



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSES NO. 265 OF 2009 AND 373 OF 2016**

**IN THE MATTERS OF THE ESTATES OF GITERE KAHURA (DECEASED) AND MARY NYOKABI (DECEASED)**

**RULING**

1. There are two causes being handled simultaneously, relating to the estates of a husband and wife, respectively, following orders that I made in HCSC No. 265 of 2009 on 21<sup>st</sup> June 2017 and 27<sup>th</sup> June 2017.

2. On 30<sup>th</sup> May 2017 I delivered a ruling herein where I directed the administrators to file an application for confirmation of their grant, and serve the same on all the parties affected. A consent was recorded by the parties on 27<sup>th</sup> June 2017 in HCSC No. 265 of 2009, allowing a section of the administrators, being Kenneth Kimani Gitere and David Wakang'u Gitere, to file for confirmation, with the rest of the administrators filing affidavits in protest, upon service. There has been compliance with the directions of 30<sup>th</sup> May 2017, for Kenneth Kimani Gitere and David Wakang'u Gitere did file an application for confirmation of grant dated 10<sup>th</sup> July 2017. Curiously, the other administrators, even though the direction was that they file affidavits of protest, if at all, to the proposals to be made by Kenneth Kimani Gitere and David Wakang'u Gitere, have filed their own application for confirmation of grant also dated 10<sup>th</sup> July 2017. I shall refer to the application by Kenneth Kimani Gitere and David Wakang'u Gitere as the first application, and that by Anne Wanjiru Gitere and as the second application.

3. The principal affidavit in support of the first application was sworn by Kenneth Kimari Gitere on 10<sup>th</sup> July 2017. He identifies the individuals who survived the deceased and who are entitled to a share in his estate as twelve (12), being six (6) sons, five (5) daughters and a daughter-in-law. The sons are Kenneth Kimari, David Gitere Wakaangu, John Tumuti, Samuel Mburu, David Itibi and Lucas Waitthaka. The daughters are Anne Wanjiru, Lucy Muthoni, Elizabeth Wachu, Teresia Wambui and Jane Njoki. The daughter-in-law is Rebecca Wambui Kahura, who is the widow of the late Peter Kahura, a son of the deceased. The estate is said to comprise of the following assets – LR No. 21070 Loresho, LR No. 150/20 Nazareth, LR No. 7097/4 Nazareth, LR No. 4871/1 Komothai, LR No. 481/4 Kenya Box, LR No. 8943/10 Midas Estate, LR No. 9946/2 Midas Estate, LR No. 5980/4 Muiruthi Farm, LR No. 36/1/918 Eastleigh, LR No. 209/2763/18 Gikomba, Mbeti/Kiamurina/570, Mbeti/Kiamurina/573, Weru/Kagaari/2181, LR No. 209/2729/1 Mogotio Road, LR No. 209/2729/2 Mogotio Road, LR No. 209/64/29 Muthithi Road, LR No. 209/64/30 Muthithi Road, and LR No. 209/80/24 Parklands Road. There are several other assets whose reference numbers are not indicated, being two parcels of land in Njeneni, three (3) parcels of land at Ikinu, buildings in Kiambu town and a house at Buru Buru. The liability identified is a sum of Kshs 570, 332, 000.00 owing to the National Bank of Kenya, being a loan obtained for the development of LR No. 21070 Loresho.

4. It is proposed that all the assets of the estate ought to be registered in the name of the administrators, that is to say Kenneth Kimani Gitere, David Wakang'u Gitere, Anne Wanjiru Gitere and Samuel Mburu Gitere. It is proposed that the estate be shared out amongst the beneficiaries as follows-

(a) LR No. 21070 Loresho – 12 blocks of flats to be shared equally between all twelve survivors, less 3 blocks to be sold to offset the liability;

(b) LR No. 150/20 Nazareth and LR No. 7097/4 Nazareth – equally between the twelve survivors, less five (5) acres reserved for use as homestead, cemetery, access roads and easements);

(c) LR No. 4871/1 Komothai and LR No. 481/4 Kenya Box - 224 acres to be shared equally amongst the twelve survivors, less 5 acres to be set aside for use in connection with coffee factory and homestead;

(d) LR No. 8943/10 Midas Estate, LR No. 9946/2 Midas Estate – 525 acres to be shared equal amongst the twelve survivors, less 20 acres for homestead and coffee factory;

(e) LR No. 5980/4 Muiruthi Farm – equally amongst all twelve survivors;

(f) LR No. 36/1/918 Eastleigh – equally amongst all twelve survivors;

(g) LR No. 209/2763/18 Gikomba – deceased's share of equally amongst all twelve survivors;

- (h) Mbeti/Kiamurina/570 – to Kenneth Kimani Gitere, David Wakang’u Gitere, Anne Wanjiru Gitere and Samuel Mburu Gitere to sell and thereafter distribute the proceeds equally amongst the twelve survivors;
- (i) Mbeti/Kiamurina/573 - to Kenneth Kimani Gitere, David Wakang’u Gitere, Anne Wanjiru Gitere and Samuel Mburu Gitere to sell and thereafter distribute the proceeds equally amongst the twelve survivors;
- (j) Weru/Kagaari/2181 - to Kenneth Kimani Gitere, David Wakang’u Gitere, Anne Wanjiru Gitere and Samuel Mburu Gitere to sell and thereafter distribute the proceeds equally amongst the twelve survivors;
- (k) LR No. 209/80/24 Parklands Road – 12 units on Block E to Kenneth Kimari Gitere;
- (l) LR No. 209/80/24 Parklands Road – 12 units on Block C to David Itibi Gitere;
- (m) LR No. 209/80/24 Parklands Road – ½ share of 28 units on Block D to Rebecca Wambui Kahura;
- (n) LR No. 209/80/24 Parklands Road – ½ of 28 units on Block D to Samuel Mburu Gitere;
- (o) LR No. 209/80/24 Parklands Road – 7 flats on Block B to John Tumuti Gitere;
- (p) LR No. 209/64/29 Muthithi Road – ½ of 27 flats in Block B to David Wakang’u Gitere;
- (q) LR No. 209/64/29 Muthithi Road – ½ of 27 flats in Block A to Teresia Wambui Gitere;
- (r) LR No. 209/64/29 Muthithi Road – ½ of 32 flats in Block A to Elizabeth Wachu Stevens;
- (s) LR No. 209/64/30 Muthithi Road – to Gitere Kahura Investments Limited (hereinafter to be referred to as the company);
- (t) LR No. 209/64/29 Muthithi Road – ½ of 27 flats in Block B to Lucas Waithaka Gitere;
- (u) LR No. 209/2729/2 Mogotio Road – ½ share of 28 flats to Lucy Muthoni Gitere;
- (v) LR No. 209/2729/1 Mogotio Road – Anne Wanjiru Gitere to collect rent from block of 16 flats after the loan on LR No. 21070 Loresho is repaid, whilst Lucy Muthoni Gitere and Jane Njoki Gitere will collect rent from the block with 8 flats until Anne Wanjiru Gitere redevelops the two blocks of flats;
- (w) LR No. 209/2729/1 Mogotio Road - Lucy Muthoni Gitere to collect rent from 8 flats until such time Anne Wanjiru Gitere redevelops the two blocks of flats;
- (x) LR No. 209/2729/1 Mogotio Road – Jane Njoki Gitere to collect rent from 8 flats until such time Anne Wanjiru Gitere redevelops the two blocks of flats;
- (y) LR No. 209/2729/2 Mogotio Road – ½ share of 28 flats to Jane Njoki Gitere;
- (z) 3 parcels of land at Ikinu – to Rebecca Wambui Kahura;
- (aa) Buildings in Kiambu town – deceased’s share thereof to Rebecca Wambui Kahura;
- (bb) Njeneni farms – 71 acres to be shared equally amongst the twelve survivors;
- (cc) Buru Buru house – equally amongst the twelve survivors; and
- (dd) All movable assets of the estate – to Kenneth Kimani Gitere, David Wakang’u Gitere, Anne Wanjiru Gitere and Samuel Mburu Gitere to sell and thereafter distribute the proceeds equally amongst the twelve survivors

5. The first application has an elicited response, by way of affidavit of protest; by Anne Wanjiru sworn on 27<sup>th</sup> July 2017. She concedes that the deceased persons herein were survived by the twelve (12) individuals identified in the first application. She states that both deceased persons held a share each in the company, which in turn owned most of the assets that are sought to be distributed in the first application. She asserts that the deceased in HCSC No. 265 of 2009 did not own all the assets listed in the first application and in the consent of 24<sup>th</sup> September 2014, stating that he only owned half of those assets with the other half being owned by his widow, the deceased person in HCSC No. 373 of 2016. She says that although she and others had agreed by consent on how the estate was to be distributed, she had since shifted ground as the company owning the said assets had substantial liabilities and in her view only partial confirmation was feasible as the liabilities needed to be sorted out first so as to free up the property for distribution. She has given details of the said liabilities of the company as well as of the several suits that are still pending between the company and the creditors over the said liabilities. She has then gone ahead to propose distribution of the assets that are not encumbered, leaving out those that have burdened with liabilities. She makes a case for her confirmation and that of Samuel Mburu Gitere as administrators, but she pleads that Kenneth Kimani Gitere and David Wakang’u Gitere not to be confirmed as administrators and to be required to account for their administration of the estate.

6. The second application proposes distribution of the estate along the lines of the affidavit of protest to the first application by Anne Anne Wanjiru, that is have recited in paragraph 5 here above. The same pitches for a partial distribution of the estate on the grounds that the estate was burdened with liabilities that needed sorting out before the affected assets were distributed. She suggests that the assets available for distribution are those that are not touched by the said liabilities. The said second application elicited several protests by Teresia Wambui, Kenneth Kimari, David Wakang'u, Anthony Tumuti, David Itibi, Lucas Waitthaka and Wachu Stevens. They all root for distribution founded on the consent of 24<sup>th</sup> September 2014. They take the position that distribution of all the assets was still feasible notwithstanding the debts and liabilities of the estate.

7. It was directed on 24<sup>th</sup> January 2018 that the parties do file skeletal submissions to be highlighted. There has been compliance. Both sides did file detailed written submissions, complete with authorities. I have read through them and noted the arguments made therein. The highlights were given on the written submissions on 28<sup>th</sup> February 2018 by Mr. Kamau for the applicant in the first application, and Mr. Gacheru for the applicant in the second application. I have noted too the arguments advanced orally by the parties in their respective highlights of the written submissions.

8. In the course of the proceedings several consents were recorded, which are relevant to what I am called upon to determine. The key ones being those recorded on 24<sup>th</sup> September 2014 and 28<sup>th</sup> February 2018. The consent order of 24<sup>th</sup> September 2014 entailed adoption of a consent comprised in a letter dated 16<sup>th</sup> September 2014 signed by the parties, detailing the distribution of the estate item by item amongst the twelve survivors. The first application seeks distribution along the lines of the said consent. The consent of 28<sup>th</sup> February 2018 makes all the twelve survivors shareholders in Gitere Kahura Investments Limited in lieu of the two deceased persons herein.

9. I have carefully perused through the voluminous papers filed herein by the parties. What emerges from the pleadings, the various affidavits and other documents on record is disturbing. I get the sense that the parties herein, virtually all of them, are inviting me to distribute assets that do not belong to the estates of the deceased persons. The averments and documents on record suggest that the assets that are alleged to belong to both estates actually is property registered in the name of the company known as Gitere Kahura Investments Limited, in which each of the deceased persons held one share.

10. The fact that the assets placed before me belong to the said company is averred to quite prominently by the applicant in the second application, in that application and in her protest to the first application. Among the documents attached to the affidavit she swore on 10<sup>th</sup> July 2017 in support of the second application are -

a) a letter dated 8<sup>th</sup> August 2016 from Regent Auctioneers addressed to the company being notice of intention to dispose of the company's property described as LR 4872/1 over an outstanding debt owed by the company to Kenya Planters Cooperative Union Limited of Kshs. 212, 527, 533.99;

b) a certificate of title/lease in respect of a property described as LR No. 21070 IR 81850, which shows that the property was transferred to the company on 11<sup>th</sup> September 2006 for Kshs. 9, 000, 000.00 and that there was a charge and a further charge to National Bank of Kenya Limited to secure sums of Kshs. 118, 000, 000.00 and Kshs. 350, 000,000.00, respectively, the charges were registered on 7<sup>th</sup> August 2013 and 24<sup>th</sup> September 2014, respectively;

c) a bank statement dated 26<sup>th</sup> May 2017 from National Bank of Kenya Limited with respect to the accounts referred to in (b) above addressed to the company;

d) a certificate of title/lease in respect of a property described as LR No. 209/2729/1 IR 99142 indicating the company as registered owner since 5<sup>th</sup> September 2005 and that the property had a charge in favour of the National Bank of Kenya Limited registered on 13<sup>th</sup> August 2013 to secure a sum of Kshs. 132, 000, 000.00; and

e) a plaint dated 18<sup>th</sup> March 2016, filed in Nairobi HCCC (Commercial Division) No. 119 of 2016, where the company has sued Kenneth Kimari Gitere and others, and it is pleaded that the company owns the following assets, being LR No. 36/1/918, LR No. 209/2763/18, LR No. 209/2729/1, LR No. 209/2729/2, LR No. 209/64/29, LR No. 209/64/30, LR No. 209/80/24, LR No. 150/20, LR No. 7097/4, LR No. 4871/1, LR No. 4871/2, LR No. 8943/10, LR No. 9946/2, LR No. 5980/4 and the Njeneni Farm.

The same documents are exhibited in several other affidavits and filings that are on record in the matter.

11. The petition lodged in HCSC No. 265 of 2006 lists the estate of the deceased therein as comprising of LR No. 4872/1, LR No. 7079/2, LR No. 150/17, LR No. 209/2763/18, LR No. 2729/2, LR No. 209/64/29, LR No. 36/1/918, Mbeti/Kiamurina/570, Mbeti/Kiamurina/573 and Weru/Kagaari/2182. There is no mention of the company and the shares that the deceased held therein. The title documents lodged together with the petition include a certificate of title/lease in respect of LR No. 209/64/30, which reflects the deceased as registered owner thereof and also that there was a charge to National Credit Bank Limited, registered on 15<sup>th</sup> December 2004.

12. Ideally, in applications for confirmation of grant it is imperative that the administrators, in addition to listing the assets that make up the estate of the deceased, attach copies of title documents to the application. The purpose to be served by such action would be twofold. Firstly, to demonstrate that those assets exist so that the court is not made to make orders in vain. Secondly, to demonstrate that the said assets do in fact belong to the deceased so that the court does not end up distributing property that does not belong to the deceased. That was not done in this matter, and therefore it is not clear which of the assets listed in fact were registered in the names of the either of the two deceased persons or by legal entities in which they held shares.

13. It is abundantly clear that a substantial part of the assets listed in the two confirmation applications do not belong to the estates of the deceased persons or are not registered in the names of the deceased persons or the said deceased persons were not the registered owners

thereof, but were registered in the name of the company in which the two deceased held equal shares. It would appear that most of these assets were initially registered the name of one or both of the deceased persons before the two formed the company and transferred the assets to the name of the company. From the material before me, it is clear beyond peradventure that the bulk of what is claimed by the administrators to be assets in the estates of the two deceased persons do not in fact belong to them but to the company in which they held shares. The said assets are therefore not available for distribution in these two causes. Secondly, although the only shareholders of the company died, the company outlived them. Indeed, there is evidence that it continued to trade. It charged its assets to access funds for development of some of them. Whether these activities were done in keeping with company law is matter that is not for me to decide. The assets in question belong to the company; the probate court cannot possibly distribute them in any way or form for they do not form part of the estates the subject of these proceedings.

14. It is classic company law, as stated in the celebrated case of *Salomon vs. A. Salomon & Co Limited* (1896) UKHL 1, (1897) AC 32, that a limited liability company enjoys a separate legal existence apart from its shareholders. It can own property. It can sue and be sued. And it has perpetual existence, which means it can continue to exist despite the demise of its owners, the shareholders.

15. The relationship between the deceased persons and the company was that they were shareholders in the company by virtue of the two shares they held. The fact of being shareholders did not constitute them owners of the property of the company. That remained property of the company, for their sole interest in the company were the shares. It is the said shares that are available for distribution herein amongst the survivors of the deceased. Should the survivors have no interest in continuing to have the company exist, then it is up to them to wind it up or to liquid it, so as to have access to its assets. However, that cannot happen until after the shares in the company have been distributed to the beneficiaries. The jurisdiction of the probate court lies with distribution of the shares, but not the liquidation of the company or the distribution of its assets.

16. From the material before me, it would appear that whilst some of the assets do not belong to the estates but to the company, there are other assets that could still be in the names of the deceased persons. The administrators ought, in their respective applications, to have separated the assets belonging to the company from those belonging to the deceased persons. Indeed, the assets belonging to the company ought not to have been listed at all, in their stead the applicants ought to have listed only the shares held by the deceased persons in the company alongside the assets registered in the names of the deceased persons. I need not say more on this.

17. I have alluded to two consents that are of relevance to the matters at hand, that recorded on 34<sup>th</sup> September 2014 and that of 28<sup>th</sup> February 2018. The consent order of 24<sup>th</sup> September 2014 is no longer tenable given that it disposed of assets that do not belong to the estates of the deceased persons, in view of what I have stated in the foregoing paragraphs. The said consent appears to have been recorded either in ignorance of the actual position with regard to ownership of the said assets or against a background of a misunderstanding on the said ownership. However, the consent of 28<sup>th</sup> February 2018 is still relevant. Indeed, the same preempts the orders that this probate court ought to make with regard to distribution of the shares that the deceased persons held in the company.

18. The proper thing to do in these proceedings is to distribute the said shares as between all the twelve survivors, and to distribute any other asset that is registered in the name or names of the deceased persons. Whereas the issue of the shares is as clear as daylight, that relating to any other assets that the deceased persons owned personally is unclear. The court is therefore not able, at this stage, to determine what these assets were, and cannot therefore make any orders for their distribution.

19. The applicant in the second application has invited the court to consider removal of the applicants in the first application as administrators and to require them to account for their administration. As stated above, the parties have not been either clear on what constitutes the estate or have not been candid to the court about it. The invitation by the said applicant is founded on the position that the said administrators mishandled estate assets, to wit the landed property registered in the names of the deceased. It has turned out that the said property belonged not to the deceased persons but to the company. That ought to force a change of approach to the provision of the accounts sought. If the assets said to have been mishandled belong to the company it would then mean that that is a matter subject to company law and should be handled in accordance with the provisions of the Companies Act, Cap 486, Laws of Kenya. Accounts sought regarding handling of assets of a company can only be limited to the handling of the shares of the company rather than on the assets themselves. The only assets of interest to the probate court so far as the company herein is concerned are the shares that the deceased held in the company. That is the only thing that the probate court can ask the administrators to account for, and that should only arise in cases where the administrators are accused of having transferred or sold the shares to third parties, or diminished their value in any way, among others. No such allegations have been made against them, and therefore I do not find any basis to grant any order on accounts. The other thing of course is that the applicant has not identified the assets that personally belonged to the deceased that the administrators might have mishandled to require the court to demand accountability. Due to the misunderstanding as to what assets comprise the estates of the two deceased persons, the case made out for the removal of the administrators lacks clarity and I hereby decline the invitation to remove them.

20. Issues were raised about certain liabilities of the estate, which in the opinion of the applicant in the second application ought to be settled before the assets affected by those liabilities are distributed. I have perused through the material herein and noted that those liabilities are not of the estate but of the company. They should not in any way affect distribution of the assets that belong to the estates herein. The issue of those liabilities have nothing to do with this court and should be raised at the appropriate forum.

21. In the end, I shall determine the two applications as follows:

**(a) That the shares held by the two deceased persons in Gitere Kahura Investments Limited shall be shared equally between or amongst all the twelve survivors of the deceased in the terms of the consent order of 28<sup>th</sup> February 2018;**

**(b) That there shall be partial confirmation of the grants in the two causes in those terms;**

**(c) That the administrators shall hereafter take an audit of all the assets listed in the two applications to determine which ones belong to the company and which ones were registered in the names of the two deceased persons, and compile a report thereon to be placed before the court in the next forty-five (45) days;**

(d) That the administrators shall, in addition, obtain copies of documents of title in respect of all the assets of the two estates and as well as of the company the subject of the two applications, and shall lodge a bundle of the said documents here in court within forty-five (45) days;

(e) That the court shall thereafter distribute amongst the twelve (12) survivors the assets that shall be found, from the said audit reports and bundles of documents, to be registered in the names of the deceased persons herein;

(f) That the matter shall be given a date for mention at the delivery of this ruling after forty-five (45) days for compliance;

(g) That each party shall bear their own costs; and

(h) That any party not satisfied with the decisions in the ruling herein shall be at liberty, within twenty-eight (28) days, to lodge an appeal against the same at the Court of Appeal.

**DATED, SIGNED and DELIVERED at NAIROBI THIS 18<sup>TH</sup> DAY OF MAY, 2018.**

**W. MUSYOKA**

**JUDGE**