



In re Estate of Geoffrey Kamanu Gathura (Deceased) (Succession Cause 627 of 1990) [2023] KEHC 19706 (KLR) (Family) (29 May 2023) (Ruling)

Neutral citation: [2023] KEHC 19706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE 627 OF 1990

EKO OGOLA, J

MAY 29, 2023

IN THE MATTER OF THE ESTATE OF GEOFFREY KAMANU GATHURA (DECEASED)

BETWEEN

WINNIE WAMBUI MBUTHIA 1ST APPLICANT

CATHERINE WANJIKU NJUGUNA 2ND APPLICANT

ANNE WANGARI GATHURA 3RD APPLICANT

AND

GODFREY MUCHIRI KAMANU 1ST RESPONDENT

JAMES KAMANU GATHURA 2ND RESPONDENT

RULING

1. Before the court are three applications for determination. The first application is the Originating Summons dated July 31, 2018 by the Applicants Winnie Wambui Mbuthia, Catherine Wanjiku Njuguna and Anne Wangari Gathura. The second Application is the Chamber Summons Application dated April 15, 2019 made by one Florence Wachera Kamanu (now deceased having died in 2021) and who for purposes of this ruling is referred to as “deceased administrator”. The third application is the Notice of Motion Application dated February 28, 2022 by the Applicants.

Originating Summons dated 31st July, 2018

2. The Application seeks the following orders

1. That the Applicants be named as beneficiaries in the above named estate of the late Geoffrey Kamanu Gathura



2. That Florence Wachera Kamanu, Winnie Wambui Mbuthia and James Gathura Kamanu be appointed as administrators of the above mentioned estate and a new grant be issued to the administrators
3. That costs of this application be provided for
3. The application is premised upon Section 69(1) of the Law of Succession Act, rules 41, 49 and 59 of the Probate and Administration Rules, Order 37 rule 1 (g) of the Civil Procedure Rules, 2010 and all enabling provisions. It is based on the grounds set out therein and supported by an Affidavit of even date sworn by all three Applicants.
4. The Applicants' case is that one Florence Wachera Kamanu obtained Grant of letters of Administration. The applicants sought for the same to be revoked since they had not been included as beneficiaries of the estate of the deceased. The court revoked the grant of letters of Administration issued to Florence Wachera Kamanu on October 28, 2014.
5. It is the Applicants' case that the Estate of the deceased remains without Administrators and his assets have not been distributed among his beneficiaries. The Applicants state that during the pendency of the Application for revocation, some of the beneficiaries subdivided part of the estate assets amongst themselves and processed new titles to the exclusion of other beneficiaries.
6. According to the Applicants, all the beneficiaries apart from one Godfrey Muchiri Kamanu have agreed that Florence Wachera Kamanu, Winnie Wambui Mbuthia and James Kamanu Gathura be appointed as administrators of the deceased to collect, account and administer the estate.
7. In response to the Originating Summons, Florence Wachera Kamanu (herein after 'Deceased Administrator') filed a Replying Affidavit dated February 14, 2019.
8. The Deceased Administrator's case was that the court issued her with the grant of letters of Administration on August 7, 1990. The same was confirmed on November 5, 1991 and through the Certificate of Confirmation of Grant, various parcels of land were transferred to the deceased administrator's name. This was done in full knowledge of all her children.
9. According to the deceased administrator, when she was processing the transfer of parcels of land to her sons, the 2nd Applicant who is an Advocate of the High Court of Kenya witnessed and certified the land transfer forms and aided the objector in the entire transfer process.
10. The deceased administrator contended that the estate of the deceased has already been distributed and nothing is pending distribution.
11. According to the deceased administrator, her Advocates informed her that an Application for revocation was filed and a Replying Affidavit in answer to the application for revocation was filed by an Advocate unknown and not appointed by the Objector. The deceased administrator stated that she did not know the firm of O.H. Oyugi & Co. Advocates and she did not instruct that firm or any other law firm to act for her in the application for revocation.
12. The deceased administrator contended that she did not sign the Replying Affidavit to the application for revocation and was not even aware that her daughters had sought for revocation. The deceased administrator stated that she could not read and write and had always relied on the 2nd Applicant for legal matters; she alleged that the 2nd Applicant made her sign the Replying affidavit. According to her, the revocation of grant was obtained fraudulently.



Chamber Summons dated April 15, 2019

13. The Application seeks the following Orders
 1. That this Court's order made on the 28th day of October 2014, revoking the Grant of Letters of Administration, made on August 7, 1990 to Florence Wacera Kamanu, be and is hereby set aside.
 2. That the costs of this application be provided for.
14. The application is premised upon rules 49 and 73 of the *Probate and Administration Rules* and all other enabling provisions of Law. It is based on the grounds set out therein and supported by the Affidavit of Florence Wachera Kamanu. The deceased administrator reiterated the deponents as per her response to the Originating Summons of 31st July, 2018.
15. The Applicants in response to this application relied on their Replying Affidavit dated February 26, 2019. The Affidavit is dated earlier since the deceased administrator had filed a similar application on February 14, 2019.
16. The applicants aver that the deceased administrator left them out from the list of beneficiaries. According to the applicants, the Objector was meant to hold the following properties in trust for the deceased's children as per the confirmation of Grant.
 - a. LR No Evurore/Kathera/1806
 - b. LR No Loc.3/Gichagiini/280-Forthall
 - c. Motor vehicle registration number KSY-278 Pick-up
17. The Applicants aver that in 1998, the deceased administrator subdivided Loc.3/Gichagiini/280 into five sub-plots and registered them in her name.
18. In response to the deceased administrator's allegation that the entire estate of the deceased has already been distributed, the applicants state that there was no mode of distribution filed in court. The Applicants state that the deceased administrator had appointed the firm of O.H. Oyugi & Company Advocates who filed a notice of appointment and a Replying Affidavit to the application for Revocation. The Applicants aver that the Objector was involved in the Application for revocation and that the Objector was even present when the court revoked the Grant issued to her on August 7, 1990.
19. The applicants state that the deceased administrator cannot contend not to know how to read and write since all the documents the Objector has brought to court are in English Language. It is the applicants' averments that the deceased administrator during the pendency of the application for revocation proceeded to transfer three sub-plots that were part of Loc.3/Gachagiini/280 to her sons Godfrey Muchiri Kamanu, Humphrey Njuguna Kamanu and James Gathura Kamanu as gifts. This act was illegal according to the Applicants since property should pass to beneficiaries as inheritance not as gifts.

Notice of Motion dated February 28, 2022

20. The Application seeks the following orders
 1. Spent
 2. That this Honorable Court be pleased to issue conservatory orders directed at the Respondents whether by themselves or their representatives, servants, agents, and/or assigns to preserve



the properties restraining them from selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the properties known as title Numbers Loc.3/Gichagini/280 and or its sub-divisions being Loc.3/Gichagini/860, Loc.3/Gichagini/861, Loc.3/Gichagini/862, Loc.3/Gichagini/863, Loc.3/Gichagini/864 and title number Evurore/Kathera/1806 pending the hearing and determination of this application inter-parte and pending determination of this suit

3. That this Honorable court be pleased to grant an injunction restraining the respondents whether by themselves, their agents and/or servants from dealing, interfering, alienating or otherwise disposing of the title numbers Loc.3/Gichagini/860, Loc.3/Gichagini/861, Loc.3/Gichagini/862, Loc.3/Gichagini/863, Loc.3/Gichagini/864 and the Title Number Evurore/Kathera/1806 pending the hearing and determination of this application and pending determination of this suit.
 4. That the costs of this application be provided for
21. The application is premised under order 40 rules 1 & 4, order 51 rule 1 of the *Civil Procedure Act*, Section 1A, 1B, 3A & 3B of the *Civil Procedure Act* and all other enabling provisions of Law. It is based on the grounds set out therein and supported by the Affidavit of Catherine Wanjiku Njuguna.
 22. The Applicants case in this application is basically the case they have already raised in the Originating Summons and in their response to the deceased administrator's Application.
 23. In response, one Godfrey Muchiri Kamanu the 1st Respondent filed a Replying Affidavit dated January 12, 2023. It was revealed that the administrator Florence Wachera Kamanu had died in the year 2021. According to the 1st Respondent, the Order revoking the grant was issued on October 28, 2014 but no order was extracted by the Applicants until June 25, 2018.
 24. The 1st Respondent contends that the grant was issued to the deceased administrator on August 7, 1990 and confirmed on November 5, 1991. By strength of the Confirmation of Grant, the various parcels of land were transferred to Florence as follows; Loc.3/Gachagiini/280, 1st March, 1995, Gichugu/Settlement Scheme/487, 6th November 1991; and Evurore/Kathera/1806, August 16, 2013. The Objector further contends that this transfers were made with full knowledge and consent from all the children of Florence.
 25. According to the 1st Respondent, Title Loc.3/Gachagiini/280 was closed after the land was sub-divided into five portions that is Loc.3/Gachagiini/860, 861, 862, 863 and 864; that Loc.3/Gachagiini/860, Loc.3/Gachagiini/861 and Loc.3/Gachagiini/63 were transferred by the Objector to Godfrey Muchiri Kamanu, Humprey Njuguna Kamanu and James Kamanu Gathura om May 22, 2009. According to the 1st Respondent, the transfer of land forms were drawn, witness and certified by the 2nd Applicant.
 26. The 1st Respondent deposes that the transfer of the three parcels of land was done with the knowledge and agreement of all the children of the deceased. According to the 1st Respondent, the other parcels of land are still in the deceased administrator's name.
 27. The 1st Respondent deposes that himself and the 2nd Respondent have been registered owners of Loc.3/Gachagiini/63 and Loc.3/Gachagiini/860 since 2009 and have been cultivating on those parcels of land; that the applicants attempt to have the titles cancelled is time barred as per the *Limitation of Actions Act*.
 28. The 1st Respondent deposes further that the Applicants lodged a similar application with the ELC Court in Muranga in ELC Case No E20 of 2021 seeking the same prayers as in the current Notice of Motion. The Respondents filed a Preliminary Objection raising the issue of the Applicants being



time barred; that the Muranga ELC upheld the Preliminary Objection and struck out the suit and the application. The 1st Respondent contends therefore that the matter is *res judicata*.

29. The parties filed submissions. The Applicants' submissions are dated January 27, 2023 whilst the Respondent's submissions are dated January 18, 2023.

Determination

30. I have carefully considered the Applications, the Affidavits and the Written Submissions by parties. The issues arising for determination are:
- i. Whether the court should appoint new Administrators as prayed
 - ii. Whether the Order for revocation should be set aside
 - iii. Whether the Application dated February 28, 2022 is *res judicata*
31. Before embarking on the determination of issues, it is important to answer a few questions. First it is not in dispute that the Deceased Administrator Florence Wachera Kamanu was issued with grant of letters of Administration to the estate of the deceased on August 7, 1990. It is also not in dispute that the grant was confirmed on November 5, 1991.
32. In the confirmed Grant, the following were listed as the properties of the deceased.
- a) Evurore/Kathera/1806
 - b) LR Loc.3/Gichagiini/280 Forthall
 - c) LR Gichugu settlement Scheme/487 Embu
 - d) LR Ngariama/Ngiriambu/1816
 - e) M/V Reg. No KSY 278 Chovluv P/up
33. From the material before the court, the deceased was owing Kenya Commercial Finance Company Limited Kshs 709,850.90 as at September 30, 1991 with interest still accruing. The other amount of Kshs 500,000 was owing to the Middle Africa Finance Company Limited. The amounts borrowed by the deceased had been secured using LR Gichugu settlement Scheme/487 Embu and LR Loc.3/Gichagiini/280 Forthall.
34. On October 24, 1991, the deceased Administrator entered into an agreement for sale of LR Gichugu settlement Scheme/487 Embu and LR No, Ngariama/Ngiriambu/1816. The Confirmation of Grant aided the said sale. It is the duty of an administrator to use the proceeds from the estate of the deceased to pay for the liabilities of the deceased which is what the deceased administrator did. Therefore, the two properties have been accounted for.
35. The contention is on the property LR Loc.3/Gichagiini/280 Forthall where the Applicants contend that this land was sub-divided without the Applicants' knowledge and that it was sub-divided and transferred to the respondents during the pendency of the Application for revocation of the Grant. The Application for revocation of Grant was filed on April 23, 2007 and was revoked on October 28, 2014. The land was sub-divided in the year 2008. The respondent contends that when the land was being sub-divided, all the children of the deceased were in agreement and that the 2nd Applicant who is an Advocate of the High Court and was the one who assisted the deceased Administrator with the sub-division and the transfer process.



36. On the Replying Affidavit dated February 14, 2019 which is the response to the Originating Summons, the Deceased Administrator attached transfer forms drawn by the firm of C.W. Njuguna & Co. Advocates which is the firm of the 2nd Applicant. This shows that the 2nd Applicant was aware of the dealings of the said parcel of land even at the time of the making the Originating Summons and the Notice of Motion.
37. The said parcel of land was sub-divided into 5 portions and the five portions were given new title numbers as Loc.3/Gachagiini/860, 861, 862, 863 and 864. All the sub-divided parcels were registered in the name of the deceased Administrator. The three sons of the deceased were given Loc.3/Gichagiini/860, Loc.3/Gichagiini/861 and Loc.3/Gichagiini/863 as gifts from the deceased Administrator. This means that Loc.3/Gichagiini/862 and Loc.3/Gichagiini/864 are still in the names of the deceased Administrator.
38. The other properties Evurore/Kathera/1806 and M/V Reg. No KSY 278 Chovlup P/up have not been accounted for. The deceased administrator contended that the entire estate had already been distributed yet there is nothing to show how the two properties were distributed. It is therefore safe to state that not the entire estate of the deceased was distributed.
39. With that established, I now proceed to determine the issues.

Whether court should appoint new Administrators as prayed

40. The Grant issued to the deceased Administrator was revoked in October, 2014. The applicants in the Originating Summons prayed that Winnie Wambui Mbuthia, and James Kamau Gathura and Florence Wachera Kamanu be made administrators to the estate of the deceased. Before this application was determined, Florence Wachera Kamanu died.
41. When a Grant of representation is revoked, it means that the estate is left without a representative and all properties revert back to the deceased. Thus there is need for the estate to be represented to avoid wastage. The person who successfully sought for revocation orders should therefore Petition the court for Grant of letters of Administration. The Petition should be complete together with consents from all beneficiaries.
42. The applicants have attached to the Originating Summons a document marked "WWM3". The document is a consent to the making of a grant of Administration Intestate to person of equal or lesser priority. The consent was signed by all the beneficiaries except one Godfrey Muchiri Kamanu. Godfrey Muchiri Kamanu however did not lodge an Objection to that application.
43. Florence Wachera Kamanu the deceased administrator died after the previous grant had been revoked meaning she was no longer an Administrator thus there is no need for an application for substitution of a deceased Administrator. There was no Objection to the proposed administrators and also in consideration that not the entire estate of the deceased was distributed this court makes the following Orders with regard to the Originating Summons dated July 31, 2018 this court makes the following orders:
 - i. The Applicants shall be added to the list of beneficiaries of the estate of the deceased Geoffrey Kamanu Gathura
 - ii. Winnie Wambui Mbuthia and James kamanu Gathura are appointed as the Administrators of the estate of the deceased.



Whether the Order for revocation should be set aside

44. The application for setting aside the revocation orders was made by Florence Wachera Kamanu who is now deceased.
45. Order 24 of the *Civil Procedure Rules, 2010* comprehensively outlines what ought to happen if a party or parties to a suit dies; Order 24, rule 3 provides for procedure in case of death of one of several Plaintiffs or of sole Plaintiff t as follows:
1. Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
 2. Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

46. In this case, no one has made an application to this court to continue pursuing the Application as lodged by the deceased Administrator. The deceased Administrator died in the year 2021. One year has since lapsed as per the above provisions of law. The Application for setting aside the revocation order therefore abates. The chamber Summons Application dated April 15, 2019 is hereby struck out.

Whether the Application dated February 28, 2022 is *res judicata*

47. The Applicants in the Notice of Motion dated February 28, 2022 are seeking an injunction to restrain the Respondents or their agents from selling or in any other way dealing with Loc.3/Gichagiini/280 or its sub-divisions Lo3.3/Gichagiini/860, 861, 862, 863, 864 and title Evurore/Kathera/1806.
48. The 1st Respondent argued that the Application is *res judicata* since the ELC Muranga in E20 of 2021 dismissed similar prayers for being time barred.
49. The substantive law on *res judicata* is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

The *Black's law Dictionary* 10th Edition defines “*res judicata*” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

50. The 1st Respondent in his Replying dated July 21, 2021 attached a ruling of the ELC Court marked GMK-3. From the ruling, the parties are the same, the prayers are the same as the prayers in the



current application. The subject matter is the same. However, the ELC court ruled that it did not have jurisdiction to rule on the issues since the same was pending in the Succession Court. The Court also ruled that it did not have jurisdiction since the matter was time barred.

51. In consideration that the ELC court recognized that the matters were pending before the Succession Court, it is for this court to determine the issues raised by the Applicants in the current Application. The question remains whether this court should grant the injunctive Orders as prayed by the Applicants.
52. The Applicants rely on the principles of *Giella v Cassman Brown Company Ltd* (1973) EA 358 and contends that they have met the threshold set in the case. In particular, they submit that existence of *prima facie* case with high chances of success has been met as they were left out in the distribution of the deceased's estate. The Applicants further submit that they will suffer irreparable loss which cannot be adequately compensated by an award of damages if the injunction is not granted and the Respondents end up selling the parcels of land registered in the respondent's names. The Applicants submit that they are already suffering losses as the Respondents are the only ones benefitting from the sale of the tea in those parcels of land. The Applicants submitted that the balance of convenience lies in the court granting them the Orders for injunction to preserve the parcels of land pending the determination of this cause.
53. The High Court has jurisdiction to issue all manner of orders including the issuance of conservatory and or injunctive orders where appropriate, to preserve and safeguard, the estate of a deceased person. Indeed, it is common ground that for an injunction to be issued, the applicant must satisfy the three requirements settled in *Giella v Cassman Brown* [1973] EA 348 where the court held that an applicant must demonstrate that they have a *prima facie* case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favor.
54. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 others* [2003] eKLR explained that a *prima facie* is,

“a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”
55. In the instant application, the applicants claim that the deceased administrator sub-divided Loc.3/ Gichagiini/280 into five portions and proceeded to transfer three of the portions to the sons of the deceased without the knowledge of the Applicants. The Respondents on the other hand have argued that the 2nd Applicant being an Advocate of the High Court aided with the transfer process of the Sub-divisions from the deceased administrator's name to the Respondents and indeed there is proof for the same. The deceased administrator when doing sub-divisions was acting on the power of the Grant issued and the subsequently confirmed. However, there has been no schedule of distribution filed in this court showing how the properties were distributed. From the foregoing, even though the 2nd applicant might have been aware of the transfer of the parcels of land, we cannot assume that the other applicants were made aware of the said transfers. There is then a *prima facie* case.
56. The second thing to consider before granting injunctive orders is whether the Applicants will suffer irreparable damage that cannot be compensated by an award for damages. The Applicants in this case have argued that if this court does not issue the injunctive order sought and the respondents happen to sell the parcels in question, then the applicants will suffer irreparable damage. It is also the applicants' argument that the respondents by their own words stated that they are benefitting from the tea planted



in the portions of land yet the applicants are not. *In re Estate of Leah Wanguii Nding'uri (Deceased)* [2020] eKLR, the court held that;

“The grant that was issued to the respondents was revoked. It means that, all actions taken by the respondents including the registration of the deceased’s property in their names was rendered a nullity. This court has jurisdiction to order cancellation of the said titles so that the land can revert back to the deceased’s names”

57. The Grant that was issued to the deceased Administrator was revoked in 2014 meaning the sub-divided property should have reverted back to the name of the deceased so as to form part of the estate of the deceased for re-distribution when new administrator(s) is/are appointed.
58. From this, there exists a possibility for the Applicants to lose out on their share from their father’s estate if the Respondents are to sell the parcels of land. The duty of the succession court is to see that the deceased’s estate is preserved and protected and when distributed that it is equally and rightfully distributed to all the beneficiaries.
59. The Applicants have satisfied the requirements for injunction and therefore the prayers in the Application of February 28, 2022 are granted as follows:
 - i. The respondents are restrained whether by themselves, their agents and/or servants from dealing, interfering, alienating or otherwise disposing of the title numbers Loc.3/Gichagiini/860, Loc3/Gichagiini/861, Loc.3/Gichagiini/862, Loc.3/Gichagiini/863, Lo3.3/Gichagiini/864, and the Title Number Evurore/Kathera/1806 pending the hearing and determination of this suit.
 - ii. Parties shall bear their own costs

Orders Accordingly

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MAY 2023.

E.K. OGOLA

JUDGE

Ruling read and delivered in chambers online in the presence of:

M/s Biaco for the Applicants

Ms. Gisiele Court Assistant

