



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**SUCCESSION CAUSE NO. 60 OF 2016**

**(FORMERLY MERU SUCCESSION CAUSE NO.567 OF 2014)**

**IN THE ESTATE OF M'NGERETHA M'MUNYUA ALIAS JOSEPH**

**NGERE MUNYUA (DECEASED)**

JULIESTA KANINI NJERU.....1<sup>ST</sup> ADMINISTRATIX

CIAMBUBA NGERE MUNYUA.....2<sup>ND</sup> ADMINISTARTIX

PAMELA WACUKA NGERE.....1<sup>ST</sup> APPLICANT

JOYCE GATAKAA NGERE.....2<sup>ND</sup> APPLICANT

**VERSUS**

PENINAH GATAKAA.....RESPONDENT

**RULING**

**INTRODUCTION**

This matter relates to the estate of **M'Ngeretha M'Munyua alias Joseph Ngere** (deceased) who died intestate on 24/12/2004. A grant of letters of administration was issued to **Juliesta Kanini Njeru and Ciambuba Ngere** who are the widows of the deceased. A grant of letters of administration which was issued 15/2/2010 and confirmed on 13/11/2013 was revoked and annulled by consent on 4/5/2020. A fresh grant was issued to the two widows of the deceased.

Apart from the two widows of the deceased, there were other beneficiaries.

These are-

- i. CiambubaNgere - Widow.
- ii. JuliestaKaniniNjeru – Widow.
- iii. BenardMbakaNgere - Son.
- iv. PeninahGatakaaNgere – Daughter.
- v. Joyce Gatakaa – Daughter.
- vi. MugendiNgere - Son.
- vii. Gilbert GantikuNgere - Son.

- viii. Henry MigwiNgere – Son.
- ix. KariukiNgere – deceased but survived by MwendaKariuki.
- x. Erastus Gitonga survived by Gitonga.
- xi. Jane KageniNgere – Daughter.
- xii. Florence KarimiNgere – Daughter.
- xiii. Pamela WachukaNgere – Daughter.

The estate available for distribution being:

- i. L.R.No. KARINGANI/NDAGANI 3946.
- ii. L.R.No. KARINGANI/NDAGANI 5374.
- iii. L.R.No. KARINGANI/NDAGANI 5372.
- iv. L.R.No. KARINGANI/NDAGANI 3944.
- v. LR. MARIANI ADJUDICATION SECTION 2461.

The two administrators could not agree on the mode of distribution and therefore the court directed the 2<sup>nd</sup> administrator to file a protest to the summons for confirmation of grant. This court, **Justice Limo** heard the protest and proceeded to render Judgment on 13/2/2019. He directed that the grant of letters of administration issued on 8/5/2017 be confirmed and the estate be distributed as follows:-

**(a) L.R Karingani/Ndagani/5374 - (3.32 acres)**

- (i) Ciambuba Ngere Munyua - 0.59 acres
- (ii) Benard Mbaka Ngere Munyua - 0.59 acres
- (iii) Mwenda Kariuki Ngere - 0.59 acres
- (iv) Gilbert Gatinku Ngere - 0.59 acres
- (v) Mugendi Ngere - 0.59 acres
- (vi) Henry Migwi Ngere - 0.37 acres

**(b) L.R. No. Karingani/Ndagani/5372 (0.425 acres)**

- (i) Henry Migwi Ngere - 0.22 acres
- (ii) Pamela Wacuka Ngere - 0.20 acres

**(c) L.R No. Karingani/Ndagani/3946 (1.51 acres)**

- (i) Pamela Wacuka Ngere - 0.39 acres
- (ii) Peninah Gatakaa - 0.59 acres
- (iii) Joyce Gatakaa Ngere - 0.53 acres

**(d) L.R Karingani/Ndagani/3944 (0.25)**

- (i) Jane Kageni Ngere - whole

**(e) Mariani/Adjudication Section/2461- (1 acre)**

- (i) Florence Karimi Ngere - 0.5 acres

(ii) Antony Murimi Gitonga - 0.5 acres

1. What is now pending before this court is an application dated 27/7/2020. It seeks the following orders under **Section 47 Law of Succession Act and Rules 49, 59(1) & 73 of the Probate and Administration Rules, Article 50 and 159 (2) of the Constitution.**

1. That the Honourable court be pleased to issue an order in the interim basis direct scene visit to conduct on the suit land and Deputy Registrar to visit Land Parcels Karingani/Ndagani/13419, Karingani/Ndagani/13420, Karingani/Ndagani/13421 and Karingani/Ndagani/13422 all of them being a resultant of the subdivision land parcel No. Karingani/ndagani/3946, in the presence of the District Land Registrar, the parties herein and their Advocates and submit a report on the subdivisions carried out therein, pending the hearing and determination of this Application.

2. That the Honourable court be pleased to issue an order directing the District Land Registrar Meru South, to cancel and/or prevent further issuance of the title deeds, transfer, charging and/or any other dealings on land parcels No. Karingani/Ndagani/13419, Karingani/Ndagani/13420, Karingani/Ndagani/13421 and Karingani/Ndagani/13422 and all other resultants subdivisions of land parcel No. Karingani/Ndagani/3946 pending the hearing and determination of this Application.

3. That the Honourable court be pleased to issue an order directing the District Land Surveyor Meru South, to cancel the mutations registered as a result of the subdivisions of land parcel Karingani/Ndagani/3946 and the court to direct that the land be resurveyed afresh in a fair and equitable manner.

The application is based on the following grounds:-

**1. That a confirmed grant was issued on the 15<sup>th</sup> February, 2019, in this matter.**

**2. That the deceased herein had two wives the Ciambuba Ngere Munyua as the 1<sup>st</sup> wife and Julieta Kanini Njeru who was the 2<sup>nd</sup> wife. That during the subdivision Land Parcel No. Karingani/Ndagani/3936 on the 19<sup>th</sup> June 2020, chaos and disputes arose between parties from the two houses of the deceased person due to the unfair manner in which the land was subdivided.**

**3. That the surveyor that visited Land Parcel No. Karingani/Ndagani/3946 for the purposes of subdivision declined to subdivide the land in an equitable manner giving the only habitable and usable portion of the land to one beneficiary Peninah Gatakaa, the respondent herein who is the daughter of the 1<sup>st</sup> wife, leaving the other two beneficiaries Pamela Wacuka Ngere and Joyce Gatakaa, the Applicants herein, who are daughters of the 2<sup>nd</sup> wife the 1<sup>st</sup> Applicant herein in a hill/sloppy and swampy place, making it economically unviable.**

**4. That unless the land registrar is estopped by the court from effecting the registration of the new title deeds and the land subdivided afresh in a fair and equitable manner, then the 1<sup>st</sup> and 2<sup>nd</sup> Applicant's herein shall suffer irreparable loss since their portions are economically unviable.**

**5. That the Applicants are willing to reimburse the costs incurred by the Respondent in obtaining the title deed to Land Parcel No. Karingani/Ndagani/13419, and cater for the fees required to resurvey the land if the orders sought herein are granted by the Honourable court.**

**6. That it is only just and fair and for the interest of justice that the prayers being sought in his application be allowed to enable a speedy and smooth distribution of the estate of the deceased and at the same time foster a cordial relationship between the beneficiaries of the deceased herein without disadvantaging any beneficiary.**

The grounds are reiterated in the supporting affidavit sworn by Pamela Wacuka Ngere sworn on 27/7/2020. The respondent Penina Gatakaa filed a replying affidavit sworn on 12/8/2020. She deposes that the application is an abuse of the court process as a similar application was filed by 1<sup>st</sup> and 2<sup>nd</sup> Applicants mother which was dated 27/7/2020 and was withdrawn after they sensed that they would lose. She further avers that the Land Parcel No. Karingani/Ndagani/3946 was surveyed by the District Surveyor on 19/6/2020 as directed by this court on 5/5/2020 and the District Surveyor had invited all the beneficiaries to attend when he carried out the work. It is the applicant's averment that no chaos or disputes arose during the exercise. That after the survey process was concluded, the District Surveyor prepared the mutation form which was registered in the Land's office. The respondents deposes that the allegations by the applicant are not supported by any evidence and the application has no basis; is a waste of Judicial time and court ought to dismiss it.

I have considered the application, the submissions and the affidavits. There are two issues which arise for determination:-

1) *Functus officio*

2) Whether the application has merits

Whether this court is *Functus officio*.

*Functus officio* is defined under Blacks Law Dictionary Ninth Edition as follow:

*“Having performed his or her office” (of an officer or official body) without further authority or legal competence because, the duties and functions of the original commission have been fully accomplished.”*

Similarly in **Raila Odinga –Vs- IEBC& 3 Others Petition No. 5 of 2013** the Supreme Court of Kenya cited with approval the following passage from **“The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law”** by Daniel Malan Pretorius:-

...“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter..The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

In addition, the Supreme court also referred to the case of **Jersey Evening Post Limited –Vs- A. Thani [2002] JLR 542** at pg. 550 where the Court stated: -

“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 a 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 challenge to its ruling on adjudication must be taken to a higher court if that right is available.” [own emphasis]

***In light of the above, does the current court have jurisdiction over this matter?***

Jurisdiction goes into the heart and soul of any proceeding. In this regard, the question of jurisdiction should not only be raised at the earliest opportunity, but it must be the first issue to be resolved from the outset.

In **Republic v KarisaChengo& 2 others [2017] Eklr**, the Supreme Court of Kenya held: -

“Jurisdiction” has emerged as a critical concept in litigation. Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows: -

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.

The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.

A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

In the celebrated Court of Appeal decision in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] Eklr**, Nyarangi JA famously held: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.

A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”.

The application is brought under **Section 47 of the Law of Succession Act, rule 49 Rule 59(1) of Rule 73** of the **Probate and Administration Rules**. These provisions do not relate to any substantive prayer and only guide a party on the procedure to be followed when filing the application under the Act and the Rules. **Rule 73** in particular provides for the inherent powers of the court.

It provides that-

***” Nothing in these rules shall limit or otherwise limit 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.”***

As for **Rule 49**, it makes provisions for filing an application not otherwise provided for. With regard to **Rule 59**, it provides for the form of proceedings. **Section 47 of the Act** provides that;

***“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.”*

The Section makes provision for the jurisdiction of the High court.

The applicant has not cited any provision seeking a substantive order. It seems the applicant is only seeking the exercise of discretion by this court to grant the orders sought. The application is not seeking review of the orders issued by this court nor is it seeking to set aside the orders. The applicant is not challenging the mode of distribution. This court had ordered that the District Surveyor do visit the land in the presence of the parties for the purpose of transmission the estate in accordance with the confirmed grant issued on 14<sup>th</sup> 2019. The surveyor did visit the land in question in the presence of the parties as directed by this court. The surveyor registered the mutation and some parties like the respondent have gone ahead and obtained title deed.

The order of this court has been complied with to the letter. There can be no further intervention by this court. Discretion of the court must be exercised Judicially. The court has a duty to ensure that litigation comes to an end. There is therefore no room for this court to exercise discretion in favour of the applicant. The applicant has relied on **Article 159** of the **Constitution**. The article articulates that there be expedition in resolution of disputes.

This matter was put to rest when the court gave its judgment on 13/2/2019. There was no appeal. This court is now '*functus officio*'. The matter must therefor come to a rest.

**Conclusion:**

This court is *functus officio*. The application lacks merits. I dismiss it. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 28TH DAY OF JULY, 2021.**

**L.W. GITARI**

**JUDGE**

**28/7/2021**

The ruling has been read out in open court.

**L.W GITARI**

**JUDGE**

**28/7/2021**