



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

(FAMILY DIVISION)

SUCCESSION CAUSE NUMBER 362 OF 2008

IN THE MATTER OF THE ESTATE OF THE LATE LUCAS GATONYE GATHUMBI (DECEASED)

BENARD MBUGUA GATONYE APPLICANT

VERSUS

ELIZABETH NJOKI KIMANI 1ST RESPONDENT

EDWARD KINUTHIA GATONYE 2ND RESPONDENT

ROSEMARY NYOKABI IRENGE 3RD RESPONDENT

R U L I N G

1. On 25th March 2013 a Certificate of Confirmation of Grant was issued to Elizabeth Njoki Kimani, Edward Kinuthia, Bernard Mbugua and Rosemary Nyokabi, the administrators of the estate of Lucas Gatonye Gathumbi.
2. In the distribution of the estate, the widow and mother to the applicant and the respondents Violet Wambui Gatonye was granted life interest in LR xxxx/x.
3. During the pendency of this cause it was found that some of the administrators proceeded to Nairobi and filed **Succession Cause Number 570 of 2010** with respect to the same estate. The matter proceeded to the point where a Certificate of Confirmation of Grant was issued to them. When this matter came to light, an application was made for the revocation of that grant, by an order dated 25th May 2012 this court (*Ouko J as he then was*) suspended the Certificate of Confirmation of Grant in that matter.
4. It is in this backdrop that vide Chamber Summons filed on 30th October 2020 under **Section 46 of the Law of Succession Act and Rule 73 of the P & A Rules** the applicant Bernard Mbugua Gatonye seeks the following prayers;
 1. *Spent*
 2. *THAT pending the hearing and determination of this application inter-partes the court be pleased to issue conservatory orders and /or injunction orders for L.R. xxxx/x to prevent the Respondents from selling and or disposing the said property.*
 3. *THAT pending the hearing and determination of this application the court be pleased to issue conservatory orders for L.R. xxxx/x to prevent the Respondents from selling and or disposing the said property.*
 4. *THAT the court be pleased to direct that Nairobi HC Succession Cause Number 576 of 2010 in the matter of the estate of Lucas Gatonye Gathumbi be placed before the court for further directions.*
 5. *THAT the court be pleased to consolidate Nakuru H.C. Succession Cause Number 362 of 2008 with Nairobi H.C. Succession Cause Number 576 of 2010 as both files relate to one another and the same deceased person.*
 6. *THAT the court be pleased to direct that entries Nos. 2, 3, 4 and 5 in the land registry for L.R. No. xxxx/x be cancelled and or revoked in order to give effect to the judgment of this court dated 25th March 2013 and the certificate of confirmation dated 25th March 2013.*

7. *THAT the costs of this application be provided for.*

5. His application is supported by his affidavit sworn on 29th October 2020, and the annexures thereto.

6. The application is opposed by the respondents through a Replying Affidavit sworn by Edward Kinuthia Gatonye on his behalf and on behalf of the 1st and 3rd respondents on 30th December 2020.

7. The respondent through their counsel N.S. Matiri & Co. Advocates have also filed Preliminary Objection dated 3rd December 2020 on the ground that;

1. *THAT the application is grossly incompetent, bad in law and an utter abuse of the Court process.*

2. *THAT this Honourable Court is functus officio having heard and determined this matter with finality and issued a Confirmation of Grant giving the subject matter of the Application being L.R. xxxx/x to Violet Wambui Gatonye.*

3. *THAT this Honourable Court lacks jurisdiction to deal with the property of Violet Wambui Gatonye in the present Succession Cause which relates to Lucas Gatonye Gathumbi.*

4. *THAT having determined with finality that Violet Wambui Gatonye should get L.R. xxxx/x and a transfer in that regard having been registered in the Land's office in her favour, the said property after the demise of Violet Wambui Gatonye on 19th September 2019 can only be handled in a Succession Cause relating to her estate and not the Estate of Lucas Gatonye Gathumbi or by the Environment and Land Court.*

5. *THAT the Applicant is not challenging the Honourable Court's decision to give the property to Violet Wambui Gatonye (now deceased) as per the Grant and hence this Court lacks power to entertain this application.*

6. *THAT Applicant's application is misconceived in law and in fact.*

8. The applicant filed a Further Affidavit sworn on 14th December 2020.

9. Counsel to the parties N. S. Matiri & Co. Advocates, and Waiganjo & Co. Advocates agreed to first deal with the Preliminary Objection by way of Written Submissions.

10. It is the respondent's position that this court is *functus officio* on the grounds that;

- *The court determined the matter formally and issued a Certificate of Confirmation of Grant in the estate of Lucas Gatonye Gathumbi.*

- *That the issues raised by the applicant relate to the estate of Violet Wambui Gatonye which cannot be litigated within the estate of Lucas Gatonye Gathumbi.*

- *That the orders sought fall within the jurisdiction of the Environment and Land Court.*

11. In response the applicant acknowledges that when a court is *functus*, it cannot deal with the same matter and cites the Supreme Court in **Raila Odinga & 2 Others vs IEBC & 3 Others [2013] eKLR.**

12. However the applicant argues that when the judgment of the court has not been perfected, the court cannot be *functus*.

13. He argues further that this court is empowered by **Section 47 of the Law of Succession Act** with 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

...and **Rule 73 of the P & A Rules** saves the inherent powers of court *to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

14. The court is to do so by ensuring that its judgment is complied with by all parties.

15. According to the applicant when Violet Wambui Gatonye died, the property that had been bequeathed to her through life interest was to revert back to the estate of Lucas Gatonye Gathumbi for distribution to her children. However during the pendency of this cause the respondents transferred the property to themselves. From the documents annexed to this application, the green card;

Entry No. 2 states:

Grant of letters of Administration of Estate of Lucas Gatonye Gathumbi to Violet Wambui Gatonye – Administrator.

Date of Registration 12/1/2021.

Entry No. 3 (Transfer (Assent) to Violet Wambui Gatonye

Date of registration 12/1/2012.

Entry No. 4

Transfer to Elizabeth Njoki Kamau and Rosemary Nyokabi Irengi as tenants in common in equal shares for Kshs. 1,500,000/=

Date of Registration 29/11/2012

Entry No. 5

Transfer to Edward Kinuthia Gatonye for Kshs. 1,500,000/= on 9/8/2019.

16. The applicant's case is that entry No. 2, 3 and 4 were done before the Certificate of Confirmation of Grant was issued on 25th March 2013, during the pendency of this matter. In fact the judgment of *Ouko J (as he then was)* was delivered on 4th April 2013 by *H.A. Omondi J (as she then was)*. Hence the actual date on the Certificate of Confirmation of Grant ought to have been 4th April 2013 when the judgment was delivered.

17. The respondents position is that the court having dealt with the property and granted it to Violet Wambui Gatonye, the same was registered in her name at the Lands Registry in her favour and following her demise on 19th September 2019 the issue of that property can only be dealt with in a cause relating to her estate. Further that she transferred the property to the 1st and 2nd respondents in her life time and they sold the same to the 2nd respondent, in her lifetime. That the application cannot be heard because their mother gifted the property to her daughters, who then sold it to the 2nd respondent. That this court having rendered itself on 25th March 2013 cannot re-open the matter.

18. I have carefully considered the Preliminary Objection, the submissions by each counsel. A Preliminary Objection has been defined to be a point of law whose determination would determine the whole matter. If this court finds that it is *functus*, then the court becomes powerless to determine the application dated 29th September 2020.

19. Both parties rely on the same Supreme Court authority on the definition of *functus*;

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision, any change of its ruling on adjudication must be taken to a higher court if that right is available.”

20. The question then, has the judgment of this court been perfected for this court to be *functus*?

21. Let me point out that the nature of succession proceedings is such sometimes even when the court's judgment has been perfected an application under **Section 76 of the Law of Succession Act** for Revocation of the Grant can lead to the undoing of all that perfection.

22. That besides, in this case the judgment was delivered on 4th April 2013, a Certificate of Confirmation dated 25th March 2013 was issued. Evidently Vivian Wambui Gatonye could not have transferred the property to herself nor to her daughters on 12th January 2012 vide this same judgment because the property was still in the name of the deceased herein. Clearly therefore the said Vivian could not have transferred a life interest or otherwise to her daughters that had not been conferred to her. Secondly, **Section 37 of the Law of Succession Act** speaks for itself, with regard to the powers of a spouse during life interest.

23. The respondent's argument that;

Since the grant of the Certificate of Confirmation issued was implemented and the transfer perfected as per the court order is not tenable.

24. The purported transfer on 12th January 2012 by Vivian was not in compliance with the Court Order of 4th April 2013, and even if she had done so under the said order, she would not have had the power to do so without the consent of the court. And as submitted by the counsel for the applicant, the administrators have not complied with **Section 83(e) of the Law of Succession Act, which states within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.**

25. The upshot is that this court is not *functus officio* with regard to the issues raised in the application dated 29th September 2020.

26. The Preliminary Objection fails with costs to the applicant.

27. Orders Accordingly.

DATED, SIGNED AND DELIVERED VIA ZOOM THIS 30TH DAY OF JUNE, 2021.

MUMBUA T. MATHEKA

JUDGE

In the presence of:-

Court Assistant Edna

Ms. Mbugua holding brief for Mr. Matiri for the Respondent

N. S. Matiri & Co. Advocates

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Ms. Wangari holding brief for Mr. Waiganjo for the Applicant

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