



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Kamau Kamiri Kungu (Deceased) (Succession Cause
3051 of 2004) [2022] KEHC 11862 (KLR) (Family) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11862 (KLR)

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

FAMILY

SUCCESSION CAUSE 3051 OF 2004

AO MUCHELULE, J

JULY 26, 2022

IN THE MATTER OF THE ESTATE OF KAMAU

KAMIRI KUNGU (DECEASED)

HELLEN WANGUI MURIU.....1ST

APPLICANT

GEORGE GACHWE MURIU.....2ND

APPLICANT

-VS-

JOHN GACHWE KAMAU.....1ST

RESPONDENT

JOHN KABUNGU KAMAU.....2ND

RESPONDENT

RULING

1. The deceased Kamau Kamiri Kungu died intestate on 19th March 2007. He left shares in companies and the following parcels of land in his name:-
 - a. Rwang'onde Settlement Plot No. 77;
 - b. Kakamega/Sango/255;
 - c. Kakamega/Sango/568;
 - d. Gatamaiyu/Kagaa/T.130
 - e. Gatamaiyu/Kagaa/T.135;



- f. Gatamaiyu/Kagaa/T.124;
 - g. Gatamaiyu/Kagaa/291;
 - h. Gatamaiyu/Kagaa/101;
 - i. Githunguri/Githunguri/472; and
 - j. Kagaa Market Plot No. 8.
2. He was survived by a widow Hannah Gathoni Kamau and the following children:-
- a. John Gachwe Kamau;
 - b. Rahab Mbaire Njuguna;
 - c. John Kabungu Kamau;
 - d. Margaret Njeri Kamau;
 - e. Laban Chege Kamau;
 - f. Mary Wanjira Kamau Njuguna;
 - g. Peter Njenga Kamau;
 - h. Joseph Muriu Kamau;
 - i. Joyce Wanjira Ndungu; and
 - j. Fredrick Muchai Kamau.
3. The deceased's two sons John Gachwe Kamau (1st respondent) and John Kabungu Kamau (2nd respondent) on 14th October 2004 petitioned the court for the grant of letters of administration intestate. The grant was issued on 10th December 2004, and confirmed on 19th March 2007. The estate was shared among the beneficiaries who were to each equally get 1.68 Ha, except for the widow who got 2.70 Ha.
4. The 1st applicant Hellen Wangui Muriu is the widow of the deceased's late brother John Muriu Gachwe and the 2nd applicant George Gachie Muriu is her son. In the instant application dated 31st August 2021, brought under section 76 of the *Law of Succession Act* (Cap. 160), they sought the revocation of the grant issued and confirmed to the respondents. The reasons were that the deceased was registered in respect of Gatamaiyu/Kagaa/T.124, T.130 and T. 135 but to hold them in trust for his brothers who included the 1st applicant's late husband. They stated that they have lived on the parcels since the 1970's to the knowledge of the respondents; that these facts were fraudulently concealed from the court when dealing with the petition; and, lastly, that they were not at all involved in the succession cause to be able to protect their claim to the parcels. She stated that the grant was obtained by means of untrue allegation of fact because the properties were being held in trust by the deceased for the 1st applicant's late husband.
5. The replying affidavit was sworn by the 2nd respondent. It was conceded that indeed there were properties that were registered in the name of the deceased to hold in trust for his siblings, and that such properties had been subject of many cases before the clan elders. He, however, denied that the three properties in the application were part of those held in trust. The respondents' case was that the three properties belonged to the deceased's and had therefore been properly inherited by this family.



6. It was evident from the response that, following the issuance of the certificate of confirmation, the respondents sued the applicants in the Principal Magistrate's Court at Githunguri in ELC Case No. 5 of 2018 seeking their eviction from the three parcels of land, among other prayers. In their plaint it was conceded that land parcels Githunguri/Githunguri/472 and Gatamaiyu/Kagaa/101 that were the subject of the succession cause had been registered in the name of the deceased in trust for himself and for his siblings, including the 1st applicant's late husband. The applicants raised a preliminary objection to the suit saying that they owned the parcels by adverse possession. The objection was dismissed and they have filed an appeal to the ELC Court at Thika in Appeal No. E065 of 2021. The matter is pending.
7. In further defence to the present summons, the respondents filed a notice of preliminary objection dated 29th October 2021 whose grounds were that:-
 - “ 1) The Applicants application dated 31st August 2021 is sub judice;
 2. This Honourable Court lacks jurisdiction to hear and determine the applicants case; and
 3. The application before the court is vexatious, frivolous and an abuse of the process of the court.”
8. The parties agreed that both the objection and the summons be heard together by the affidavit evidence and written submissions. Mr. H. Kago for the applicants and M/s Kamuyu for the respondents each filed written submissions which I have read and considered.
9. If it is conceded that some of the property in the name of the deceased were held in trust for his siblings, including the late husband of the 1st applicant, then it follows that the properties, specifically Githunguri/Githunguri/472 and Gatamaiyu/Kagaa/101, were not the free properties of the deceased as defined under section 3 of the Act. Secondly, there had been a long standing claim by the applicants to Gatamaiyu/T.124, T.130 and T.135. Whether the claim was valid or not is not the issue. A march was stolen on them when this succession cause was filed, heard and determined without reference to them. But more important, they had an admitted claim to Githunguri/Githunguri/472 and Gatamaiyu/Kagaa/101. It was fraudulent when the claim was not brought to the attention of the court, and when the applicants were neither cited nor served with the petition to be able to participate in the distribution of the estate of the deceased.
10. On the question whether or not this summons is subjudice, it is clear that section 76 of the Act provides that “any interested party” can seek the revocation of the grant on any of the grounds in (a) to (e). The applicants were certainly interested in the estate of the deceased as shown in the foregoing. Further, the respondents sought the eviction of the applicants on the basis that they were the administrators of the estate of the deceased and had a certificate of confirmation. It is only the court that issued the grant and certificate of confirmation that has the jurisdiction to revoke the same. This answers both grounds 1 and 2 of the preliminary objection. Certainly, the summons is not vexatious or frivolous or an abuse of the process of the court. This is because the applicants have a claim to the properties that had been registered in the deceased's name, and the claim was all along known to the respondents who deliberately failed to cite them. But more important, a preliminary objection proceeds on the basis that what is raised is a pure point of law that is argued on the assumption that all the facts pleaded by the other side are correct, and cannot be raised if any fact had to be ascertained (*Mukisa Biscuit Manufacturing Co. Ltd -v- West End Distributors Ltd* [1969] EA 696). The dispute between the



applicants and the respondents raises facts that have to be ascertained. They include whether or not the deceased held the three properties in question in trust for the 1st applicant's late husband.

11. In all, I find that preliminary objection is not sustained and dismiss it with costs. I allow the summons with costs and revoke, review and set aside the certificate of confirmation issued on 19th March 2007.
12. I direct the respondents, whom I have decided that they continue to administer the estate of the deceased, shall within 60 days file and serve an application for the confirmation of the grant on the applicants and the siblings of the deceased. Those served shall respond within 30 days. The matter shall then be mentioned on 24th January 2023 for directions. One of the preliminary issues to be addressed shall be whether the issue of trust and/or ownership of the parcels in question should be referred to, and determined by, the Environment and Land Court created under Articles 162(2)(b) and 165(5)(b) of *the Constitution* and section 13(1) of the *Environment and Land Court Act*.
13. The effect of revocation is that all titles issued subsequent to the certificate of confirmation shall be cancelled and the entire estate shall revert to the deceased.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2022.

A.O. MUCHELULE

JUDGE

