



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 83 OF 2007**

**REGINA WAKARITI GACHO.....APPLICANT**

**VERSUS**

**TERESIA WANJA GACHO.....1ST RESPONDENT**

**DAVID MWANGI MACHARIA.....2ND RESPONDENT**

**RULING**

1. This is an application dated 11/10/2016 seeking for orders for review and/or set aside its orders in the ruling dated 14/10/2015. The grounds supporting the application are that the ruling is not in tandem with the directions of Ong’udi, J. in her ruling delivered on 7/06/2012.

2. It is also contended that the mistake relating to the ruling of 14/10/2015 should be rectified and that the respondents are ready and willing to execute on the judgment having already filed the application dated 9/08/2016.

3. The applicant states that she is the widow of the deceased in this case and that her affidavit of protest was never considered in the confirmation of the grant. The ruling of Ong’udi, J. directed that a new schedule for confirmation of grant be filed and include the shares of the 2nd respondent, that of Cecilia Wanjiku and Miriam Wahito.

4. The respondents filed grounds of opposition in which it was argued that the only remedy available to the applicant was to appeal against the ruling delivered on 14/10/2015 and not to apply for review or setting aside. It is further stated that the applicant refused to comply with the court order and rushed to the court of appeal where she was met with frustrations.

5. The applicant was required to file an affidavit of protest and submissions which she failed to do. She also failed to give an explanation for delay of filing this application.

6. The respondent challenged the court’s power to set aside the ruling and especially based on the fact that the applicant failed to file the necessary pleadings.

7. The ruling in issue was delivered by Bwonwonga, J. on 14/10/2015 after hearing the 1st respondent’s summons for confirmation of grant dated 27/06/2012. It was ordered that the estate of the deceased be shared between the respondent Teresia Wanja Gacho and David Mwangi Macharia. The 1<sup>st</sup> respondent got 2.5 acres while the 2<sup>nd</sup> respondent got 3.5 acres.

8. The ruling by Ong’udi, J. was delivered on 7/06/2012 as a result of a summons for revocation of grant filed by the applicant Regina Wakariti Gacho. The Judge declined to revoke the grant but set aside the confirmation of grant made on 31/12/1993. The following directions were made:-

*(a) That fresh summons for confirmation to issue with a new schedule for distribution which must include:-*

*(i) The 2nd respondent’s share;*

*(ii) The share of Cecilia Wanjiku and Miriam Wahito which may be given to their mother by election;*

*(b) The 1st respondent to comply and serve within 30 days; and*

*(c) Any protest to be filed and served within 30 days of service of summons of confirmation.*

9. The 1<sup>st</sup> respondent partly complied with the order by filing a new schedule for confirmation within 30 days but failed to include the shares

of the 2 children of the deceased.

10. It appears that the applicant was not satisfied with the ruling of Ong'udi, J. and proceeded to file an appeal. It is not clear what the result of the appeal was. However, there is nothing to show that the orders of Ong'udi, J. were reversed. The court will proceed on the premise that those orders are still valid.

11. After filing of the fresh summons for confirmation dated 27/06/2012, which did not include the shares of the 2<sup>nd</sup> respondent and the two children of the deceased, the applicant failed to file a protest or any submissions for that matter. The court then proceeded to prepare its ruling and delivered it on 14/10/2015.

12. The respondent raised several issues which I proceed to deal with before going to the merits of the application.

13. It is not in dispute that the applicant has not annexed the decree sought to be reviewed as required by the rules. Section 159(2)(d) provides that courts shall hear all matters without due regard to technicalities. The provisions of the overriding objective Section 1A and 1B of the Civil Procedure Rules overrules technicalities focusing on substantial issues.

14. The orders sought to be reviewed was made in this file and it is part of the record. The failure to annex it does not prejudice any of the parties since it is in the court record. The applicant relied on the case of **MONICAH NYAWIRA WAHOME VS VERONICA WAMBUI [2016] eKLR** where it was held that the omission to extract and annex the decree was not fatal to the application.

15. It is my considered view that the failure to annex the order does not render the application fatally defective since the enactment of the overriding objective provisions in 2009 and the enactment of the Constitution in 2010. The defect does not affect the fair and just determination on the application.

16. I therefore proceed to consider the merits of the application.

17. It is not in dispute that the 1<sup>st</sup> respondent was directed to file a fresh confirmation schedule and include the shares of the 2<sup>nd</sup> respondent, that of two beneficiaries namely Ceciliah Wanjiku and Miriam Wahito in the ruling of Ong'udi, J.

18. The 1<sup>st</sup> respondent in filing the summons for confirmation did not comply with the orders of the honourable Judge. The confirmation only benefited the respondents who got 3.5 acres and 2.5 acres respectively out of L.R. Kiine/Sagana/11. The said orders were not appealed against by the 1<sup>st</sup> respondent and are still valid.

18. The court recognized Ceciliah Wanjiku and Miriam Wahito as the children of the deceased. The court heard that applicant was living on the land which had been inherited by the respondents before it make the orders in favour of her children who had a right to inherit their late father's estate.

19. The question which arises is whether the honourable Judge Bwonwonga who confirmed the grant in favour of the respondents was aware of the ruling of Ong'udi, J. There is no mention of the orders of Ong'udi, J. in the ruling of Bwonwonga, J. If the ruling was within the knowledge of the Judge, he would have discussed it in his own ruling and given the reasons for his departure from the said orders.

20. It is evident that the respondents failed or neglected to comply with the court orders and the honourable judge due to oversight did not read the ruling of Ong'udi, J. If the ruling of Bwonwonga, J. was to be implemented, it would result to injustice to the two beneficiaries who have been left out in the distribution in disregard of the valid orders of the honourable judge.

21. The applicant filed an affidavit against confirmation on 19/09/2012 accusing the respondents of defrauding her of her rightful inheritance. At the time the summons for confirmation of grant was heard, this protest was not considered. The respondents submitted that the applicant failed to prosecute her affidavit.

22. It is my conviction that so long as there is a protest on record, the court has a duty to ensure that the protester is heard before distribution is made unless he/she has since changed the position which must be recorded. The court herein did not make any mention of the protest in its ruling delivered on 14/10/2015. This confirms that the protest was never heard though on record. The right of the applicant ought to have been given to her irrespective of whether her counsel did use diligence to prosecute the protest.

23. The parties took directions to have the matter heard by way of written submissions. The applicant later changed her mind and told the court she preferred *viva voce* evidence which was resisted by the respondents. In her affidavit of protest, she had indicated her reasons for wanting *viva voce* evidence in that she wanted the respondents in that she wanted the respondents cross-examined to explain their interests in the estate.

24. The court overruled the applicant and ordered that written submissions be filed. The counsel did not file the said submissions nor did he challenge the ruling leaving his client's right at stake.

25. The court has a duty under the overriding objective to determine cases in a just and fair manner and to deliver justice to the parties. For the applicant to go and file an appeal against the ruling in issue as submitted by the respondents, I find that this would be against the overriding objective which calls for economic use of the court's resources and aspect of a cost-effective suit for the parties.

26. In view of the foregoing events which led to the ruling of Bwonwonga, J., it is my considered opinion that it is in the interests of justice that the ruling of Bwonwonga, J. be set aside so that both parties may be heard and the orders of Ong'udi, J. be complied with.

27. The relevant orders are two fold:-

*(a) In regard to the cancellation of titles, L.R. Kiini/ Sagana/2428 and 2429 to revert to the original title L.R. Kiini/Sagana/11 in the name of the deceased.*

*(b) For the inclusion of the shares of the applicant, children Cecila Wanjiiru Gacho and Miriam Wahito Gacho.*

28. The parties have 30 days from the date of this ruling to comply with the orders of the court issued on 7/06/2012 and have the protest fixed for hearing within 60 days.

29. I hereby find the application merited and allow it accordingly. The ruling delivered on 14/10/2015 and consequential orders related thereto are hereby set aside.

30. Each party to meet its own costs.

31. It is hereby so ordered.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 2ND DAY OF MAY, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Abubakar for Applicant**

**Mr. Gacheru for respondent**