



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 323 OF 2010

IN THE MATTER OF THE ESTATE OF GATHARIKI KAMAU GAKUMO (DECEASED)

JOHN KIMATHI GATHARIKI.....OBJECTOR/APPLICANT

VERSUS

HENRY NGIGI GATHARIKI.....RESPONDENT

RULING

This Ruling relates to an application dated 19/08/2014 and filed on 28/08/2014 for orders that -

1. *that this application be certified as urgent and its service be dispensed with in the first instance.*
2. *that the estate of Gathariki Kamau Gakumo (deceased) is alienated, mismanaged, wasted and under threat for sale by the 2nd Defendant's and the only existing Administrator.*
3. *that the Administrator herein Tabitha Wamucii Gathariki (deceased) be substituted by the applicant, herein John Kimathi Gathariki.*
4. *that James Njenga Ngugi is hereby included as a new Administrator in the place and exclusion of the Defendant.*
5. *that, the owners of the land titles deeds emanating from the sub-division of the original title deed named GATHARIKI KAMAU GAKUMO NO. NYANDARUA/LESHAU KARAGOINI/BLOCK 1/14, be cancelled for illegal subdivisions to title, NYA/LESHAU KARAGOINI BLK 1 NYAHURURU FARMERS/1146/7/8/9 and title NYA/LESHAU KARAGOINI FARMERS 1150/1/2/3/4/5 in the names of TABITHA WAMUCII GATHARIKI, LYDIA NJANJA MWAURA, HENRY NGIGI GATHARIKI, STEPHENE NJUGUNA GATHARIKI, TABITHA WAMUCII GATHARIKI, TABITHA WAMUCII GATHARIKI, PHYRIS WANGUI KAMAU, NAOMI WATHERA GATHARIKI, KEZIA NJOKI KARUGU, JOSEPH KAMAU WAKAHU respectively.*
6. *that the Director of the Criminal Investigation Department (C.I.D.) investigate and compare the authenticity of the thumb print purported to be that of TABITHA WAMUCII GATHARIKI (deceased) to the one in her other documentations.*
7. *that, the distribution of the estate in disregard of the law stands revoked.*
8. *that all the properties of the deceased not listed for distribution be considered under the estate of*

our parents for distribution.

9. *that, the costs of this application be in the cause.*

2. The application is based upon the grounds on the face thereof, and the Supporting Affidavit of John Kimathi Gathariki (*the Applicant*) sworn on 19th August 2014, but attached to the Applicant's application described as a Summons also dated 19th August 2014. However this Ruling as already stated is confined to the Application (*Chamber Summons*) filed on 28th August 2014.

3. The Applicant made five points when he urged his application on 7/10/2014 -

1. *that he be made an administrator of the estate of the late Tabitha Wamucii Gathariki;*

2. *that no transfers be made to existing sub-divisions;*

3. *that the Director of Criminal Investigations be ordered to carry out investigations into transfers of certain parcels of land;*

4. *that properties not included in the confirmed grant be included in the distribution of the estate;*

5. *that the Respondents be ordered to pay costs.*

4. I have considered the application in light of the orders sought. The Grant was first made to John Kimathi Gathariki and Henry Ngigi Gathariki on 26th October 2010 and was confirmed by a Certificate of Confirmation of a Grant made on 2nd December 2011. However by an application dated 14th May 2012, made through the firm of B. W. Mathenge & Co. Advocates, Tabitha Wamucii Gathariki, the beneficiary of the estate was substituted as one of the Administrators of the estate, in place of John Kimathi Gathariki (*the Applicant*), who the beneficiary deposed had left the country and was residing in Ethiopia.

5. By the Amended Grant of Letters of Administration Intestate made on 27th July 2012, Tabitha Wamucii Gathariki and Henry Ngigi Gathariki were appointed Administrators of the Estate of the late Gathariki Kamau Gakumo (*deceased*). Consequent upon the issue of the said Amended Grant of Letters of Administration a Rectified Certificate of Confirmation of a Grant was also issued on the same day (*27th July 2012*) distributing the same estate property to the same beneficiary, Tabitha Wamucii Gathariki.

6. The Applicant, in his Statement of Witness also dated 19th August 2014 as well as the Supporting Affidavit, claims that his removal as the first Administrator was stage-managed by the Respondent, who hired an old lady from Molo to represent their ailing mother as the Applicant while he was all the time in Kenya. The Applicant says that the entire exercise was fraudulent, and all orders obtained should be set aside as well as consequential actions based on those orders be nullified.

7. Though the application was duly served at least by the Affidavit of Service of Hermon G. Mwangi, a Process Server, sworn on 23rd September 2014 and filed on 7th October 2014, the Respondent, Henry Ngigi Gathariki has not filed any papers in response to the application. The Affidavit of Service states that the Respondent insisted upon a court summons for him to attend court, and therefore refused to sign on the copies of the application which were subsequently returned to court together with the Affidavit of Service.

8. In refusing to sign the copies of the Application on the pretext that he be served with a court summons the Respondent was entirely misguided as to the effect of service of an application and a court summons. Those processes are similar. Both are a call upon a Respondent or Defendant to answer what may be in the Summons, or in the Application. A Defendant ignores either at his own peril. If the Applicant should demonstrate by an Affidavit of Service, that the Summons or Application was duly served, the court may well exercise its discretion, and allow the orders and prayers in the application.

9. In this case, the Applicant has sought a raft of orders including cancellation of titles arising from sub-divisions of the original Title No. NYANDARUA/LESHAU/RARAGOINI/BLOCK 1/14. **Firstly** as a fraud is in law a crime or offence, it must be strictly proved. **Secondly** as the sub-divisions involve many third parties who are probably innocent purchasers for value without notice, no adverse orders may be made against any of them without first hearing them as to how they came by their titles to the sub-divisions of the original title. I therefore decline to grant any such orders.

10. I also notice that no service was made upon one James Njenga Ngugi who the Applicant seeks to be appointed a new administrator in place of and in exclusion of the Respondent.

11. Administration of estates are touchy issues and any person being introduced as administrator into an already disputed estate needs to expressly consent thereto. There is no such consent by the proposed Administrator James Njenga Ngugi. I therefore decline to appoint him as administrator until he files an affidavit to confirm his willingness to become such an Administrator.

12. Finally, though the Applicant refers to his mother Tabitha Wamucii Gathariki as deceased, there is no record of any application for any person including the Applicant to be appointed administrator of her estate; since the estate of her husband, Gathariki Kamau Gakumo was vested in her by virtue of the Rectified Certificate of Confirmation of Grant dated 27th July 2012.

13. However as no prejudice would be caused to such estate, John Kimathi Gathariki is re-appointed an Administrator of the Estate of the late Gathariki Kamau Gakumo in addition to Henry Ngigi Gathariki until such time as James Njenga Ngugi consents to the appointment.

Dated, signed and delivered at Nakuru this 17th day of October, 2014

M. J. ANYARA EMUKULE

JUDGE