



REPUBLIC OF KENYA



**In re Estate of Lucas Gatonye Gathumbi (Deceased) (Succession Cause 362 of 2008) [2024] KEHC 390 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 390 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 362 OF 2008  
SM MOHOCHI, J  
JANUARY 19, 2024**

**IN THE MATTER OF THE ESTATE OF LUCAS GATONYE GATHUMBI (DECEASED)**

**BETWEEN**

**BENARD MBUGUA GATONYE ..... APPLICANT**

**AND**

**ELIZABETH NJOKI KIMANI ..... 1<sup>ST</sup> RESPONDENT**

**EDWARD KINUTHIA GATONYE ..... 2<sup>ND</sup> RESPONDENT**

**ELIZABETH NJOKI KIMANI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant moved court by way of Chamber Summons dated October 29, 2020 under Section 46 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules supported by the annexed affidavit of Benard Mbugua Gatonye seeking *inter alia*;
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That the court be pleased to direct that Nairobi H.C. Succ Cause No. 576 of 2010 in the matter of the estate of Lucas Gatonye Gathumbi be placed before the court for further directions.
  - e. That the court be pleased to consolidate Nakuru H.C. Succ Cause No. 362 of 2008 with Nairobi H.C. Succ Cause No. 576 of 2010 as both files relate to one and the same deceased person.



- f. That the court be pleased to direct that entries Nos. 2,3,4 & 5 in the land registry for L.R. No. 9066/8 be cancelled and or revoked in order to give effect to the judgment of this court dated March 25, 2013 and the certificate of confirmation dated March 25, 2013.
- g. That the cost of this application be provided for.
2. The Application was premised upon the grounds: -
- i. That this matter was heard and judgment delivered on March 25, 2013.
- ii. That the grant issued in Nairobi H.C. Succ Cause No. 576 of 2010 was obtained by fraud and during the pendency of this cause and it was suspended by this court on May 25, 2012.
3. A Notice of Preliminary Objection was filed on July 9, 2021, as follows;
- i. That the substantive prayers of the application i.e prayers 6 cannot lie as Violet Wambui Gatonye is deceased and the judgment of the court cannot legally be perfected in its form.
- ii. That cancelling the entries No. 2, 3, 4 and 5 in the Land Registry as sought by the Applicant without existence of a legal way forward is legally absurd and untenable.
- iii. That the entire application is fundamentally flawed and/or incompetent and bad in law.
4. While directions were issued on the concurrent determination of the Notice of preliminary objection together with the substantive Application, I am nonetheless duty bound to commence my undertaking by considering the objection raised as the first task and should I sustain the notice then I shall rest my pen.
5. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] as follows:-
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
6. Therefore, Preliminary Objection may only be raised on a pure point of law. *In Re Estate of Joseph Mutiso Kithome* it was held that the issue of *locus standi* is a pure point of law that can be properly raised in a Succession Cause.
7. In the current instance, the High Court presided by W. Ouko (J) (as he then was) deliberated on this matter and entered judgment and as such this court cannot purport to alter the learned Judge’s decision as this would be tantamount to an appeal. An appeal against an order granted by the High Court can only be heard and determined by the Court of Appeal by dint of Article 164(3)(a) of the [Constitution](#) of Kenya. As such, the court is *functus officio* in this regard.
8. While this court is vested with adjudicative powers, once a court becomes *functus officio*, the only orders it can grant are review orders which are an exception to the *functus officio* doctrine. This was aptly summarized in the case of *Jersey Evening Post Ltd vs. Al Thani* [2002] JLR 542 at 550 which was cited and applied by the Supreme Court in [Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others](#) [2013] eKLR that:
- “A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change



of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

9. In light of the above therefore, the only recourse available to the Applicant in this case would be to seek a review of the order of W. Ouko (J) (as he then was) or to appeal against the said order in the Court of Appeal.
10. This Court was *functus officio* after judgment of W. Ouko (J) (as he then was) on the March 25, 2013 and the only exception thereof would be review or an appeal which is not this instant Application. No Appeal or Application for Review was ever filed.
11. This Court is persuaded that upon distribution and settlement of an estate any subsequent fraudulent allegations resulting and or affecting the ownership thereof are best addressed by the Environment and Land Court. In this instance the Applicant brings forth twenty-two (22) year old fraud allegedly committed by a deceased person. The Jurisdiction thus lies elsewhere.
12. The Court notes that an Order sought for transfer of a High court Succession No 576 of 2010 from Nairobi to Nakuru is equally untenable to the extent that this court is not currently seized of the jurisdiction in the aforesaid matter and nothing was placed before this court relating therewith.
13. I associate with a similar position of Hon. Musyoka, J. in *JGM v ZMM* [2013] eKLR, holding that:

“There is no power granted by Section 17 of the *Civil Procedure Act* for the High Court to withdraw a suit from one High Court to another. Indeed, there is not a single provision in the *Civil Procedure Act* and its rules which specifically empowers the High Court to order the transfer of cases from one High Court station to another. Transfer of suits from one High Court station to another can only be ordered by a High Court in exercise of inherent power. However, such power should only be exercised by the High Court judge sitting at the station where the matter is pending – it is that court that should order that the matter be transferred from itself to another High Court station and not vice versa. This is particularly important in a cases such as this, where this court has not had the benefit of seeing the pleadings filed in the cause sought to be transferred”.
14. For the above reasons, I find merit in the Preliminary Objection dated July 8, 2021 and accordingly, the Application dated October 29, 2020 is not tenable and is hereby struck out.
15. This being a family matter each party will bear its own costs.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 19<sup>TH</sup> DAY OF JANUARY, 2024.**

.....  
**S. MOHOCHI**

**JUDGE**

