



**In re Estate of Peter Kamau Gatundu (Deceased) (Succession Cause 28 of 2011)  
[2022] KEHC 15883 (KLR) (Family) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15883 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 28 OF 2011  
MA ODERO, J  
NOVEMBER 25, 2022  
IN THE MATTER OF THE ESTATE OF PETER KAMAU  
GATUNDU (DECEASED)**

**BETWEEN**

**JOHN KINUTHIA MIGWI ..... APPLICANT**

**AND**

**PINA WAITHIRA KAMAU ..... 1<sup>ST</sup> ADMINISTRATOR**

**BETRUDA WAIRIMU MIGWI ..... 2<sup>ND</sup> ADMINISTRATOR**

**JUDGMENT**

1. Before court is the summons for confirmation of grant dated October 28, 2020. The objector John Kinuthia Migwi in opposing the summons for confirmation of grant filed the summons dated April 29, 2021. The court directed that the two (2) applications be heard together by way of *viva voce* evidence.

**Background**

2. This succession cause relates to the estate of Peter Kamau Gatundu (hereinafter ‘the deceased’) who died intestate on September 11, 2010. A copy of the death certificate serial number 0xxxx8 is annexed to the petition for grant of letters of administration intestate dated January 7, 2011.
3. According to a letter dated January 5, 2011 written by the chief of Gathiga Location in Kabete Division the deceased was survived by the following persons-
  - (1) Felistar Wanjiru Migiwi – daughter
  - (2) John Kinuthia – son



- (3) Robert Kathweta Migwi – son
  - (4) Margaret Wanjiru Migwi – daughter
  - (5) Betruda Wairimu Migwi – daughter
  - (6) Pina Waithera Migwi – daughter
  - (7) Rosalia Wangari Migwi – daughter
4. The estate of the deceased was said to comprise of the following assets-
- (i) LR No 3xxxx7
  - (ii) Partners Inn – Juja Road
  - (iii) Plot No 108 Kikuyu Township
  - (iv) Plot No xx Bahati Estate

The total value is estimated to be Kshs 42,000.000.

5. Following the demise of the deceased grant of letters of administration intestate was on July 16, 2013 made to Rosalia Wangari Migwi and Pina Waithira Migwi. Unfortunately, Rosalia Wangari Migwi passed away on April 5, 2019.
6. The objector herein John Kinuthia then filed a summons for revocation of grant dated July 29, 2019 seeking to be appointed as co-administrator of the estate. The beneficiaries held a meeting on October 20, 2019 and agreed by consent to appoint Betruda Wairimu as co-administrator to replace Rosalia Wangari. That consent was adopted by the court on October 28, 2019 and on November 27, 2019 a fresh grant was issued in the names of Pina Waithira Kamau and Betruda Wairimu Migwi.
7. The joint administrators of the estate then filed a summons for confirmation of grant dated October 28, 2020 setting out a proposed mode of distribution of the estate.
8. However when that summons came up for hearing on March 10, 2021 Mr Karimi counsel for the objector indicated that his client objected to the confirmation of the grant as well as to the proposed mode of distribution of the estate. The court directed the objector to file a protest. The objector then filed the summons dated April 29, 2021 in which he sought the following orders:-
1. That the honourable court be pleased to declare that the actions of the 1<sup>st</sup> administrator Pina Waithira Kamau of continuing to refuse and ignore to render accounts of the estate as directed on November 27, 2019 is disobedience and gross disrespect of these court orders and amounts to contempt and is punishable.
  2. That this honourable court does mete out an appropriate punishment against the administrators for being in contempt of its orders and proceeds to remove them from further administration of the deceased estate and revoke the grant issued to them on July 29, 2019.
  3. That the objector John Kinuthia Migwibe appointed one of the administrators of the estate or sole administrator of the estate.
  4. That an account be opened immediately in the joint names of Mbuthia Kinyanjui & Co Advocates, B N Kiptoo & Co Advocates and Kinyanjui Kirimi & Co Advocates at any reputable bank in Kenya where the rental proceeds should be paid immediately in compliance with the order of November 27, 2019.



5. That the grant herein upon reissue, be confirmed by way of having all the children of the deceased and or their rightful legal representatives the family company of Migwi Family Investment Limited where they will own equal shares and where all the properties of the estate will be transferred and all incomes derived from there shall be shared at 70% equally between the beneficiaries and 30% be utilized for maintained, management and redevelopment.
6. That this application be heard before the application for confirmation of grant dated October 28, 2020.
7. That the costs of this application be provided for.”
9. The summons which was premised upon article 159 of the Constitution of Kenya, sections 70, 76 of the Law of Succession Act and rules 44 & 73 of the Probate and Administration Rules and all other enabling provisions of law was supported by the affidavit of even date sworn by the objector.
10. The respondent /administrator vehemently opposed this application through their replying affidavit dated May 7, 2021. One Peter Migwi Gathetha a beneficiary of the estate also filed a replying affidavit dated May 21, 2021 seeking to have the estate distributed as soon as possible. It is this summons dated April 29, 2021 which is effectively a protest to the summons for confirmation of grant dated October 28, 2020 which is now for determination .

### **The Evidence**

11. Hearing proceeded by way of *viva voce* evidence. The objector testified on her own behalf whilst the respondents called three (3) witnesses in support of their case.
12. The objector told the court that he was a son to the deceased and therefore was a beneficiary to the estate. He sought the revocation of the grant which had been issued to the respondents on grounds that they had failed to properly administer the estate.
13. The objector asked that the respondents be found to be in contempt of the court orders of November 27, 2019 directing that a joint account be opened in the names of the three (3) advocates for the parties into which all rental income derived from the estate was to be deposited. The objector also alleged that the administrators had disobeyed the orders of the court directing them to prepare and file statements of accounts in respect of the estate.
14. Finally, the objector opposes the mode of distribution of the estate as set out in the summons for confirmation of grant. He proposes that all the beneficiaries be registered as equal shareholders in the family company known as Migwi Family Investment Limited. That all the estate properties be transferred to the company and that 70% of all income derived from the estate be shared equally amongst the beneficiaries with the remaining 30% being utilized for the management and development of the estate.
15. Pina Waithira Kamau And Betruda Wairimu Migwi the respondents both confirmed that they were the administrators of the estate and beneficiaries thereof. They told the court that the objector was their brother. The respondents denied being in contempt of court orders issued on November 27, 2019.
16. The respondents stated that the court order directed that a joint account be opened in the name of the advocates for all three (3) parties. That this could not be done as the objector changed his advocate whilst Peter Migwi had no advocate on record. The respondents further stated that they did in compliance with the court orders file on December 19, 2019 a comprehensive statement of accounts prepared by an auditor.



17. The respondents told the court that all the beneficiaries save for the objector consent to the mode of distribution of the estate proposed in the summons for confirmation of grant. That apart from the objector no other beneficiary is willing to have the estate run and managed by the family company.
18. The respondent accuse the objector of having sold off vehicle belonging to the deceased and pocketing the proceeds of sale. They also state that they have been paying each beneficiary their share of the rental income monthly and state that the objectors has himself been receiving an amount of Kshs 80,000/- per month. The respondents claim that the objector is only seeking to have them removed as administrators because they are women. They accused the objector of denying them entry and access to the family home.
19. DW3 Peter Migwi who was not represented by counsel told the court that his late father Robert Gathethia Migwi (who died in 2015) was a son to the deceased thus he is a grandchild to the deceased and a beneficiary of the estate. DW2 stated that he does not support the summons dated April 29, 2020 filed by the objector. That he does not support the proposal by the objector to have the estate assets transferred to the family company.
20. DW3 confirmed that he supported the mode of distribution of the estate proposed by the administrators in the summons for confirmation of grant dated October 28, 2020. He also opposed the prayer to have the grant revoked.
21. DW3 confirmed that he had been served with the statement of accounts filed by the administrators. He urged the court to move with haste and have the grant confirmed.
22. Upon conclusion of oral hearings the parties were invited to file and exchange their written submissions. The objector filed written submissions dated April 2, 2022 whilst the respondents relied upon their written submissions dated June 22, 2022.

### **Analysis and Determination**

23. I have carefully considered the summons before this court, the replying affidavit filed by the administrators, the evidence adduced in open court as well as the written submissions filed by both parties. The issues which arise for determination are -
  - (i) Whether the administrators are in contempt of court.
  - (ii) Whether the grant ought to be revoked.
  - (iii) Whether the grant ought to be confirmed.
- (i) Contempt of court
24. It is not in any doubt that *vide* a ruling delivered on November 27, 2019 Hon Lady Justice Achode (as she then was) made the following orders:-
  - (a) That the rent proceeds from the building known as 'partners' on LR No 36/1/232 shall be deposited in a joint account to be opened in the joint names of the three counsel on record. The proceeds to be deposited pending confirmation of the grant.
  - (b) That the 1<sup>st</sup> administrator Pina Waithira prepare and file statement of accounts showing her dealings with the estate since April 2019 when her co-administrator Rosalia Migwi died to a date within 45 days from the date of the court order. (own emphasis)
25. The objector alleges that the respondent failed and/or declined to obey both orders (a) and (b) above and as such ought to be punished for contempt.



26. The respondents on their part deny having willfully disobeyed the orders made by the court on November 27, 2019.
27. It goes without saying that court orders must be obeyed by the persons to whom such orders are directed. Courts it is said, do not make orders in vain.
28. The Court of Appeal in Kenya in *AB & another v RB* [2016] eKLR referred to the decision of the South African Constitutional Court in *Burchell v Burchell* case No 364 of 2005 in which it was held as follows:-

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The *constitution* states that the rule of law and supremacy of the *Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organ of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as instrument to resolve any disputes and may thus impact negatively on the rule of law.”

29. The first order made by the court on November 27, 2019 required that a bank account be opened in the joint names of the advocates representing the three parties. The objector claims that the respondents disobeyed this order by failing to ensure that said joint account was opened.
30. Although the respondents were the administrators of the estate the order of the court did not direct that the joint account be opened in their names. The order directed that the three (3) advocates on record open a joint account in their own names (or in the name of their respective law firms). Therefore, the role of the respondents was to facilitate the opening of said account but the burden of opening the account fell on the three advocates.
31. The respondents explain that the account was not opened because the objector changed his advocate whilst Peter Migwi did not have any advocate acting for him. In other words, new developments came up after the order was made.
32. I note that indeed Peter Migwi who was on November 2019 being represented by Mr Kiptoo Advocate, later opted to act in person. The said Peter Migwi filed a notice to act in person dated June 14, 2021.
33. Likewise the objector who on the date of ruling was being represented by Mr Waluko Advocate is now being represented by a Mr Kirimi Advocate.
34. From the above it is clear that the ground somewhat shifted and the status of representation of the parties were altered from the date when the ruling was given. Whilst a change of advocates will not negate a valid court order, the court has not been told why the new advocate who came on record did not move to open the joint account as directed by the court.
35. Whilst I do agree that the respondents as the administrators of the estate ought to have returned to court to seek a review of the orders due to the fact that Peter Migwi no longer had counsel acting for him, it is pertinent to note that the respondents were in fact distributing the rental proceeds to all the beneficiaries. The objector in his evidence concedes that he was receiving Kshs 80,000 out of the estate rent. It is noteworthy that although the order was made in 2019 the objector did not raise the issue of non compliance until October 2020 almost one (1) year later. He was happy to continue receiving the rental income paid out to him and was clearly not aggrieved by the failure by the advocates to open the joint account.



36. The main purpose of the joint account was to preserve the rental income pending confirmation of the grant. The amount paid out to the beneficiaries will be taken into account in the final distribution of the estate. In his submissions the objector states that he is receiving nothing at all from the estate yet in his evidence the objector concedes that he was already receiving his share of the rental income. Thus, the objector by accepting this money effectively acquiesced to the breach of the said court order. It is duplicitous of him to now seek to have the respondents cited for contempt. Why did the objector not refuse to accept the Kshs 80,000 per month.
37. I find that the respondent cannot shoulder the entire blame for the failure to obey this order. There were other players involved. The advocates to whom the order was directed did not move to open the joint account. I find that all the parties herein, the advocates, the respondents as well as the objector turned a blind eye to the disobedience of the order to open a joint account. The respondents in the circumstances cannot be singled out for punishment. The respondents cannot be said to have willfully disobeyed the court order when the order was not directed at them. I therefore decline to punish the respondents for contempt.
38. The second order requiring the filing of accounts was directed only to the 1<sup>st</sup> respondent Pina Waithira Kamau. It is trite law that only a person to whom an order is directed is obliged to obey the same. Given that the order was not directed at the 2<sup>nd</sup> respondent Betruda Wairimu Migwe she cannot be held to be in contempt of said order.
39. The 1<sup>st</sup> respondent avers in her replying affidavit that she did file a statement of accounts as directed by the court. She has annexed the statement of accounts dated December 19, 2019 filed by Mbuthia Kinyanji and Company Advocates (annexure PWK- '1'). Indeed Peter Migwi confirmed to the court that he was served with the statement of accounts filed by the 1<sup>st</sup> respondent and he had no issue with the said statement of accounts.
40. In cross-examination the objector denies having seen the statement of accounts yet in the same breath he dismisses the accounts filed as incomprehensible. How can the objector opine that the accounts filed were incomprehensible if he did not see them? It is obvious that the objector did see the statement of accounts filed by the 1<sup>st</sup> respondent. His quarrel is with the nature of accounts filed.
41. In the circumstances, I find that the 1<sup>st</sup> respondent did file a statement of accounts as directed by the court on November 27, 2019. She therefore cannot be said to have been in contempt of court orders.
- (ii) Revocation of grant
42. The objector has prayed to have the grant issued to the respondents revoked and to have himself appointed as a co-administrator or sole administrator of the estate. The objector claims that the administrators have been mismanaging the estate.
43. The grounds on which a grant may be revoked are clearly set out in section 76 of the [Law of Succession Act](#) cap 160 Laws of Kenya.
44. The objector has not demonstrated in what manner the respondents have been mismanaging the estate. Apart from that a perusal of the record reveals that this prayer for revocation of the grant is clearly 'res judicata'. The objector filed a similar application dated July 29, 2019. The application was heard on merit and determined by Hon Lady Justice Achode (as she then was) in a ruling delivered on November 27, 2019.
45. The application of July 29, 2019 was compromised following a consent reached at a family meeting held on October 20, 2020. This consent was duly adopted by the court on October 28, 2019



appointing Pina Waithira Kamau and Betruda Wairimu Migwi as the administrators of the estate. At the time the said consent was being adopted by the court, neither the objector nor his advocate raised any objection.

46. The present application seeking revocation of the grant is therefore a devious attempt to re-open a matter that has already been determined by the court. The objector is effectively trying to alter, review and/or amend the consent, which was adopted by the court on October 28, 2019. This, the court will not countenance.
47. The procedures for setting aside a consent are clearly set out. The objector must file a substantive application seeking to have that consent set aside. I find that this prayer for revocation of the grant is *res judicata* and as such, this court will not entertain the same. Accordingly, prayer (2) of this summons is declined.

(iii) Confirmation of the grant

48. The respondents herein as administrators of the estate have filed a summons for confirmation of grant dated October 28, 2020. In that summons, the respondents have proposed a mode of distribution of the estate. The objector opposed the proposed mode of distribution of the estate. He suggests that the estate be managed by the Migwi Family Investment Limited, a company which had been registered by the deceased prior to his death. Annexed to the objectors supporting affidavit dated April 29, 2021 is a copy of the certificate of incorporation of Migwi Family Investment Limited which is dated April 17, 2010 (annexture JKM '2').
49. The objector proposes that all the beneficiaries be allocated equal shares in the company. Thereafter all properties belonging to the estate be transferred to this family company and that 70% of income derived from the estate be divided equally. The remaining 30% of the income to be utilized for maintenance, management and re-development purposes.
50. The respondents oppose the transfer of the estate assets to the family company. They state that this matter has dragged on for too long. They accuse the objector of being the stumbling block to the final distribution of the estate. The respondents told the court that all the other beneficiaries desire to have the estate fully distributed with each beneficiary receiving his/her share to do with as they wish.
51. Peter Migwi a beneficiary of the estate who testified in court also stated that he opposed the proposition made by the objector that the estate be managed by the family company. 'Peter' states that he is not a shareholder of the company nor does he wish to be one. He urges the court to direct that the estate be distributed in terms of the mode of distribution set out in the summons for confirmation of grant filed by the respondents. 'Peter' also laments that this succession cause has dragged on for too long and prays that the matter be finalized.
52. It is clear that all the beneficiaries save for the objector consent to the mode of distribution of the estate proposed by the respondents.
53. A look at the memorandum and articles of association of Migwi Family Investment Limited reveals that the only shareholders of the company include the deceased, the Objector John Kinuthia Migwi and the 1<sup>st</sup> respondent Pina Waithira Migwi. The deceased held 4000 shares whilst the objector and the 1<sup>st</sup> respondent each holds 50 shares. No other beneficiary is a shareholder in the company.
54. It is clear that the objectors insistence that the estate be managed by the family company is a further attempt to insinuate himself into the management/administration of the estate assets, a move which has been roundly rejected by the other beneficiaries.



55. Whilst the beneficiaries are at liberty to have the estate managed by the family company they cannot be compelled to agree to the proposal made by the objector. The objector cannot impose his wishes on the other beneficiaries. In any event, in order to have the estate managed by the family company there needs to be consensus between all the beneficiaries. In this matter there is a clear lack of consensus between the beneficiaries therefore any attempt to have the estate managed through a family company is doomed to fail.
56. This is an extremely old matter. The deceased herein passed away in September 2010. This succession cause has been live in the courts since the year 2011. Now ten (10) years after the cause was initiated the matter ought to put to rest. I do agree that the stumbling block to the final distribution has been the objector who has been filing numerous applications in opposition to the administrators. The application (protest) dated April 29, 2021 is yet another attempt by the objector to scuttle the final distribution of this estate. It is enough! Litigation must come to an end.
57. Under section 47 of the *Law of Succession Act*, the High Court has inherent powers to make appropriate orders in the interest of justice and for the preservation of the deceased's estate. It reads as follows.
- “The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”
58. Similarly rule 73 of the P&A also provides:-
- “Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
59. In order to bring finality to this matter, I find that the estate ought to be distributed to each beneficiary individually. Each beneficiary should receive their share of the estate to do with as they wish. I have perused the proposed mode of distribution as set out in the summons dated October 28, 2020. In my view, the same is fair and equitable as all the beneficiaries including the objector will receive a share of the estate.
60. I further note that the proposed made of distribution does incorporate the proposal by the objector that a portion of the rental income be divided equally amongst the beneficiaries whilst 10% be retained to cater for administrative and renovation costs. The only difference is that the proposal to involve the family company is omitted. Therefore, this mode of distribution largely accords with the proposal mode by the objector. I therefore direct that the summons for confirmation of grant be set down for hearing within forty (40) days of the date of this judgment.

## **Conclusion**

61. Based on the foregoing I make the following orders:-
- (i) The summons dated April 29, 2021 is dismissed in its entirety.
  - (ii) The summons for confirmation of grant dated October 28, 2020 to be set down for hearing within forty (40) days.
  - (iii) All the beneficiaries to sign a consent to the proposed mode of distribution of the estate.
  - (iv) This being a family matter each side will bear its own costs.



DATED IN NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.

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**MAUREEN A. ODERO**

**JUDGE**

