



In re Estate of Gitau Wabara Gitau aka Gitau Njuguna (Deceased) (Miscellaneous Application 551 of 2013) [2022] KEHC 15964 (KLR) (Family) (25 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15964 (KLR)

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

FAMILY

MISCELLANEOUS APPLICATION 551 OF 2013

MA ODERO, J

NOVEMBER 25, 2022

**N THE MATTER OF THE ESTATE OF THE LATE GITAU
WABARA GITAU AKA GITAU NJUGUNA (DECEASED)**

BETWEEN

JOHN GACHOKA NJUGUNA 1ST ADMINISTRATOR

LUCY NJERI NJUGUNA 2ND ADMINISTRATOR

AND

PETER MBUGUA GITAU PROTESTOR

JUDGMENT

1. The Administrators/respondents herein John Gachoka Njuguna and Lucy Njeri Njuguna filed a summons for confirmation of Grant dated December 14, 2016 seeking to have the Grant issued to them on May 27, 2016 confirmed.
2. The protestor Peter Mbugua Gitau filed an affidavit of protest dated December 24, 2019 opposing the proposed mode of distribution of the estate. The 1st administrator/respondent then filed a replying affidavit to the protest dated October 2, 2020 in response to which the Protestor filed a further affidavit of Protest dated March 31, 2022.
3. The matter was canvassed by way of viva voce evidence in open court. The protestor testified on his own behalf while the respondents also each gave evidence in support of their case.



BACKGROUND

4. This Succession Cause relates to the estate of the late Gitau Wabara Gitau alias Gitau Njuguna (hereinafter 'the Deceased') who died intestate on August 19, 2012. A copy of the Death Certificate Serial Number 214691 forms part of the record. The Deceased was survived by the following:-
 - (i) George Njuguna – son
 - (ii) Stephen Kimani Gitau –son
 - (iii) Peter Mbugua Gitau – son
 - (iv) Wanjiku Gitau – Daughter
5. The estate of the Deceased comprised of the following two (2) parcels of land.LR Ndumberi/ Ndumberi/306LR Ndumberi/Ndumberi T.141
6. Following the demise of the Deceased none of his children filed a Petition seeking Grant of representation to his estate. Accordingly, John Gachoka Njuguna and Lucy Njeri Njuguna (the respondents herein) who are the siblings to the Deceased took out a citation dated March 26, 2013 against the children of the Deceased to accept or refuse letters of Administration Intestate.
7. The Citors (respondents) claimed a beneficial interest in LR Ndumberi/Ndumberi 306 and Ndumberi/Ndumberi T.141) (hereinafter the 'suit properties') which they alleged was held in trust for them by the Deceased.
8. The protestors filed replies to the citation dated April 7, 2014 and June 30, 2014.
9. The citation was heard by Hon Justice William Musyoka who vide a Ruling delivered on January 30, 2015 allowed the citation and authorized the Citors to Petition the court for Grant of letters of Administration Intestate. In compliance with the Ruling, the respondents filed a Petition and Grant was duly issued to the two (2) jointly on May 27, 2016.
10. Thereafter the respondents filed a summons for confirmation of Grant dated December 14, 2016. In said summons it was proposed that the estate of the Deceased be distributed as follows:-
 - “(a) Ndumberi/Ndumberi/301
To be transferred to the following -
 - i. John Gachoka Njuguna– 1/3
 - ii. Lucy Njeri Njuguna– 1/3
 - iii. George Njuguna Gitau
 - iv. Wanjiku Gitau Njuguna- 1/3
 - v. Peter Mbugua Gitau
 - vi. Stephen Kimani Gitau
 - (b) Ndumberi/Ndumberi/ T.141
To be transferred to the following -
 - i. John Gachoka Njuguna– 1/3



- ii. Lucy Njeri Njuguna- 1/3
- iii. George Njuguna Gitau
- iv. Wanjiku Gitau Njuguna- 1/3
- v. Peter Mbugua Gitau
- vi. Stephen Kimani Gitau

11. Before the summons for confirmation of Grant could be heard the protestors (the children of the Deceased) filed a summons for revocation of Grant dated March 29, 2017 on grounds that the court erred in issuing letters of Administration to the siblings of the Deceased when children of the Deceased who ranked in priority were alive and were ready and willing to take up the administration of their late fathers estate. They alleged that the Grant issued to the Respondents was for revocation as the same had been obtained fraudulently.
12. The summons for revocation of Grant was heard by Hon Lady Justice Ali Aroni (as she then was). In a Ruling delivered on November 7, 2019 the Hon Judge stated as follows: -

“ 14. For the reasons enumerated above, I do not see merit in the allegations that the court erred, if it did, an appeal ought to have been preferred or a review sought. Secondly, there was no concealment of any material facts as the respondents petitioned the court pursuant to a court process where the Applicants participated and where they failed to convince the court to issue orders in their favour. Thirdly, this court cannot sit on appeal on an order of a Judge of concurrent jurisdiction.
15. In any event, the applicants can still have another bite at the cherry by filing a protest to the proposed application for confirmation of grant, the proposed distribution and place their case before court.”
13. In so saying, the court thereby dismissed the summons for revocation of Grant. The protestors then filed this affidavit of protest challenging the proposed mode of distribution of the estate contained in the summons for confirmation of Grant.

THE EVIDENCE

14. The Protestor Peter Mbugua Gitau confirmed that he was one of the sons of the Deceased. He stated that the Deceased was the absolute owner of the two (2) parcels of land known as LR Ndumberi/ Ndumberi 306 and LR Ndumberi/Ndumberi/T.141. He has annexed to his Affidavit a copy of the Title for Plot 306 (Annexure PMG ‘1’). The Protestor told the court that litigation over this matter commenced in the Kiambu Court way back in the year 2009. That vide Kiambu Land Tribunal Case No. 3 of 2009 it was decreed that the suit property be divided amongst the Deceased, the 1st Respondent and the 2nd Respondent with each party getting a 1/3rd share of the land.
15. The protestor insists that being aggrieved by the decision of the Tribunal the Deceased moved to challenge that decision in the High Court. That vide a ruling delivered by Hon Lady Justice Jean Gacheche (as she then was) in Milimani Misc. Application No. 92 of 2009 the decision of the Land Tribunal was quashed.
16. The protestor categorically denies the respondents allegation that the suit land was held by the Deceased in trust for his siblings. According to the Protestor the two (2) parcels of land belonged to the Deceased, and the same form part of his estate. He prays that the court allow the children of the Deceased to inherit the property of their late father.



17. The respondents John Gachoka Njuguna and Lucy Njeri Njuguna told the court that Plot 306 was purchased by their late mother. They state that in compliance with Kikuyu Customary norms the land was registered in the name of the Deceased who was the eldest son in the family with the understanding that the same would be held by the Deceased in trust for his siblings.
18. The respondents told the court that the 1st respondent resides on Plot 306 whilst the 2nd respondent has put up rental units on the property.
19. The respondents confirm that litigation over the suit property commenced in the Kiambu Court. The 1st protestor says he filed a suit against the Deceased in the year 1988 claiming a share of the property. They insist that the Kiambu Land Tribunal found in their favour and directed that each of the three (3) parties be allocated a one-third (1/3) share of the land. The protestor makes no mention at all of the decision of Hon Justice Gacheche. Indeed, they appear to be unaware that an appeal was filed against the decision of the Land Tribunal.
20. The respondents urge the court to dismiss this protest and to direct that the suit land be divided into three (3) portions as proposed in the summons for confirmation of Grant dated December 14, 2016.
21. Upon close of oral evidence parties were invited to file and exchange written submissions. The Protestor filed submissions dated May 30, 2022 whilst the respondents relied upon their written submissions dated June 27, 2022.

Analysis and Determination

22. I have carefully considered the summons for Confirmation of Grant the Protest filed thereto, the evidence adduced in court as well as the written submissions filed by both parties.
23. In the affidavit of protest at para 15 the protestor prays that the Grant which was issued to the respondents be revoked. That is a matter that is 'res judicata' as the summons for Revocation of Grant was heard and determined by Hon Justice Ali-Aroni. This court cannot review or alter a decision made by a court of concurrent jurisdiction. The only remedy available to the Protestors is that of appeal. Therefore the prayer to have the Grant revoked is declined.
24. The protestors have objected to the mode of distribution of the estate proposed by the respondents who are the Administrators of the estate. The protestor asserts that it is only the children of the Deceased who are entitled to benefit from the estate. That the respondents who are the siblings of the Deceased have no right or claim over the properties comprising the estate of the Deceased.
25. The protestors point to the fact that the two properties in question are both registered in the names of the Deceased absolutely as evidence that the said properties belonged to the Deceased and form part of his estate.
26. On their part the respondents claim to have a beneficial interest in the suit properties. They assert that the same do not form part of the estate of the Deceased as they were being held by the Deceased in trust for his siblings.
27. This is a Probate Court. The duty of this court is to supervise/oversee the distribution of the estate to the genuine beneficiaries. The respondents who are siblings of the Deceased and who do not claim to have been dependants of the Deceased cannot be said to be beneficiaries of the estate. They therefore cannot seek to inherit the property forming the estate of the Deceased.
28. The protestor insists that the suit properties belonged exclusively to the Deceased. The respondents claim that the suit properties were being held in trust for them by the Deceased. The question here



revolves around ‘ownership’ of the suit land. That is an issue which this court sitting as a Probate Court does not have the jurisdiction to determine.

29. Matters relating to the ownership use and occupation of land have now underarticle 162 of the Constitution of Kenya 2010 been mandated to be determined by a specialized court being the Environment and Land Court (‘ELC’).
30. Section 13 of the Environment and Land Court Act provides for the jurisdiction of that court as follows:-
 13. Jurisdiction of the court
 - (1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under article 162(2)(b) of the Constitution, the court shall have power to hear and determine disputes——
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land. [Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1]
31. Therefore, the correct and proper forum before which each party ought to ventilate their claim to the suit land is the ELC. The Environment and Land Court is the only court exclusively mandated by law to determine the question of ‘ownership’ of the suit land.
32. In Re Estate of Stone Kathubi Muinde (Deceased) [2016] eKLR Hon Justice William Musyoka held that:-

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.” (own emphasis)
33. This is a family court and this matter was filed as a Succession Cause. The duty of a Probate Court is to oversee the transmission of the estate of the Deceased to the genuine and recognized beneficiaries. The purpose of a succession cause is to ascertain the assets and liabilities of the estate, the identity of the beneficiaries and the mode of distribution of the estate.



34. In *Alexander Mbaka v Royford Muriuki Rauni & 7 others* [2016] eKLR, it was held thus:-

“It is only where one has established claim against the estate that has already crystallised that he can litigate it before a Family Court. The claim is to be considered as a liability to the estate. This court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the Family Court can entertain it.” (own emphasis)

35. Therefore the remedy for the protestor herein lies in the Environment and Land Court. If and when the Protestors obtain judgment in their favour from the Environment and Land Court then they will at liberty to present the decree to this court for implementation.

Conclusion

36. The estate of the Deceased is comprised only of the two disputed properties. It would be pointless for this court to proceed with the summons for confirmation of Grant before the question of ‘ownership’ of the suit properties has been resolved. Therefore based on the foregoing this court will suo moto stay the summons for confirmation of Grant pending a determination by the Environment and Land Court regarding the question of ‘ownership’ of the suit land. Either party is at liberty to move the Environment and Land Court for such determination. This being a family matter, I make no orders on costs.

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

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MAUREEN A. ODERO

JUDGE

