



**In re Estate of Waiganjo Gikurumi (Deceased) (Succession Cause 3218 of 2014)
[2022] KEHC 13369 (KLR) (Family) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 3218 OF 2014
MA ODERO, J
SEPTEMBER 23, 2022
IN THE MATTER OF THE ESTATE OF WAIGANJO GIKURUMI (DECEASED)**

BETWEEN

JOHN NDOTONO WAIGANJO APPLICANT

AND

JOHN KUMURU WATHOKO 1ST RESPONDENT

MICHAEL MACHARIA NJUGUNA 2ND RESPONDENT

RULING

1. Before court is the summons dated November 24, 2020 by which the applicant John Ndotono Waiganjo seeks the following orders:
 1. Spent.
 2. That this honourable court be pleased to issue orders of injunction restraining the respondents from entering, alienating, using, trespassing, sub-dividing and/or making any use of land parcels xxxx, xxxx and xxxx until proper procedures of sub-divisions are followed.
 3. That an order be issued by this honourable court cancelling the subdivision done by a surveyor on the 3rd October on the strength of the certificate of confirmation which had error.
 4. That the land registrar Gatundu and Thika respectively be prohibited from effecting any registration of any instrument/document in respect of land parcels xxxx, xxxx and xxxx.
 5. That the cost of this application be borne by the 1st and 2nd respondents.



2. The application was supported by the affidavit of even date as well as the further affidavit dated May 21, 2021 both sworn by the applicant.
3. The respondents John Kumuru Wathoko and Michael Macharia Njuguna opposed the application through their replying affidavit dated March 5, 2021 sworn by the 1st respondent. The application was canvassed by way of written submissions. The applicant filed written submission dated July 1, 2021 whilst the respondents relied upon their written submission dated May 11, 2021. The beneficiaries to the estate who referred to themselves as ‘interested parties’ filed written submissions dated May 20, 2021.
4. At the outset I wish to apologize to all the parties for the delay in rendering this ruling. This was due to the fact that several documents which had been referred to by the parties had not been uploaded on the court portal. The court had to request the parties to avail hard copies of their documents.
5. Secondly, I wish to note that although parties made reference to an application dated November 23, 2020, no such application was availed. What exists in the file is the application dated November 24, 2020. Given that the parties in their submissions all refer to the application dated November 24, 2020 this court will only consider the summons dated November 24, 2020.

Background

6. The succession cause relates to the estate of Waiganjo Gikurumi (hereinafter ‘the deceased’) who died intestate. A Succession Cause No 185 of 2006 was initially filed at the Thika Law Courts. That matter was later consolidated with this Succession Cause No 3218 of 2014 filed at the High Court in Nairobi.
7. The dispute between the parties was referred to court annexed mediation and a mediation settlement agreement was reached. That agreement was filed in court on November 22, 2017.
8. Following the agreement between the parties a certificate of confirmed grant was issued on March 12, 2018 in which the 1st and 2nd respondents were named as the administrators of the estate. According to the confirmed grant, it was agreed that the estate of the deceased would be distributed amongst the beneficiaries in the following manner:-



Name	Description of properties	Share of Heirs
Joseph Gikurumi Waiganjo John Kumru Wathoko Michael Macharia Njuguna John Ndotono Waiganjo Lucia Njahira Waiganjo Anastacia Mugwanja Purity Ngendo Agnes Wanjiku Elizabeth Njahira Gideon Waiganjo Wangari (heirs of (Wairimu deceased) Joseph Gikurumi Joyce Kalunda Kathuli – Gikurumi David Waiganjo Gikurumi James Njuguna Gikurumi	Land parcel xxxx	To be divided into two (2) equal shares among the five (5) beneficiaries of each family. Eleventh beneficiary will be given equal parts form both families.

9. Following the issuance of the certificate of confirmed grant the applicant who is one of the beneficiaries of the estate filed this present application.
10. The applicant avers that although the mode of distribution of the estate was clearly set out in the confirmed grant issued on March 12, 2018, the respondents/administrators of the estate proceeded to obtain another grant which had errors. That on October 3, 2020 the respondents using this unlawfully acquired grant proceeded to subdivide the land comprising the estate of the deceased without the consent and/or participation of the applicant and the other beneficiaries to the estate. Three other beneficiaries Lucia Njahira Waiganjo, Anastacia Wangari Titus and Joyce Kalunda Kathuri all filed replying affidavits dated May 21, 2021 supporting the allegations made by the applicant.
11. The applicant avers that sub-division as done by the surveyor brought by the respondent failed to provide for access roads to each beneficiary's portion of land and that no consent for the sub-division had been obtained from Land Consent Board. He further alleged that the respondents ought not have been included in the distribution of the estate as they had not obtained letters of administration in respect of the estate of Veronica Ngendo Wathoko and Hannah Wamaitha Njuguna who were daughters of the deceased herein. That the said mothers of the respondents had other children who were not included as beneficiaries to the estate of the deceased.
12. The applicant therefore asserts that the land was sub-divided on the strength of a confirmed grant which had errors.
13. In opposing the application the respondents (the administrators of the estate) reiterate that consensus on the mode of distribution of the estate as set out in the confirmed grant dated March 12, 2018 was reached after a mediation process had been undertaken. That since the mediation settlement agreement



was reached, no party including the applicant herein raised an objection over said mode of distribution. The respondents aver that properties were sub-divided after the parties met at the office of the area chief and in his presence agreed on how to sub-divide the land.

14. Thereafter the respondents engaged a land surveyor proceed with the sub-division. The respondents insists that the sub-division was lawfully done in accordance with the confirmed grant. They urge that this succession cause has been dragging in court for a long time and that litigation must come to an end. They urge the court to dismiss this application in its entirety.

Analysis and Determination

15. I have carefully considered the application before the court the replies filed thereto as well as the written submissions filed by both parties. The applicant has by prayer (3) of the summons sought an order of injunction to prevent the sub-division of the properties in question.

16. The principles upon which an interlocutory injunction may be granted are set out in the often cited case of *Giella vs Cassman Brown* [1973] EA 358 as follows:-

1. The applicant must establish a *prima facie* case with a probability of success.
2. The applicant must demonstrate that he stands to suffer irreparable harm if the orders sought are not granted.
3. If there is any doubt then the court will decide the case on a balance of probability.

17. The definition of what constitutes a ‘prima facie’ case was given in the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 where the court held as follows:-

“In civil case a *prima facie* case is a case in which as 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. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. This is clearly a standard which is higher than an arguable case.”

18. The applicant argues that the sub-division was conducted in accordance with a grant that had errors.

19. The applicant has not annexed to his pleadings a copy of this allegedly ‘erroneous’ grant. He has not told the court where or when this second grant was issued to the respondents. I have carefully and anxiously perused the court file. There is only one grant issued to the respondents being the confirmed grant dated March 12, 2018. There is no other confirmed grant in the file.

20. What the applicant is basically telling this court is that the respondents are operating on the basis of a fraudulent confirmed grant and that the properties were sub-divided in contravention to the certificate of confirmed granted dated March 12, 2018. He further alleges that the respondents do not hold letters of administration in respect of the estate of their late mother and that therefore they have no locus standi in this matter.

21. I note that the appointment of administrators was agreed upon by all parties. The applicant raised no objection at the time the grant was being confirmed. Instead, he waits for two (2) years to raise an objection. The applicant’s remedy was to file a summons to revoke the grant issued to the respondents.



22. The applicant has claimed that the sub-division of the estate properties was being undertaken by the respondents/administrators without the consent of himself and some of the other beneficiaries to the estate.
23. The respondents have annexed to their replying affidavit dated March 5, 2021 a letter dated December 21, 2020 (annexture 'C') written by the Assistant Chief Kahugu-ini Sub-location Gatundu Sub-county. The Assistant Chief in the letter states that on November 4, 2021 all the beneficiaries attended at his office where the implementation of the confirmed grant was discussed. The only beneficiary who did not attend the meeting was one Anastacia Mugwaya. The Assistant Chief stated that he personally telephoned the said Anastacia who consented to the exercise proceeding. The Assistant Chief indicated in the letter that the applicant who was present at the meeting said that he would oversee the interest of Anastacia.
24. Having attended the meeting at which the mode of distribution of the estate was confirmed it is duplicitous for the applicant to now move the court seeking to injunct what he himself had agreed to. The applicant alleges that he arrived late to the meeting at the Chief's Office. Even if he arrived late, the applicant could have in the presence of the assistant chief objected to the sub-division, but he did not do so. There is no evidence to show that the applicant objected to the sub-division. All the other beneficiaries consented in the presence of chief.
25. The Assistant Chief went on to state that he personally led the government surveyor who was present at the meeting to the properties in question. He further confirms the sub-division was done in accordance with the confirmed grant and that each beneficiary was given his/her share of the estate.
26. Given that the sub-division has already taken place this application seeking injunctive orders has now been overtaken by events. The horse has already bolted. The mother title no longer exists. Moreover, the applicant has not anchored the application for injunctive orders on any substantive suit upon which the orders he is seeking maybe granted. The applicant has not filed an affidavit of protest nor has he filed a summons seeking to revoke the grant.
27. All in all I find that the applicant has failed to establish a *prima facie* case. The application seeking injunctive orders has no merit and accordingly I dismiss prayer (2) of this summons.
28. By prayer (3) of the summons the applicant seeks that the court cancel the sub-division done by the surveyor. Cancellation of titles can only be ordered by the Environment and Land Court upon being satisfied that such titles were erroneously and/ or fraudulently issued. This court sitting as a probate court is only empowered to oversee the distribution of the estate to the genuine beneficiaries. This court has no power to cancel title deeds issued by the registrar of lands. Accordingly, I decline to grant prayer (3) of the summons.
29. Finally I find no merit in the summons dated November 24, 2020. The same is hereby dismissed in its entirety. This being a family matter each side shall meet its own costs.

DATED IN NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

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MAUREEN A. ODERO

JUDGE

