



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 300 OF 2010

IN THE MATTER OF THE ESTATE OF

JACOB GATUNE.....(DECEASED)

JOHN KIMINGI GATUNE.....PETITIONER

RULING

1. This ruling is in respect of the summons dated 6/8/2014 in which the orders sought are;

1. THAT REBECCA MUKUHI GATUNE the administrator of the estate of the late JACOB GATUNE be substituted and ELIUD KINYARA and JANE NYAMBURA be appointed by the court as the administrators of the said estate.

2. THAT each of the children, the beneficiaries of the estate of the late JACOB GATUNE be ordered to file an affidavit of the proposed manner of distribution of the estate of the deceased herein.

3. THAT to facilitate equitable distribution of the net intestate, the branch manager standard chartered bank be ordered to provide the court and the parties bank statements for xxxxxxxxxxxxxx and account number xxxxxxxxxxxxxx both in the names of the deceased.

4. THAT costs of this application be borne by the estate.

2. The application is based on three (3) grounds namely;

1. THAT the estate of the late Jacob Gatune was confirmed in the name of the late Rebecca Mukuhi Gatune and a certificate of confirmation issued in her favour.

2. THAT the said Rebecca Mukuhi is since deceased and the estate ought to be distributed afresh.

3. THAT it is only fair that the said administrator be replaced and the estate be distributed afresh.

3. It is supported by the sworn affidavit of Eliud Kinyara.

4. The brief facts from the application is that Eliud Kinyara (applicant) is a child of Jacob Gatune (deceased). Upon the death of Jacob, Rebecca Mukuhi Gatune, wife of Jacob, was appointed the administrator of the estate of Jacob and a grant of letters of administration was issued to her.

5. The said grant was confirmed in favour of Rebecca Mukuhi Gatune. The property which constituted the net estate of the deceased has not vested in Rebecca by way of transfer by transmission.

6. Rebecca has since died and the property ought to vest in the children of the deceased in that order of succession.

7. The applicant seeks that pending the distribution of the estate to the children of the deceased, he and his sister Jane Nyambura be appointed as administrators of the said estate. It is then sought that amounts in the bank accounts held by the deceased be confirmed, accounts be taken and the land comprising the estate be distributed equally among the children.

8. The application is opposed. The respondents raised a notice of preliminary objection on grounds;

1. **THAT** the summons/application for substitution of administrators is untenable since the Estate of Jacob Gatune was distributed to the rightful beneficiary Rebecca Mukuhi Gatune and as such there is no residual estate to be administered.
2. **THAT** the deceased's properties which passed to the beneficiary widow – Rebecca Mukuhi Gatune (now deceased) cannot revert back to the estate of the deceased's Jacob Gatune and as such the same can only be administered in a separation succession cause for the estate of the late Rebecca Mukuhi Gatune.
3. **THAT** the applicant's summons are defective for seeking to substitute Rebecca Mukuhi Gatune as an administrator whereas she was never an administrator to the Estate of Jacob Gatune (deceased) though she was ultimately the sole beneficiary.
4. **THAT** the summons by the applicant are incompetent for the 2nd applicant Jane Nyambura who seeks to be administrator is now deceased having passed away on the 31st October, 2016.
5. **THAT** the summons dated 6th August, 2014 and filed in court on 20th August, 2014 are incurably defective and an abuse of court process whereby the same should be struck out with costs to the respondents.

9. In addition, John Kimingi Gatune, with consent of Michael Karungo Gatune (Michael) has stated that the confirmed grant under reference indicated that all deceased's properties were to be inherited by Rebecca Mukuhi Gatune (now deceased) who was the mother to the parties herein and a widow to the deceased Jacob Gatune.

10. Rebecca passed on on 9/9/2013 and at the time of her death she had distributed the estate to her family members. There is thus no estate to be administered and/or distributed because all the properties had devolved to Rebecca who in turn distributed the same before her death.

11. It is urged that Rebecca Mukuhi Gatune was never the administrator of the estate and therefore the applicants cannot purport to substitute her. The 2nd applicant died on 31/10/2016 and the application is thus defective as Jane cannot be substituted as an administrator and yet she is deceased.

12. The parties filed written submissions.

13. For determination would be;

- (i) Whether the summons before court is defective for seeking to substitute Rebecca Mukuhi Gatune as an administrator.
- (ii) Whether the property constituting the estate of Jacob Gatune had transmitted to beneficiary Rebecca Mukuhi Gatune before her death.
- (iii) If in the negative, what is the legal effect to the bequest upon her death.

14. I naturally would start with issue number (i) which is raised in the preliminary objection herein and reiterated in the replying affidavit as the same is central to the matter before court.

15. By its very nature and purport, the summons by the applicants seeks the administration and winding up of the estate of Jacob Gatune.

16. The grant of letters of administration in respect of the estate of Jacob Gatune was issued to John Kimingi Gatune on the 23/9/2010.

17. The said grant was confirmed on 8/4/2011 and the entire estate in whole share distributed to Rebecca Mukuhi Gatune.

18. Whereas these facts are crystal clear and borne out of record, for inexplicable reasons, the applicants refer to Rebecca Mukuhi Gatune as the administrator of the estate of Jacob Gatune which is factually incorrect.

19. No wonder that the prayer for substitution of the administrator has been abandoned and withdrawn by the applicants through their submissions.

20. The facts of the case as seen from the record are clear. There was appointed an administrator one John Kimingi to the estate of Jacob Gatune. The grant issued to him on 23/9/2010 was subsequently confirmed on the 24/3/2011 with all the property constituting the estate being distributed to a sole beneficiary, Rebecca Mukuhi Gatune.

21. The central question as to whether there was transmission of this property, first to the administrator and onward to the beneficiary is a matter that would have been easily answered through a simple and straight forward application for accounts. This would be as per the requirements of **Section 83 (g) of the Law of Succession Act (Cap 160 Laws of Kenya)**. That Section provides;

“Section 83 (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.”

22. The applicants have taken a long and unwinding tedious route in seeking accountability in so far as the administration of the estate is

concerned.

23. The allegation that the property did not transmit to the beneficiary Rebecca Mukuhi Gatune is not supported by evidence.

24. Whoever alleges must prove. **Section 107 (1) and (2) of the Evidence provides;**

“ (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

25. The applicants have failed dismally in discharge of the burden of proof. No efforts was directed towards gathering necessary evidence e.g. records from the lands registry showing the transactions relating to the land.

26. To that extent the application would be one far failure and I need not answer issue number (iii) on the legal effect on lack of transmission before death save that the application has brought to the fore an important legal omission on the part of the administrator of the estate of Jacob Gatune which omission this court cannot afford to close its eyes to.

27. The grant herein was confirmed on 24/3/2011. Eight years down the line, the administrator of the estate of Jacob Gatune has not rendered to court a full and accurate account of the completed administration of the estate as required by him by **Section 83(g) of the Law of Succession Act.**

28. This is a legal duty that the administrator cannot evade. **Section 83(i)** mandates the court on its own motion or on application by an interested party in the estate to require an administrator to produce to the court a full and accurate account of the completed administration. The section provides;

“83(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

29. Though noting that this issue is not raised in the application as prayer or otherwise, being a legal requirement, the court acting on its own motion must address it in the interest of justice to the interested parties in the estate of Jacob Gatune.

30. From the foregoing, the natural deduction is that none of the prayers sought by the applicants in their application dated 6/8/2014 is available to them. I dismiss the application dated 6/8/2014 and make the following orders;

1. The application dated 6/8/2014 is dismissed with costs to the respondents.

2. The court on its own motion hereby orders John Kimingo Gatune, the administrator of the estate of Jacob Gatune (deceased) to produce in court within the next 90 days a full and accurate account of the completed administration in respect of the estate of Jacob Gatune (deceased).

3. Status quo in respect of all the properties which formed the estate of the deceased be maintained pending accounts.

Dated and Signed at Nakuru this 24th day of January, 2019.

A. K. NDUNG’U

JUDGE