



**In re Estate of the late Joseph Kabochi Gateri alias Joseph K Gateri (Deceased)
(Succession Cause E135 of 2021) [2024] KEHC 13651 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE E135 OF 2021
SM MOHOCHI, J
OCTOBER 31, 2024
IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH KABOCHI
GATERI ALIAS JOSEPH K. GATERI (DECEASED)**

BETWEEN

JOHN GITHINJI KABOCHI APPLICANT

AND

HANNAH WANJIRU NGATA RESPONDENT

RULING

1. Before Court for determination is the Summons dated 20th August, 2024 seeking: -
 - i. Spent
 - ii. That the Respondent is hereby permanently restrained from interfering whether by herself, agents, employees and/or servants with possessing and ownership or in any manner whatsoever or howsoever from interfering with parcel of land belonging to John Githinji Kabochi;
 - iii. That Honourable Court be pleased to issue an order of permanent injunction restraining the Respondent by herself, her agents, servants and any other persons claiming through them from remaining on, cultivating, planting, putting into use, or in any manner whatsoever interfering with the exclusive use, ownership, peaceful and quiet possession and occupation of John Githinji Kabochi's parcel of land namely Rare/Teret Block 1/1454.
 - iv. That the Honourable Court be pleased to issue an order of eviction to remove the Respondent by herself, her agents, servants and any other persons claiming



through her from John Githinji Kabochi's parcel of land namely Rare/Teret Block 1/1454.

- v. That the Respondent is hereby ordered to give vacant possession to John Githinji Kabochi with immediate effect.
- vi. That the Honourable Court orders full compliance of the orders issued on 22nd February, 2024.
- vii. General and exemplary damages for trespass.
- viii. Costs of this suit.
- ix. Any other further relief that deems fit and just for grant by this Honourable Court.

Applicants Case.

2. The Application was supported by the sworn affidavit of the Applicant of even date wherein he deposed that pursuant to the Certificate of Confirmation of Grant dated 22nd February, 2024, he obtained certificate of title for parcel of land namely Rare/Teret Block 1/1454 in his name.
3. He averred that the Respondent without right or consent encroached into the parcel of land claiming it is hers and she is currently residing there in the buildings that were constructed by the Applicant's late father. That the Respondent has been cutting down trees and doing farming there without consent and has denied the Applicant access to the land despite several demands made by the Applicant himself and the area chief to vacate.

Respondent's Case

4. The Respondent in her Replying Affidavit sworn on 12th September, 2024 opposed the Application and stated that the Petition for Grant and the subsequent confirmation was done without her knowledge and that the Respondent deliberately failed to disclose her interest on the land as a beneficial owner since the subject property belongs to her by advance possession and is subject to Nakuru HC Civil Suit No 22 of 2005 (OS) that is still pending in Court.
5. It was also the Respondent's case that the deceased title was extinguished and that the deceased was only holding the land for her in trust and that the Applicant's act of obtaining and confirming a grant does not defeat her claim for adverse possession.
6. She claimed to have been frustrated in her quest for justice as the Court file in Nakuru HC Civil Suit No 22 of 2005 (OS) went missing and efforts to locate it have been futile. It was her case further that the orders sought are incapable of being granted and that the Applicant has approached Court with unclean hands for failing to disclose her interests in an attempt to circumvent the course of justice.

Applicants' submissions

7. In the Submissions filed on 24th September, 2024, the Applicant submitted that it is not in dispute that the title was issued in the name of the deceased and that title passed to the Applicant through succession.
8. It was the Applicant's argument that a title deed is proof of ownership in an ownership dispute and relied in *Embakasi Properties Limited and another v Commissioner of Land* [2019] eKLR to submit that the title has never been challenged nor the confirmed grant.



9. The Applicant further submitted that the requirements for adverse possession have not been met and urged the Court to be guided by the Court of Appeal decision in *Samuel Kibamba v Mary Mbaisi* [2015] eKLR. The Applicant contented that adverse possession entails entering the land without secrecy or force and in the attached Originating Summons by the Respondent, the Respondent claims that she bought the land from the deceased putting her claim to scrutiny.
10. That since the Respondent had not denied being in the suit land and having failed to prove ownership, the orders sought in the Applicant should issue with the Respondent being removed as a trespasser. Reliance was placed in *Kamoye v Tipango & 2 others* [2024] eKLR where the Court held that since the registration and proprietorship was not in dispute the Plaintiff remained the rightful owner with all rights accruing thereto.
11. On the issue of costs, the Applicant relied on *Republic v Rosemary Wairimu Munene, Ex-Parte Applicant Ihururu Dairy Farmers Co-Operative Society Limited* submitted he was entitled since he was the likely successful party.

Respondent's Submissions

12. The Respondent filed her submissions on 25th September, 2024 through counsel and submitted on three issues. On the first issue, it was submitted that this Court lacks jurisdiction to determine this matter. Reliance was placed on the decision in *Sony Sugar Company Limited v Samuel M. Robi* [2015] eKLR to submit that it might be said that this Court has jurisdiction under Sections 47, 63 and 73 of the *Law of Succession Act* to issue orders in the nature of injunctions and evictions in matters succession, it lacks the requisite jurisdiction to determine ownership use and occupation of land disputes especially if the matter is pending in another Court.
13. The Respondent also relied in *Re Estate of Murianki M'Mugwika (Deceased)* [2019] eKLR, *Joseph Koori Ngugi & another v Stephen Ndichu J. Mukima* [2017] eKLR and *In Re Estate of Barasa Kanenjer Manya (Deceased)* [2020] KEHC 1 (KLR) to submit that the Court's duty ended at preservation and distribution of the estate.
14. The second issue on whether the application is merited, it was the Respondent's submission that it was not since the Applicant was guilty of non-disclosure. That the Applicant was aware of the claim for adverse possession but chose not to disclose that information. That the Applicant is seeking equitable reliefs but approaching Court with dirty hands.
15. Thirdly on the issue of costs, the Respondent submitted that costs do follow the event as provided for under Section 27 of the *Civil Procedure Act* and urged Court to condemn the Applicant to pay costs.

Analysis and Determination

16. The relief being sought herein is an equitable relief with a cardinal "clean hands" doctrine when seeking the same.
17. The unfortunate realization is that the Applicant deliberately withheld a material fact that, there exists a pending adverse possession action Nakuru HC Civil Suit No 22 of 2005 (OS) initiated by the Respondent doubles as a sister to the deceased against the estate of the deceased estate in particular to the subject property Rare/Teret Block 1/1454.
18. In *Salome Wambui Njau (suing as the Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v Caroline Wangui Kiguru*, Nairobi ELC suit No (2013) eKLR, the Court was of the view that in matters of succession disputes touching on land, the Environment and Land Court pursuant to Article



162 (2) of the [Constitution](#) and the High Court as the Succession Court under Section 47 of the [Law of Succession Act](#) would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which Court is best suited to hear and determine the dispute.

19. Musyoka J. in this regard in [In Re Estate of Alice Mumbua Mutua \(Deceased\)](#) [2017] eKLR expounded as to when a matter is best placed for a succession cause and when it ought to be referred to another Court with concurrent jurisdiction as follows:

“.....The [Law of Succession Act](#), and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate Court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate Court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the [Law of Succession Act](#) and the [Probate and Administration Rules](#) are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the [Law of Succession Act](#) and the [Probate and Administration Rules](#). Such have to be resolved through the structures created by the [Civil Procedure Act](#) and Rules, which have elaborate rules on suits by and against executors and administrators.

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil Court, the decree or order is then made available to the probate Court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate Court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate Court is distribution of the estate and once an order is made distributing the estate, the Court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate Court. The interventions by that Court are limited to what I have stated above.”

20. The dispute that has been placed before me relates to ownership, use and title of the property of the deceased between the Respondent and the late Joseph Kabochi such a dispute is governed by the [Land Registration Act](#) and the [Land Act](#), and under that law, the Court with jurisdiction, to deal with any disputes or issues that may arise over use of and title to, is the Environment and Land Court. A finding of adverse possession may confer title upon the Respondent. Therefore, any issue arising around it would be a dispute over title to which Article 162(2) of the [Constitution](#) apply.
21. Looked at differently the fact that there has been a dispute lasting over twenty years on the property Rare/Teret Block 1/1454 would eliminate it as “free property of the deceased” available for distribution.



22. I however equally note that, the Applicant in his quest has annexed a title deed issued on the 30th April 2024 in his name. In other word the transmission has been undertaken the title has passed on and such the estate is settled and the probate concluded.
23. The Applicant has been economical with the truth and is thus undeserving of the equitable relief sought.
24. I accordingly find that, the Application 20th August, 2024 lacks merit and the same is dismissed with costs to the Respondent.
25. This Probate and Administration shall be marked as settled and closed.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 31ST DAY OF OCTOBER, 2024.

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S. MOHOCHI
JUDGE

