



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1109 OF 2006**

**IN THE MATTER OF THE ESTATE OF GITHU MUHOHO (DECEASED)**

**BEATRICE WANJIKU GITHU.....ADMINISTRATOR/APPLICANT**

**-VERSUS-**

**RAPHAEL MBUCHO MUHIA.....RESPONDENT/PETITIONER**

**RULING**

Through the Notice of Motion dated 15<sup>th</sup> October 2018, the Applicant moved the court under certificate of urgency seeking:

- a) A stay of execution of the order issued on 16<sup>th</sup> April 2018 by this Court pending the hearing and determination of the application;
- b) The court be pleased to review, vacate and or set aside orders issued by the court on 16<sup>th</sup> April 2018 pending the hearing and determination the application;
- c) The applicant together with the citee (Gabriel Githu Muhoho) be served and given 14days to file a response; and
- d) Costs of the application.

The application was based on the grounds that no notice, application on invitation was ever served upon the estate of the deceased before hearing and subsequent orders being granted on 9<sup>th</sup> April, 2018.

The application was supported by the applicant's affidavit dated 15<sup>th</sup> October 2018. It was Beatrice Githu's application that she was the wife of Githu Muhoho (deceased) and mother to Antony Muhoho Githu (Deceased) who was her co administrator of the estate of the late Githu Muhoho. She stated that Anthony Muhoho Githu (deceased) purported to sell 2 acres out of 4.1968 acres of **LR Kiganjo/Nembu/157** to the Respondent. It was further, her case that she had been served with an order dated 9<sup>th</sup> April 2018 requiring 2 acres to be hived off and transferred to the Respondent. She stated that the matter had proceeded as a formal proof. She was never given an opportunity to be heard. It was her case that the sale agreements were void having been witnessed by minors and that the deceased was on his death bed denied having signed the sale agreements. The Land Control Board consents had not been procured within 6 months of the Agreement. She proceeded to state that the late Antony Muhoho had only informed them of the lease transaction with the Respondent and could not have sold a portion of **LR Kiganjo/Nembu/1157** as the letters of administration did not vest in him. In conclusion, it was her case that should the execution order proceeds the family stood to suffer irreparable loss and it was therefore in the interest of justice that a stay of execution is granted pending the hearing and determination of the application.

The Respondent file affidavit on 31<sup>st</sup> October 2018 stating; that the Applicant and Antony Muhuhu Githu (deceased) are the administrators of the Githu Muhoho's (deceased) estate; that according to the certificate of confirmation of grant, Antony Muhuhu was a beneficiary of 4.1968acres of the deceased's estate known as LR Kiganjo/Nembu/1157. In the year 2005, he bought 2 acres and later 0.19 acres of the said land from him at kshs. 540,000/=. There was delay in issuance of the documents and he filed a Succession Cause in Gatundu Law Courts to enforce the grant of 2.5 acres wherein a consent was reached and recorded in court ordering the transfer of the said parcel in the Respondent's name. Antony Muhuhu filed an application for the amendment of the grant at Nairobi High Court to have the Respondent included as a Creditor, unfortunately he died on 5<sup>th</sup> May 2014 before his application could be finalized; that efforts to have him included in the distribution of the estate and his portion had proven futile; that the Applicant had been given a chance to articulate her case but failed to take action that the Respondent had been in possession of the suit property and granting stay would effect have him suffer irreparable

damage.

## **DETERMINATION**

I have considered all the pleadings filed. The main issue for determination is whether the Applicant has met the necessary conditions to warrant a stay of execution and or review of orders pending the determination of the application.

I am aware of the requirements set out by **Order 45** of the **Civil Procedure Rules**. I find useful guidance in the decision of **Kwach, Lakha and O'kubasu JJA** in the case of **Tokesi Mambili and others vs Simion Litsanga Civil Appeal 90 of 2001 – Kisumu** where they held as follows:-

**a) In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)**

**b) Where the application is based on sufficient reason it is for the Court to exercise its discretion.**

It is the Applicant's case that she was never served with either the notice, application or an invitation and the purported sale was void, she further claimed that the deceased did not sign the documents, which she failed to prove. It is trite law whosoever alleges must prove. I have perused through the orders and the pleadings generally and note that the matter did indeed proceed for formal proof resulting to the said orders being issued I further note that similar orders had been issued in favor of the applicant by Gatundu Law courts. The respondent on the other hand claims to have rightfully purchased the property from the Antony Muhoho Githu (deceased); he attached several documents as proof thereof.

On 7<sup>th</sup> November 2017, Mr. Ndungu held brief for Ms. Njogu for the Citor/Respondent Raphael Mbucho Muhia. He told the court the Respondent bought land Kiganjo/Nembu/1157 from Anthony Muhoho Githu deceased. He filed citation and cited his son Gabriel Githu Muhoho and served him and filed in court Affidavit of service of 31<sup>st</sup> July 2017 to confirm service. As at 7<sup>th</sup> November 2017, the requisite 15 days expired. This Court directed the purchaser as Creditor to the estate ought to confirm his proprietary interest/creditor's interest to the estate of Anthony Muhoho Githu.

On 9<sup>th</sup> April 2018 the Respondent provided this court with purchasers list of documents namely;

1. Proceedings for civil case No. 317/2010 form Gatundu Law Courts.
2. Letter requesting file No.CMCC 317/2010 by Deputy Registrar Family Division dated 30<sup>th</sup> March 2015
3. Copy of receipt dated 2<sup>nd</sup> February 2016 requesting proceedings
4. Copy of identity card
5. Copy of order dated 4<sup>th</sup> April 2012 and issued on 3<sup>rd</sup> February 2014
6. Copy of PIN Number
7. Copy of co-administrator's identity card
8. Letter dated 20<sup>th</sup> March 2015 by Deputy Registrar Family Division
9. Copy of an order issued at Nairobi on 4<sup>th</sup> August 2014
10. Copy of summons for rectification of confirmed grant dated 31<sup>st</sup> March 2014
11. Sale agreement dated 29<sup>th</sup> November 2012
12. Copy of grant of letter of administration intestate issued on 16<sup>th</sup> August 2006.
13. Copy of lease agreement between Anthony Muhoho and Rephael Mbucho dated 15<sup>th</sup> April 2005
14. Copy of agreement for sale dated 9<sup>th</sup> May 2005 of importance is the consent in Chief Magistrate's Court in Gatundu Civil case 317 of 2010 was/is;

***“upon reading letter Ref: DMT/CM/13/2011 dated 12<sup>th</sup> March 2012 from M/s Dola, Magani & Co. Advocates signed by Shem Kebongo & Co. Advocates for the Plaintiff and Dola, Magani & Co. Advocates for the Defendant requesting court to record a***

consent order.

**Court: By consent this matter be settled on the following terms;**

**1) The Defendant to transfer two acres of land out of Land parcel Number Kiganjo/nembu/1157 being part of his share in the estate to the Plaintiff on condition that the plaintiff pays a sum of Kenya Shillings forty thousand (Ksh 40,000/-) the balance of purchase price to the Defendant.**

**2) Each party to meet own costs”**

A court order issued by this court on 9<sup>th</sup> April 2018, where the court ordered;

**“1. That the confirmed grant of 12<sup>th</sup> March 2007 shows 4.1968 acres was allocated to Anthony Muhoho Githu from the late father’s estate Githu Muhoho;**

**2. That the interested party Raphael Mbucho Muhia has filed 20<sup>th</sup> February 2018 bundle of documents i.e proceedings and order from Gatundu Law Courts case 317/2010 and the sale agreement of 29<sup>th</sup> November 2012 between himself and the deceased’s son Anthony Muhoho Githu of 2 acres for sale price of ksh 540,000/- which he paid to the deceased vendor;**

**3. That therefore the son of the deceased Githu Muhoho herein Anthony Muhoho Githu interest of 4.1968 of L.R Kiganjo/nembu/157 shall be hired off 2 acres and shall be transferred to the buyer Raphael Mbucho Muhia from the Deceased’s son’s estate Anthony Muhoho Githu.”**

In my opinion, the applicant has not established that there was discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicant at the time the orders in question were made. The applicant did not further demonstrate any error on the face on the record of the court which warrants to be corrected by this court. Neither did it demonstrate to the court any sufficient reason to warrant review.

#### **DISPOSITION**

**1. In conclusion, I find no merit in the application dated 15<sup>th</sup> October 2018 and hereby dismiss it with costs.**

**2. The balance of Ksh 40,000/- shall be deposited with Deputy Registrar Family Division Nairobi High Court before the transfer of 2 acres is effected and the Administrator/Family of the deceased/seller Anthony Muhoho Githu shall collect the same.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 6<sup>TH</sup> NOVEMBER 2019.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**N/A.....FOR THE ADMINISTRATOR/APPLICANT**

**N/A..... FOR THE RESPONDENT/PETITIONER**

**MS JASMINE – COURT ASSISTANT**