



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO.2795 OF 2003**

**IN THE MATTER OF THE ESTATE OF PAUL NG'ANG'A GATHATA (DECEASED)**

**DAMARIS NJOKI WAINAINA..... APPLICANT**

**VERSUS**

**AMOS KIMANI NGANGA.....RESPONDENT**

**RULING**

1. The deceased Paul Ng'ang'a Gathata died intestate on 29<sup>th</sup> June 1996. He was survived by two sons, Amos Kimani Ng'ang'a (the respondent) and Stanley Kiratu Ng'ang'a (who has since died), and daughter in-law Damaris Njoki Wainaina (the applicant). The three petitioned the court for the grant of letters of administration intestate. The grant was issued to them on 24<sup>th</sup> October 2005 and confirmed on 17<sup>th</sup> December 2007. The grant was on 26<sup>th</sup> April 2010 revoked by Justice Dulu upon the respondent's application. The respondent had complained that he had not been involved in the application for confirmation, and that he had bought one acre of Githunguri/Giathieko/226 from the deceased and that had not been taken into consideration in the confirmation. Subsequently, the respondent successfully applied for the cancellation of titles Githunguri/Giathieko/435, 435 and 437 on the ground that they were subdivisions of Githunguri/Giathieko/226 that belonged to the deceased. The cancellation order was contained in the ruling delivered by Justice Kimaru on 26<sup>th</sup> November 2010.
2. The applicant filed a motion dated 2<sup>nd</sup> February 2015 seeking the review, setting aside and/or vacation of the ruling and/or order of Justice Kimaru on the grounds that:-
  - a. there was an error apparent on the face of the record;
  - b. the orders were procured fraudulently through deception, misrepresentation and non-disclosure of material facts;
  - c. land parcel Githunguri/Giathieko/226 was not among the free estate of the deceased and not subject of the application for confirmation, and yet the respondent had misrepresented to court that it was the deceased's property and that it had, following confirmation, been subdivided to yield parcels 435, 436 and 437;
  - d. it was within the respondent's knowledge that the deceased had in 1987 subdivided land parcel Githunguri/Giathieko/ 226 and in 1989 transferred two titles 435 and 437 to Stanley Kiratu Ng'ang'a and David Wainaina Ng'ang'a and each respective title deed issued;

- e. the only free estate of the deceased was parcel Githunguri/Giathieko/436; and that
  - f. the cancellations that were ordered by Justice Kimaru were made in error and on basis of deception, misrepresentation and non-disclosure of facts on the part of the respondent.
3. The respondent filed a response to deny that there was any mistake or error apparent on the face of the record to justify any review, setting aside or revocation of the orders by Justice Kimaru. He stated that his application for revocation was based on the fact that he had bought one acre of parcel 226 from the deceased. Further that:-

**“7. THAT upon obtaining the Ruling it was not practical to distribute the estate considering the ruling of Justice Dulu since Githunguri/Giathieko/226 was the subject of the revocation.”**

4. Directions were given that the application be heard together with one dated 19<sup>th</sup> March 2015 and that parties do file written submissions. In the application dated 19<sup>th</sup> March 2015 the applicant asked that the order confirming the grant, and the subsequent certificate of confirmation, be reinstated on the basis that the orders by Justice Kimaru were obtained by fraud as parcel 226 was not in existence and therefore not the subject of the petition. It was asked that the order cancelling entries in parcel 435, 436 and 437 be vacated. The application was opposed by the respondent.
5. The law on review is found in **Order 45** of the **Civil Procedure Rules**. The **Order** applies to succession causes through **rule 63(1)** of the **Probate and Administration Rules** of the **Law of Succession Act (Cap. 160)**. It provides that a person aggrieved by a decree or order 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 the review of the same.
6. To be able to fully appreciate what the applicant is asking, it is necessary to trace the history of this petition. The petition was filed on 2<sup>nd</sup> October 2003, the deceased having died on 29<sup>th</sup> June 1996. With the petition was filed an affidavit in which were annexures. One of the annexures was the Green Card for parcel Githunguri/Giathieko/226 measuring 6.62 Hectares. The register showed that this parcel belonged to the deceased, but that on 18<sup>th</sup> October 1989 the same had been subdivided into parcels 435, 436 and 437. The title was then closed. Three certificates of search were annexed to show that the deceased was left with parcel 436 measuring 5.52 acres. Parcel 436 measuring 5.51 acres was registered in the name of Stanley Kiratu Ng’ang’a and parcel 437 measuring 5.52 acres was registered in the name of David Wainaina Ng’ang’a. Stanley, David and the respondent were sons of the deceased. The applicant is the widow of David. The affidavit in support, nonetheless, indicated that parcel 226 was one of the properties of the deceased’s estate. The petitioners were the applicant, the respondent and Stanley Kiratu Ng’ang’a. On 16<sup>th</sup> August 2007 Stanley Kiratu Ng’ang’a and the applicant applied for the confirmation of the grant that had been issued to the three on 24<sup>th</sup> October 2005. The estate had other properties. Of interest to this application was, however, parcel 436. This parcel was allocated to the respondent. The grant was confirmed, after the rest of the estate had been distributed with the consent of the two petitioners. This is the confirmation that the respondent challenged. He complained that he had not been consulted, and that he had bought one acre of 226 during the deceased’s lifetime. The Court (Justice Dulu) revoked the certificate of confirmation, and asked that the issue of distribution be dealt with in a fresh application for confirmation. The respondent then filed the application dated 23<sup>rd</sup> June 2010 seeking the cancellation of titles 435, 436 and 437 and reverting back the said parcels to the original parcel 226 in the name of the deceased. In the affidavit in support, the respondent swore that:-

**“4. THAT the parcel of land which was originally known as Githunguri/Giathieko/226, the subject of revocation herein is now subdivided into three portions namely**

**Githunguri/Giathieko/435, 436 and 437 respectively and titles issued to that effect.”**

Stanley Kiratu Ng’ang’a filed a replying affidavit to oppose the application. In the written submissions by the respondent’s counsel it was indicated that:-

**“It is my humble submission that since the grant has already been revoked this Honourable Court has jurisdiction to order the cancellation of the titles ie L.R. No.Githunguri/Giathieko/435, Githunguri/Giathieko/436 and Githunguri/Giathieko/437 and parcel of land do revert back to the original title Githunguri/Giathieko/226 in the deceased’s name to enable the parties to consult and agree on the mode of distribution.”**

7. In dealing with the application Justice Kimaru observed as follows:-

**“It is apparent that by the time the court issued he said order (order of revocation); the respondent had used the confirmation of grant to secure the sub-division of the suit property into three parcels of land, namely, Githunguri/Giathieko/435, 436 and 437. Titles in respect of the said subdivided portions have been issued to the beneficiaries proposed by the respondents in the confirmation of grant..... As earlier stated in this ruling, it was clear that the subdivision of the suit property was achieved pursuant to the certificate of grant which has now been revoked .....”**

The court went ahead and granted the application and ordered the cancelation of the titles. It asked that the subdivisions revert back into the title 226 in the name of the deceased.

8. With profound respect to my learned brother judge, he was misled by the respondent into making an error. Parcel 226 was never the subject of the application for the confirmation of the grant. By the time the deceased died he had caused the subdivision of parcel 226 into three titles. The only title left in his name was 436 and that was the subject of the confirmation. Parcel 435 was registered in the name of Stanley Kiratu Ng’ang’a and parcel 437 was registered in the name of David Wainaina Ng’ang’a. The unfortunate misrepresentation of facts by the respondent led to orders against the titles by Stanley and David without reference to them. On the face of things, parcels 435 and 437 were not the free property of the deceased at the time of his death. The respondent knew all these facts as he was a petitioner for grant and had made available all this information at the time the petition was filed. He was under a duty to present to court all facts faithfully, fully and fairly (**Go TV Kenya Limited –v- Royal Media Services & 2 Others [2015]eKLR**). When he failed to do this, the court has the responsibility to revisit its decision by way of review (**Republic –v-s Principal Registrar of Government and Three Others, Exparte John Ngugi Gathumbi [2014]eKLR**).

9. There was the allegation that the applicant had come for review about 8 months late. The applicant’s supporting affidavit addressed this issue as follows:-

**“18. THAT I have been advised by my advocate on record, which advise I verily believe to be true, that may earlier advocate on record G. Kamonde Advocate (now deceased) ought to have applied for setting aside of the honourable Justice Kimaru’s ruling and/or orders of 26<sup>th</sup> November 2010 cancelling and/or revoking the said titles timeously as the orders were procured by the respondent through misrepresentation and/or non-disclosure of material facts.**

**19. THAT I have been advised by my advocate, which advice I verify believe to be true that the mistake of an advocate should not be visited on the client and this honourable court has inherent powers to grant the orders sought in order to meet the ends of justice.”**

I accept the explanation that part of the delay was occasioned by the death of the applicant's advocate.

10. In the final analysis, I allow with costs the applications dated 2<sup>nd</sup> February 2015 and 19<sup>th</sup> March 2015. I review and set aside all the orders made on 26<sup>th</sup> November 2010 by Justice Kimaru. Specifically, I review and set aside the order cancelling titles to parcels 435, 436 and 437. Further, I review and set aside the order directing that titles 435, 436 and 437 revert back into the name of the deceased and/or revert back to parcel 226. The only parcel that shall revert into the name of the deceased shall be parcel 436. I direct the Land Registrar Kiambu to give effect to these orders.

**DATED, SIGNED and DELIVERED at NAIROBI this 4<sup>TH</sup> day of April 2016.**

**A.O. MUCHELULE**

**JUDGE**