



IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.400 OF 1993

IN THE MATTER OF THE ESTATE OF WAWERU NJOROGE GATHUNGU (DECEASED)

HARUN CHEGE GATHUNGU.....PETITIONER/RESPONDENT

VERSUS

NJENGA GETHAI.....PETITIONER/RESPONDENT

RULING

The applicant, Njenga Gethai, took up summons seeking review of the ruling/judgment of D.M Rimita J., delivered on 19th January, 2000. The application is brought under Section 47 of the Law of **Succession Act; Rule 73** of the **Probate and Administration Rules** and **Order XLIV** of the repealed **Civil Procedure Rules**. It is premised on the grounds that there is an error apparent on the face of the record; and that there is sufficient cause to review the ruling in the interest of substantive justice.

In support of the application the applicant has deposed :-

1. That in 1993 the respondent (Harun Chege), Mbugua Githae, Njenga Gitau, Daniel Gathungu and himself filed the petition dated 27th October, 1993 seeking to be made the administrators of the estate of the deceased Waweru Njoroje Gathungu in respect of Title No.Nyandarua/Lisako/136), hereinafter called “the suit property” ;
2. That they obtained a grant of letters of administration in respect of the suit property;
3. That the the grant was confirmed on 24th March, 1997;
4. That in that grant he (the applicant) was recognized as a beneficiary and allocated 61/2 acres of the deceased's estate;
5. That subsequently, Cecilia Wambui Mbugua (now deceased) filed objection proceedings and sought revocation of the grant;
6. That in the objection proceedings instituted by the Cecilia Wambui Mbugua (hereinafter called “the objector”) they (his co-petitioners and himself) were represented by the respondent;
7. That upon hearing the application the court delivered a judgment which all the respondents in the objection proceedings interpreted to be a win for all;
8. That contrary to that interpretation, the respondent has by giving the ruling a narrow,

strict and legalistic interpretation, turned against his co-petitioners by not taking into account the background of the ruling;

9. That he got to know about the respondent's mischief on 8th November, 2010 when the respondent swore his further replying affidavit to the application herein.

For the foregoing reasons, the applicant urges the court to review the court's judgment so as to clearly reflect the respondent herein as having been appointed a co-administrator only and not necessarily a sole beneficiary.

In reply, the respondent filed the affidavits sworn on 10th December, 2010 and on 5th November, 2010. In those affidavits he deposed that there was inordinate delay in bringing the application and denied that the ruling was celebrated by the respondents saying that it evinced hostility.

It is contended that the applicant played an active role in filing of the initial petition by writing documents on his behalf and instructing the advocate; that the applicant took advantage of the respondent's illiteracy and inserted in the Petition names of persons who ought not to have been included in the petition (like his cousin Daniel K. Njoroge).

Regarding the judgment sought to be reviewed, it is deposed that it was final and conclusive; and that granting of the orders would not serve the ends justice.

On 23rd May, 2013 the parties with the concurrence of the court agreed to dispose of the application by way of written submissions. Subsequently, they filed their respective submissions which they highlighted and I have read and considered.

The sole issue for determination is whether there is an error on the face of the record that can be subjected to review.

Applicable Law

Order 44 of the Civil Procedure Rules applied to succession matters by dint of **Section 63(1) of P & A Rules**. For the applicant to succeed in his application for review, he must satisfy the conditions set in **Order 44 of the Civil Procedure Rules**. These are:-

- 1. He must demonstrate that no appeal was preferred against the decision sought to be reviewed;**
- 2. That he has either discovered 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**
- 3. That there is a mistake or error apparent on the face of the record; or**
- 4. That there exists other sufficient reason for granting review.**
- 5. The applicant must also demonstrate that the application has been made without unreasonable delay.**

In the instant application, it is contended that there is an error apparent on the face of the record. The error is alleged to be that the judgment does not accurately capture the issue the court was called upon to determine, which issue is whether the respondent was to be a co-administrator and in the event of the objector's death the sole beneficiary.

Having read the entire court record, I infer that the applicant's contention is premised on the fact that the respondent was a co-petitioner and a co-respondent in the objection proceedings.

Although the respondent has submitted that the trial judge recognized him as a brother of the deceased and his co-respondents as mere relatives, the court record does not bear that out.

According to the record it is the respondent only who testified. He did so as DW1. In his testimony he, *inter alia*, stated:-

“The other petitioner's were all my relatives. We decided how to share the deceased's property. I did not invite P.W.1. I will give her something if she comes back home. It will be decided by the clan. I would give P.W.1 about 3 acres.

I have got my own land. I live there. It is a plot. I live in Githunguri Kiambu. My eldest brother died when he was landless. Mbungua Gethai has no land. My sister has no land.

In 1977 I was living on the deceased's land. I had come to live there when the deceased was sick. P.W.1 was also there. I heard that my brother was married in church. My brother had not disowned us.”

Upon considering the evidence adduced before him the judge held:-

“(b) L.R. No. Nyandarua/Lisako/136 will be registered in the name of the objector with life interest. This condition will be marked on the Land Register.

(c) Thereafter the land will revert to D.W.1 or the administrator's of his estate should he die before the objector.

(d) Each party to bear its own costs of this cause.”

In his submissions, the respondent has maintained that the judgment recognized him as a brother of the deceased and the other respondents in the objection proceedings as mere relatives.

Arguing that the judges decision was informed by the finding that the respondents were mere relatives, the respondent has maintained that there is no error on record regarding the judgment.

The respondent has also submitted that if the applicant was aggrieved by the judgment he ought to have appealed; and that there has been inordinate delay in seeking the remedy herein.

Pointing out that the applicant's claim is based on equity, the respondent has submitted that equity only aids the vigilant and not the indolent. The applicant having waited for more than 10 years is said to be unworthy of an equitable remedy.

Is there an error apparent on the face of the court's record?

It is common ground that the respondent together with his co-petitioners, namely Njenga Gitau, Daniel Gathungu and the applicant herein were the petitioners in the initial petition and subsequently the respondents in the objection proceedings lodged by the Objector.

At paragraph 7 of the affidavit sworn in support of the application herein the applicant has deposed that the respondent in his evidence recognized them as beneficiaries. He has also averred that all the respondents celebrated the ruling of the court thinking that after the life interest of the objector, they would benefit under the respondent.

The applicant has also averred that he only learnt of the respondent's intention to exclude him from benefitting from the suit property when the respondent swore a further affidavit denouncing his right to benefit from the suit property.

The respondent's in the affidavit under reference deposed, *inter alia*, as follows:-

“3.That I have read the protestors affidavit dated 20th September, 2010 against my application dated 11th March, 2010 for rectification of certificate of Confirmation of grant dated 24th June, 2003 hereby marked as “CG B”.

4. That I am a brother of the late Waweru Njoroge Gathungu (Deceased) to which estate herein devolves therefore and this Honourable Court found out that the said land is mine after the demise of my Co-Administrator as per the ruling dated 19th January, 2000 hereby attached and Marked “CGC”.

5. That the children of my late step-sister one Dorcas Waithera Gathungu and Gitau Gathungu cannot purport to take charge of the interest/benefit therefore merely because my late brother was there uncle whatsoever.

6.That in any event my late brother's estate devolves in our family and since his late wife had no children I am solely entitled to the said Estate for my other brother Kibaru Gathungu who had no family and has never been traced where he lastly stayed at Mau Narok thereto.”

In his submissions the respondent has reiterated that the judge found him to be the only beneficiary after the Objector's life interest. He has also contended that the applicant is neither a beneficiary under the Kikuyu Customary law nor under the **Law of Succession Act**. For those reasons, he maintains that there is no error apparent on the face of the record.

From the extract of the proceedings hereinabove it is clear that the trial judge was made aware of the interest of the respondent and his co-petitioners. From the court record I infer that their interest was by virtue of being family members.

Through his judgment, the trial judge revoked, the grant that the respondent and his co-petitioners had earlier on obtained.

Although the judgment does not expressly state that the court considered the interests of the other respondents, and found none existed, the fact that the court categorically decided on how the estate was to devolve and specifically left out the applicant either as an administrator or beneficiary means that it must have applied its mind to **Sections 36 and 39 of the Law of Succession Act, Cap 160 Laws of Kenya**. These sections provide:-

“36(1).Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to-

(a) the personal and household effects of the deceased absolutely; and

(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and

(c) a life interest in the whole of the remainder:

Provided that if the surviving spouse is a widow that life interest shall be determined upon her remarriage to any person.

39. (1). Where an intestate has left no spouse or children, the net intestate estate shall devolve upon the kindred of the estate in the following order of priority-

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal

shares; or if none

(d) half-brothers and half-sisters, in equal shares; if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”

According to evidence adduced before the trial Judge, P.W.1 was a spouse of the deceased. That being the case, under section 36 aforementioned, she was entitled to a life interest of whatever remained of the deceased's estate.

Bearing in mind the fact that P.W.1 was old and with no children who could inherit the deceased's estate upon her demise, in accordance with **Section 39** and the evidence adduced before him, the trial Judge found the respondent herein, who is a brother to the deceased, to be the next heir of the estate of the deceased, in accordance with the order of priority, under **Section 39** aforementioned.

In my view the Judge did not err. The applicant herein and his co-administrators in the revoked grant could only inherit the deceased, if and if only the deceased had no brothers and sisters or if there were no children of the deceased's brothers and sisters who could inherit him. That is not the case.

The evidence presented before the trial judge and in this application is to the effect that the applicant and his-co-petitioners were merely other relatives of the deceased. It was not clear how they were related. In his affidavit dated 18/4/2009, Chege described them as children of the step sister to the father. That being the case, they could only inherit the deceased after the respondent, who had and still has a prior interest in the suit property.

In view of the foregoing I agree with the respondent's submissions that there is no error apparent on the face of the record.

Is there any other sufficient reason for granting the order sought?

My answer is in the negative. I say this because the only other provision of law under which the applicant could stake a claim to the deceased's estate was through **Section 26** of the **Law of Succession Act**. The section provides:-

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the deposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate”.

Noting that the applicant's claim was not based on this section of the law, I find his claim to a share of the deceased estate to be unsustainable.

Undue delay

Contrary to the applicant's claim that he learnt of the respondent's intention to disinherit them in 2010 (after the objector's death), the evidence on record shows that the dispute arose as early as 2005. This fact is borne out by an affidavit sworn by Benjamin Gathungu on 14th April, 2005 and filed on 14th April, 2005 in support of the appliciton dated 12/4/2005 where the applicants sought to restrain the administrators from registering or handling the subject property belonging to the deceased's estate and sought to have the grant issued to Harun Chege annulled or revoked. In that affidavit, the deponent, inter alia, deposed:-

“1. That I have been authorized to make and swear this affidavit on behalf of Njenga Githae (the applicant herein) and the family of Daniel K. Njoroge;

2. That on January 2000 the court appointed Cecilia Wambui Mbugua and Harun Chege Gathungu (the respondent herein) as administrators of the deceased;

3. That Harun Chege Gathungu was appointed as an administrator and trustee of the families of the other relatives since the 1st administrator did not have children;

4. ...;

5. ...;

6. That the trustee for the former administrators is abusing his position as he is seeking to be registered as the sole proprietor of the parcel of the land belonging to the deceased;

7. That we lodged a caution to prevent the said trustee from abusing his position....”

It is, therefore, clear that the applicant was aware of the the respondent's intention to be registered as the sole administrator and beneficiary of the deceased's estate as early as April, 2005. This notwithstanding, he waited for nearly five years. I find him to have been indolent in lodging the instant application and therefore disintitiled himself of the exercise of this court’s discretion to review the order even if it had been merited.

For the foregoing reasons, the application has no merits and is dismissed with costs to the respondent.

DATED and DELIVERED this 7th day of March, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Ogeto for the petitioner/responent

Mr. Ngure for the petitioner/applicant

Kennedy – Court Assistant