



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 85 OF 2015**

**(Formerly Naivasha CM's Succession Cause No. 25 of 2012)**

**IN THE MATTER OF ESTATE OF KAHARO MUCHIRI KAHARO (DECEASED)**

**MARGARET WANGUI KAHARO.....PETITIONER/RESPONDENT**

**-VERSUS-**

**FRANCIS MATHATHI GACHOYA.....OBJECTOR/APPLICANT**

**R U L I N G**

1. Following this court's ruling on 21<sup>st</sup> April, 2016 the Protestor **Francis Mathathi Gachoya** filed an application seeking the review of the ruling; and specifically:

**"THAT the Honourable court do acknowledge that the Applciatn paid Kshs 180,000/= and the remaining payable balance is Kshs 20,000/= which Applicant is willing to settle in court or to the Respondent." (sic)**

2. The application filed on 14<sup>th</sup> June 2016 is expressed to be brought under Rules 49, 63 (1) and 73 of the Probate and Administration Rules.

3. The grounds on the face of the application which are expanded in the supporting affidavit of the Protestor are as follows:

**"1) THAT the Applicant had paid Kshs 180,000/= towards the sale price and the remaining payable balance is Shs 20,000/=.**

**2) THAT the Applicant forgot to attach the payments acknowledgement which shows that he had made payments hence the court observation that the balance of Kshs 85,000/= was pending payment.**

**3) THAT information of the balance remaining was inadvertently not disclosed to the court at the hearing of the objection by the Applicant.**

**4) THAT it is in the interest of justice that the court review the ruling delivered on the 22/4/2016 and order the Applicant to pay Kshs 20,000/=.**

**5) THAT the Applicant is ready and willing to pay the administrator/beneficiary the remaining balance of Kshs 20,000/= as the court may deem fit.”**

4. The Petitioner opposes the application through her Replying affidavit, and disputes the annexure **FMG1** purporting payment of Shs 31,500 to one of the beneficiaries, also her son, **Paul Muchiri Kaharo**. She further disputes payment of Shs 150,000/= to the deceased and points out that the evidence now presented was not tendered during the hearing.

5. Pointing to the sale agreement dated 5/3/2008, she depones that only Shs 100,000/= had been paid over to the deceased pursuant to the agreement wherein, the purchase price was stated to be Shs 200,000/=.

6. The parties did not make submissions, opting instead to rely on the affidavits filed in respect of the application.

7. By its ruling which is the subject of this application. this court had stated, inter alia that:

**“Upon a careful consideration of the matter before me, I am persuaded that the Protestor paid, pursuant to the agreement with the deceased the sum of Ksh.115,000/= towards the purchase price and took possession of the one acre piece of land which he occupies and which was originally part of the now closed title number 711. Thus, the one acre of land was held in the vendor’s name in the form of a trust for the benefit of Protestor pending the completion.**

**In Mwangi & Another -Vs- Mwangi (1986) KLR 328 the Court of Appeal held that the rights of a person in possession or occupation of land are equitable rights binding on the land and the land becomes subject to those rights. (See also Mutsonga -Vs- Nyati (1984) KLR 425 and Kanyi -Vs- Muthiora (1984) KLR 712. In an earlier case whose decision was applied in Mwangi -Vs- Mwangi (Supra) namely Gatimu Kinguru -Vs- Muya Gathangi (1976) KLR, 253 the court stated:**

***“The creation of a trust over agricultural land in a land control area does not constitute an “other disposal of or dealing” for purposes of Section 6 (1) of the Land Control Act and, therefore, does not require the consent of the Local Land Control Board.”***

**I therefore direct that before the grant can be confirmed as sought in the Summons for Confirmation, the Petitioner does within 14 days file a further affidavit proposing the mode of distribution of the estate of the deceased, among all the beneficiaries in the Petition. Such proposal will include the Protestor as a beneficiary of the share of one acre that he is currently occupying. In the meantime the Protestor should make arrangements to pay the outstanding sum of Ksh.85,000/= to the Petitioner once the grant is confirmed in order to facilitate the transfer to himself of the parcel claimed. The parties will bear own costs.”**

8. The Applicant does not deny that he failed to tender material in connection with payment of Shs 85,000/= at the hearing of the Protest. His explanation in the grounds and affidavit is that he forgot or inadvertently failed to attach the evidence.

9. By dint of Rule 63 of the Probate and Administration Rules, Order XLIV, now Order 45 of the Civil Procedure Rules applies in Succession Causes so far as relevant. Thus a party applying for review of an order of the court or decree has to bring his matter within the provisions of Order 45 Rules 1 and 2 of the Civil Procedure Rules.

10. Order 45 (1) of the Civil Procedure Rules provides as follows:

“(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.

The operative words are *“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.....”*

11. The documents which the Applicant is relying on currently do not constitute a new matter. They were presumably in the possession of the Applicant at the time of hearing as he says that the failure to produce them was “inadvertent” or unintended.

12. The Protestor had filed his protest on 4/1/2013, attaching the agreement marked **FMGII** which is dated 17<sup>th</sup> March 2008 and reflects a balance of Shs 85,000/=. The protest was heard through filing of submissions, resting with those filed on 9/2/2016 by the Respondent. The key issue running through the protest, the affidavits and submissions is whether the Protestor had a right to the 1 acre parcel of land he claimed to have bought from the deceased. Thus the question whether he had paid the purchase price to the Applicant was a key issue from the start.

13. The Applicant was represented by counsel. It is not conceivable that the Applicant “forgot” to annexe such an important piece of evidence as is now being asserted before the court. Secondly payments on the said document appear to have been made to a third party after the death of the deceased. Such third party had no capacity to represent the estate. **Paul Muchiri Kaharo** who purportedly received the sum of Shs 31,500/= from the Protestor after his father’s death, was not a representative of the estate of the deceased at any one time.

14. Thus, I find no merit in this application. All the Protestor is seeking is another bite at the cherry. Indeed under the terms of the agreement dated 5<sup>th</sup> March, 2008 the Protestor was required to pay the balance of the purchase price, that is by 31<sup>st</sup> May, 2008. At the time of the death of the deceased in September 2008 he had not paid the full sum as he also admits, only disputing the balance. There is a default clause in the said agreement for payment of 30% of the “paid amount” by any party in default.

15. The Applicant is enjoying the possession of the 1 acre parcel of land since taking possession. It is upto him to decide what he prefers to facilitate the completion of the distribution by paying the balance or

to remain in default, at his own risk as to consequences. The Protestor's application is dismissed with costs.

Delivered and signed on this **20<sup>th</sup>** day of **December, 2016**.

In the presence of:-

Mr. Gichuki for the Petitioner

Mr. Obino for the Protestor

Court Clerk: Barasa

**C. MEOLI**

**JUDGE**



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