirmation that was issued on 31st May 2018 is cancelled and recalled. In its place, a fresh certificate of confirmation shall be issued reflecting the orders contained in this ruling.

15. Because the error was made by the court, I order that no costs be paid.

DATED and DELIVERED at NAIROBI this 17TH day of JULY 2019.

A.O. MUCHELULE

JUDGE