



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 138 OF 2018**

**PERSIAH MUTHONI MASINDE (Suing as administratrix and on behalf of the**

**ESTATE OF THE LATE JOHN GITAU GICHURU.....1<sup>ST</sup> PLAINTIFF**

**RICHARD GATIMU GITAU.....2<sup>ND</sup> PLAINTIFF**

**RICHARD GATIMU DAUDI NDATHA GITAU.....3<sup>RD</sup> PLAINTIFF**

**JOE WAWERU GITAU.....4<sup>TH</sup> PLAINTIFF**

**-VERSUS-**

**HAMILTON HARRISON & MATHEWS ADVOCATES.....1<sup>ST</sup> DEFENDANT**

**JOAN NJOKI NDUNGI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The subject matter of this ruling are two notices of motion. The first motion is that dated 17<sup>th</sup> April 2019 taken out by the 1<sup>st</sup> Defendant while the second one is the one dated 19<sup>th</sup> July 2019 taken out by the 2<sup>nd</sup> Defendant. In both applications the Defendants are each seeking for the Plaintiffs suit as against them to be struck out on the basis that the same is rejudicata. The motion dated 17<sup>th</sup> April 2019 is supported by the affidavit of Richard Onwela while that dated 19<sup>th</sup> July 2019 is supported by the affidavit of Joan Njoki Ndung'u. In the response to the motion dated 17<sup>th</sup> April 2019 the Plaintiffs filed grounds of opposition dated 8/5/2019 together with the replying affidavit of David Ndatha Gitau and that of Persiah Muthoni Masinde to oppose the same. The Plaintiffs filed grounds of opposition dated 31/10/2019 to resist the motion dated 19<sup>th</sup> July 2019. With the consent of learned advocates appearing in this matter, this court directed that the two applications be heard together.

2. When those applications came up for interparties hearing learned counsels recorded a consent order to have them disposed of by written submissions.

3. I have considered the grounds stated on the face of the motions and the facts deponed in the affidavits filed in support and against the applications plus the grounds of opposition. I have also considered the rival written submissions plus the authorities cited together with the oral highlights of learned counsels.

4. It is the submission of Mr. Gichuhi learned advocate for the 1<sup>st</sup> Defendant that the suit is an abuse of the court process in that it is rejudicata. It is argued that the subject matter of this suit is directly and substantially in issue in **Nairobi H.C Succ. Case No 20 of 1983**, The estate of **James Samuel Gichuru, deceased and Nairobi H.C.S.C No 1982 of 1995, the estate of Rahab Wambui Gichau deceased**. The learned counsel pointed out that the Plaintiffs have produced documents exchanged on a without prejudice basis which were expunged in the aforesaid succession course.

5. It was averred that the 1<sup>st</sup> Plaintiff was substituted as a party to this suit without first obtaining leave of court.

6. It is also argued that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs have no capacity to institute this suit. It is pointed out that the trio are not administrators of the estate of John Gitai Gichuru, deceased. The learned advocate further argued that the allegations of fraud are time barred since they are founded on tort whose limitation period is 3 years.

7. Mr. Mbabu, learned advocate for the 2<sup>nd</sup> Defendant adopted the submissions of the 1<sup>st</sup> Defendant's advocates. The learned advocate stated that the dispute was the same as that which was dealt with in **Nairobi H.C.S.C No. 20 of 1983. The estate of James Samuel Gichuru, deceased.**

8. Mr. Mbabu, equally pointed out that the Plaintiffs have relied on documents which had been expunged in the aforesaid succession cause since they were on a without prejudice basis.

9. Mr. Oyatsi, learned advocate for the Plaintiffs stated in response that the two motions are misconceived and should therefore be dismissed. He argued that the law of succession and distributions of the deceased's estate, which was done through **Nairobi H.S.C. No 20 of 1983.**

10. Mr. Oyatsi pointed out that the instant suit is about recovering the assets of distribution which had been misappropriated through fraud.

11. The learned advocate is of the submission that the beneficiaries have a right to file an action to seek for the available remedies to recover assets lost through fraud. He further argued that there are other ways under the Civil Procedure Act and Rules in which the court can use to determine the admissibility of documents.

12. It was also argued that the family court is already *factus officio*. The learned advocate further argued that the succession court cannot and could not issue an order to award damages against parties who have conspired with the beneficiaries neither can it deal with criminal acts.

13. It is the submission of the Plaintiffs' advocate that the suit did not raise issues, which were dealt with in the family court which heard the succession cause.

14. The most serious issue raised and argued before this court is whether the subject matter of this suit is directly and substantially in issue in succession cause No 20 of 1983 in the matter of the estate of James Samuel Gichuru, deceased. I have already considered the rival submissions of the parties. Under section 6 of the Civil Procedure Act, it is provided as follows:

***“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is directly and substantially in issue in a previously instituted suit or previously instituted suit or proceedings between the same parties or between parties under whom they or any or of them claim, litigating under the same title, where such suit or proceeding is pending the same or any other court having jurisdiction in Kenya to grant the relief claim,”***

15. The question to be determined here is whether this suit is so enjoined with the aforementioned succession cause and whether the matter raised therein are directly and substantially in issue before another court of competent jurisdiction. It is not in dispute that **Nairobi H.C.S.C No 20 of 1983** is still pending in the family Division of the High court. It is also not in dispute that the 1<sup>st</sup> Plaintiff has been involved in the succession cause from the year 2003 demanding for shares in the estate of James Samuel Gichuru, deceased,. It is apparent that the 1<sup>st</sup> Plaintiff sought to have the grant issued to the 2<sup>nd</sup> Defendant revoked and for a temporary injunction to restrain the 2<sup>nd</sup> Defendant from disposing of assets of the estate vide the application dated 18/11/2003. It is apparent that the estate is the subject matter in the succession cause and in this suit.

16. A careful perusal of both this suit and succession cause will reveal that the following issues have been raised:

**First**, that the 1<sup>st</sup> Defendant failed to take care of the interests of all the beneficiaries of the estate.

**Secondly** there is an allegation that the properties known as **L.R. No 167/9 and 168/9** were illegally mortgaged.

**Thirdly**, it is stated that the estate of James Samuel Gichuru, deceased were incorporated into the estate of the late Rahab Wambui Gichuru and that she disposed of them in accordance with her will.

**Fourthly**, it is alleged that Joan Njoki Ndung'u, the 2<sup>nd</sup> Defendants for herself and her family to the utter detriment of other beneficiaries hence failing to honestly perform her fiduciary duties.

**Fifthly**, it is also alleged that there was intermeddling of the estate and that the 2<sup>nd</sup> Defendant has failed to account for the proceeds of the estate and also to distribute the estate to the beneficiaries.

**Finally**, it is further had control of the estate and collude with the 2<sup>nd</sup> Defendant to deny the beneficiaries their share of the estate.

17. Upon scrutinizing the plaint dated 11/6/2018 amended on 16<sup>th</sup> August 2018 that the Plaintiffs' have raise all the issues I have stated herein above. In the amended plaint the Plaintiffs expressly, stated that there has been no previous court proceedings nor is there a pending suit between them and the Defendants in connection with the same cause or causes of action.

18. It is clear to me that the Plaintiffs failed to disclose that the aforementioned issues were pending determination or have been determined in the succession cause. With respect, I agree with the submissions of both Defendants that this court cannot determine those issues in so far as they are raised in the succession cause in another court of competent jurisdiction.

19. I am satisfied that the issues raised in this suit are directly and substantially in issue in the succession cause. The same can competently be determined by the family court, which has been clothed by the law of succession Act with jurisdiction to deal with such issues. In sum I

find the Plaintiffs conduct or act of filing a fresh suit while the same issues could have been determined in the succession cause to amount to an abuse of the court process.

20. The second issue which featured prominently is the question touching on reliance of documents on a without prejudice cover and which were previously expunged in the succession cause. The Plaintiffs did not deny that they sought in this suit to rely on documents on a without prejudice cover but they instead argued that the issue can be addressed with under the Civil Procedure Rules. With respect, the admission by the Plaintiffs of having relied on documents on a without prejudice cover which had been expunged raises a serious indictment on their conduct. It is trite law that the entire communication is inadmissible under section 23 of the Evidence Act. The end result is that such documents would be ordered struck out in some cases it may lead to the dismissal of the suit.

21. The third ground which was ably argued is that the 1<sup>st</sup> Plaintiff was substituted by way of an amendment without leave of court. It is not in dispute that the Plaintiff i.e the estate of John Gitau Gichuru, deceased was substituted with that of Persiah Muthoni Masinde suing as the administratrix of the estate of John Gitau Gichuru.

22. The Plaintiffs admitted carrying out the amendments without leave of the court. They submitted that in the peculiar circumstances of this case it was necessary to carry out the amendments pursuant to the provisions of order 8 as read with order 1 Rule 10 of the Civil Procedure Rules. I have no doubts in my mind that the Plaintiffs should have first obtained leave before substituting the name of the estate of John Gitau Gichuru with that of Pasiyah Muthoni. In the absence of leave therefore, the substituting party is improperly on record.

23. The question as to whether or not the 2<sup>nd</sup> to 4<sup>th</sup> Plaintiffs have the capacity to institute this suit was raised and argued. The 1<sup>st</sup> Defendant is of the submission that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have no capacity to institute the suit in their own names save that they can only lawfully apply for accounts, inventories of assets and liabilities in the pending succession cause.

24. According to the Plaintiffs, upon his death in 1998, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs being his children and grandchildren of James Samuel Gichuru, deceased became the dependants, herein and the ultimate beneficiaries of both his estate and the estate of his father, James Samuel Gichuru. In short, the Plaintiffs argued that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants had a legal right to commence this suit in order to preserve and protect the assets of the estate. It is not in dispute that the 2<sup>nd</sup> to 4<sup>th</sup> Plaintiffs have not taken out letters of administration in respect of the estate of the deceased.

25. With respect, I agree with the submissions of the 1<sup>st</sup> Defendant that the 2<sup>nd</sup> to 4<sup>th</sup> Plaintiffs have no *locus standi* to institute this suit. They can only pursue their claim under the succession cause in seeking for accounts and inventories of the assets and liabilities. In the case of **Otieno Vs Ougo & Another [1986 – 1989] EALR 468**.

It was held *inter alia*

**“An administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent”**

26. The final ground which was ably argued before this court is that this suit is time barred. According to the 1<sup>st</sup> Defendant the allegations of fraud, misrepresentation and collusion raised against the 1<sup>st</sup> Defendant are claims founded on tort of which the limitation period is 3 years. It was pointed out that the Plaintiffs have had knowledge of the matters alleged to be fraudulent more than 10 years before the filing of this suit.

27. The Plaintiffs are of the submission that the conspiracy was continuous and that the 1<sup>st</sup> Defendant has continuously committed acts in furtherance of the said conspiracy. With respect, I am persuaded by the Plaintiffs’ submission that the act of conspiracy by the Defendants was a continuous one since the time when the right of action accrued begins from the time when the Plaintiffs come to know the conspiracy complained of. The suit is therefore not time – barred.

28. In the end and on the basis of the grounds stated hereinabove, I find the two motions meritorious. Consequently, this suit is ordered struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

**Dated, Signed and Delivered at Nairobi this 28<sup>th</sup> day of February, 2020.**

.....

**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> Plaintiff

..... for the 2<sup>nd</sup> Plaintiff

..... for the 3<sup>rd</sup> Plaintiff

..... for the 4<sup>th</sup> Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant