



**Gathuma v Mwangi & another (Environment & Land Case  
66 of 2016) [2023] KEELC 18780 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18780 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 66 OF 2016**

**JO OLOLA, J  
JULY 14, 2023**

**BETWEEN**

**PETER NDUMIA GATHUMA ..... APPLICANT**

**AND**

**JOHNSTONE KAMAU MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**ISAAC MAINA WAICHUNGO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By the undated notice of motion before me filed herein on November 18, 2022, Peter Ndumia Gathuma (the applicant) prays for orders that the two respondents herein do give and transfer a portion of land measuring 2.105 Ha. being part of the parcel of land known as Marmanet/Melwa Block 1/1993 (Muhotetu) to himself as per an agreement executed between himself and one Watson Wachira (now deceased). The applicant further urges the court that in the event the respondents decline to sign the necessary transfer documents, the Deputy Registrar of this court should be authorised to sign the same.
2. The said application is supported by a short affidavit wherein the applicant avers that he had in the year 1999 entered into an agreement with the said Watson Wachira Muriithi for the exchange of the said portion of land but Watson failed to transfer the same to him. The applicant further asserts that the said Watson passed away on July 28, 2017 and that upon his death the respondents were declared the administrators of his estate after they filed a Succession Cause at Nanyuki.
3. The applicant further avers that because this court had given him the said portion of land through this suit, then the said administrators of the Estate of Watson Wachira Muriithi should be made to give him his portion of the land.



4. The two respondents named herein as Johnstone Kamau Mwangi and Isaac Maina Waichungo jointly filed what was framed as a notice of preliminary objection dated January 13, 2023 in which they urge:
  1. That the entire application dated November 18, 2022 be struck out with costs for want of compliance with the provisions of section 6 of the Civil Procedure Act cap 21 laws of Kenya as there is a similar application in Nanyuki Chief Magistrate Succession Cause No 103 of 2017 by applicant in form of a protest;
  2. That the entire application dated November 18, 2022 herein is incompetent, bad in law and incurably defective in that pursuant to the provisions of the Civil Procedure Rules 2010 and the Law of Succession Act, cap 160 of the laws of Kenya, this court lacks the mandate and jurisdiction to determine questions arising from a deceased's estate;
  3. That the suit herein, in form and substance, offends the mandatory provisions of the Civil Procedure Act and Rules, 2010 and the Law of Succession Act cap 160 of the laws of Kenya hence the same is untenable and liable to striking out in limine;
  4. That thus honourable court has no jurisdiction to hear and determine the entire application dated November 18, 2022 herein as currently framed and instituted; and
  5. That the entire application dated November 18, 2022 be struck out with costs to the respondents as the same is frivolous, a non-starter and a glaring abuse of the court process.
5. I have carefully perused and considered both the applicant's notice of motion as well as the respondents' preliminary objection thereto. This court was persuaded that the issues raised in the so-called preliminary objection were more in the nature of grounds of opposition than a preliminary objection *sensu strictu*.
6. Indeed, it was telling that while the respondents attacked the application before the court on the basis that there was a similar application pending before the Nanyuki Chief Magistrates Court, the respondents did not bother to file a replying affidavit herein and there was absolutely no way in which this court could verify that allegation as stated in their notice of preliminary objection.
7. From the record herein, it was apparent that the applicant had filed this suit on April 11, 2016 seeking the same orders as those against the respondents herein from the said Watson Wachira Muriithi. The applicant's claim is premised on an agreement allegedly entered into between the said Watson and himself in the year 1999 for the exchange of their parcels of land which agreement the said Watson allegedly breached.
8. In his statement of defence dated May 13, 2016, Watson acknowledged having entered into the agreement on which the applicant's suit is premised but he contended that the agreement was revoked through a subsequent agreement entered into by the parties and dated September 30, 2014.
9. It was also apparent from the record that on March 13, 2017, the applicant's case was heard and closed in the absence of the defendant and that the same was listed for mention for purposes of taking a date for judgment on June 5, 2017. While the applicant contends that this court had already given him the portion of land he claims and that the respondents as the administrators of the estate of Watson Wachira Muriithi should now be compelled to give him his portion of the land, it was evident that no



judgment has been delivered herein and that there was no basis upon which the court could grant the orders sought herein.

10. From the material placed before me, it was evident that the said Watson Wachira Muriithi passed away on July 28, 2017 before judgment was delivered. On May 8, 2018 the Honourable Lady Justice L Waithaka who had heard the plaintiff/applicant's case fixed the same for delivery of judgment on June 12, 2018.
11. As it turned out the judgment was not delivered on the said date and the parties next appeared before the Honourable Justice Y M Angima on June 14, 2021 for mention to fix a judgment date. Upon being informed of the defendant's death, the court directed that the defendant be substituted before the matter proceeds to judgment. No such substitution was ever done.
12. Instead, the applicant came up with the present application not to substitute the respondents for the deceased but to have them compelled to give him his portion of the land said to have been exchanged with the deceased. That as they say is like putting the cart before the horse. While it would appear from the documents annexed to the applicants supporting affidavit that indeed the respondents are the administrators of the estate of the late Watson Wachira Muriithi, the applicant must first bring them to this suit in the proper manner and wait for the court to determine the case as by law required.
13. It follows that I neither found any basis for the applicant's motion nor merit in the respondents' preliminary objection. Both are dismissed with no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 14<sup>TH</sup> DAY OF JULY, 2023.**

**IN THE PRESENCE OF:**

**MR. PETER NDUMIA GATHUMA – THE APPLICANT PRESENT IN PERSON**

**MR. MUTHEE FOR THE RESPONDENT**

**COURT ASSISTANT - KENDI**

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**J. O. OLOLA**

**JUDGE**

