



**In re Estate of Josephat King’ori Njoge (Deceased) (Succession Cause  
2543 of 2004) [2024] KEHC 7492 (KLR) (Family) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7492 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 2543 OF 2004**

**HK CHEMITEI, J**

**JUNE 20, 2024**

**IN THE MATTER OF THE ESTATE OF JOSEPHAT KING’ORI NJOGE (DECEASED)**

**BETWEEN**

**JOHN MWANGI KING’ORI ..... 1<sup>ST</sup> PETITIONER**

**DANIEL MACHARIA KING’ORI ..... 2<sup>ND</sup> PETITIONER**

**PETER MACHARIA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**ANTHONY WAMBUGU ..... PROTESTOR**

**RULING**

1. This ruling relates to the application dated 17<sup>th</sup> December, 2022 filed by the Protestor, Anthony Wambugu, seeking for orders that:
  - (a) The Deputy Registrar of this honorable court be authorized to execute all necessary documents to facilitate sub – division and transfer of L.R. No. Laikipia/marmanet/328 in terms of the judgment delivered herein on 9<sup>th</sup> April, 2019 and the certificate of confirmation of grant issued pursuant thereto in view of refusal or neglect by the estate administrators to do so.
  - (b) The County Surveyor, Laikipia be authorized to sub – divide and register the mutation instrument of L.R. No. Laikipia/marmanet/328 in accordance with the certificate of confirmation of grant issued herein.
  - (c) The Assistant County Commissioner, Marmanet Division and the OCS, Marmanet Police Station do provide security during sub – division of the said land parcel and ensure peace and order is maintained thereafter.



2. The application is supported by undated affidavit sworn by Anthony Wambugu who states inter alia that judgment in this case was delivered on 9<sup>th</sup> April, 2019 through which the claim by the estate of Esther Wanjiru Wambugu (Deceased) to half portion of L.R. No. Laikipia/marmanet/328 was upheld. The petitioners were confirmed as administrators of the deceased's estate and were required to distribute the estate in terms of the judgment.
3. The Petitioners, he deponed have taken no steps in ensuring implementation of the said judgment and have instead engaged in filing multiple applications aimed at defeating it.
4. That through his request, the Petitioners were summoned by the Assistant County Commissioner, Marmanet Division to agree on distribution of the estate but they failed, refused or neglected to appear.
5. It is imperative that the instant application be heard and determined in the interest of justice as any further delay in implementation of the certificate of confirmation of grant is highly prejudicial to beneficiaries of the estate of Esther Wanjiru Wambugu (Deceased) who he represents in the instant proceedings.
6. In opposition, John Mwangi King'ori has filed an application for revocation or annulment of grant dated 6<sup>th</sup> November, 2023 seeking for Orders That:
  - (a) Pending the hearing and determination of this summons status quo prevailing as of 6<sup>th</sup> November, 2023 be maintained as until the determination of the summons herein.
  - (b) This honourable court be pleased to revoke and annul the certificate of confirmation of grant dated 9<sup>th</sup> April, 2019.
  - (c) All actions undertaken pursuant to the issuance of the grant be declared null and void.
  - (d) This honourable court be pleased to forthwith issue a fresh certificate of confirmation of grant with the schedule of distribution being delineated solely to the beneficiaries of the deceased.
  - (e) The honourable court be pleased to issue any other order it deems fit and just in the interest of justice.
7. The application is supported vide replying affidavit sworn by John Mwangi King'ori on 6<sup>th</sup> November, 2023. He states inter alia that on 9<sup>th</sup> April, 2019 this honorable court issued a certificate of confirmation of grant apportioning half of the deceased's estate to the estate of Esther Wanjiru Wambugu. In issuing the impugned grant, this honourable court was misguided through a manipulative account of the apparent history and sequence of judicial proceedings pertaining to the subject estate.
8. Owing to the evident inadvertent misapprehension of the said sequential proceedings, it behooves him to intricately elaborate on the sequence of proceedings that led to the applicants' proposed distribution, which have not been frankly demonstrated clearly.
9. The applicant went ahead to give chronology of events and history of the matter beginning with Esther Wanjiru's complain and arbitration before the panel of elders against Kingori Njuki (Deceased) & Felisca Wakarima Kingori being Panel of Elders Land Dispute No. 24 of 1982: *Esther Wanjiru v Kingori Njuki & Mrs. Elizabeth Wakarima*.
10. The elders pronounced the arbitration award to wit, "The panel of elders had no reason to doubt that the complainant and the respondent bought together plot No. 328 Marmanet Settlement Scheme. Therefore, the plot is jointly owned by them and the plot should be subdivided into two equal parts. And as well share the settlement loan which is due or been paid."



11. Esther Wanjiru thereafter filed an application for enforcement of the award in the Resident Magistrate's Court at Nyahururu: Land case No. 4 of 1983: *Virginia Wangui Wambugu v King'ori Njonge & Felisca Wakarima* where the court ordered,

“That the executive officer of this honourable court be and is hereby authorized to execute all the necessary and appropriate documents to effect the sub – division of Plot No. 328 Marmanet Settlement Scheme into 2 equal portions and transfer of the ½ (half) portion to Virginia Wangui Wambugu in terms of the elder's decision herein.”

12. King'ori Njuki (Deceased) then appealed against the said orders in High Court of Kenya at Nakuru, Civil Appeal No. 9 of 1983: *King'ori Njuki & Another v Esther Wanjiru*. The court issued a verdict to wit,

“I agree with the learned counsel for the Respondent that no sufficient reason was given by the appellant before learned magistrate to justify setting aside the arbitration award. In the result, I see no merit in this appeal which is dismissed.”

13. On or around the year 1987, King'ori Njonge (Deceased) filed an application to set aside the said arbitration award owing to non – compliance with the arbitration award in the High Court of Kenya at Nakuru, Civil Suit No. 124 of 1987 *King'ori Njonge v Virginia Wangui Wambogo* where the court ordered,

“That the Defendant/ Respondent by herself, her agents, servants and/or employees be restrained from constructing a home and using the plot No. 328 Marmanet, Laikipia Rift Vallet Province until this suit is heard and finally determined.”

14. Ultimately, the High Court of Kenya at Nakuru directed that the matter be placed again before the panel of elders for determination of King'ori's application for setting aside owing to non–compliance. To that end, the District Commissioner was ordered by the said court to reconvene the arbitration by summoning all constituent parties.

15. Pursuant to the High Court's orders, with the said application being referred to arbitration, the panel of elders reconvened over the matter in Civil Case 124 of 1987 – High Court of Kenya *King'ori Njoroge v Virginia Wangui Wambogo* Plot No. 328 Marmanet Scheme – Case before 1/ 2/ 89.

16. The matter proceeded to hearing where the issue of non–compliance with the initial arbitral award was therein comprehensively canvassed and both Kingori Njoroge (deceased) and Virginia Wangui Wambogo testified and were subjected to cross – examination.

17. The panel's verdict was:

“Although it is clear that Virginia's mother contributed very little towards the loan repayment, it is the feeling of the elders that she has the right to share the land in accordance with her contributions towards the loan repayment. It is therefore the decision of the elders that Mr. Kingori gets 30 acres and Virginia's mother Esther Wanjiru gets 5 acres out of 35 acres. Since she has lived and cultivated the land for long. The survey fees in subdividing the land is to be paid by Mr. Kingori since he got the bigger portion of the land. This decision of the panel of the elders supersedes the previous decision made since the question of loan repayment was not put to account.”



18. He went on to depose that it marked the finality of the judicial proceedings pertaining to all that property known as Plot No. 328 Marmanet Settlement Scheme. It is worth mentioning that evidence of payment was tabled before the said panel by dint of the Director of Land Adjudication and Settlement letter dated 20<sup>th</sup> April, 1989. The very same panel of elders who set out the original award, thereafter with authority and leave of the High Court of Kenya at Nakuru, quashed and annulled it.
19. It was therefore his view that the court was not presented with the above cogent evidence as the arbitral award was never vacated.
20. This honourable court therefore has the discretion to call to order a matter where material and compelling facts had been misrepresented to the court, in order to correct apparent facts and truths. The respondents have since elected to file an application seeking the revocation of the impugned grant owing to the apparent misapprehension of the court of the actual sequence of proceedings in the matter.
21. He went on to state that as a senior member of the deceased's extended family, he has irrefutable knowledge that Esther Wanjiru was survived by 4 daughters i.e. Mary Kabura Nyaga, Mary Muthoni Mwangi, Mary Waceke Mburu and Virginia Wangui. With the protestor being a grandson of Esther Wanjiru, he has omitted the aforementioned fact in a spirited effort to conceal the rights of Esther Wanjiru's surviving issues who supersede his. It is in the interest of justice that this honourable court revokes and annuls the said grant owing to the emergent abrogation of law.
22. Anthony Wambugu has filed a replying/ supplementary affidavit sworn on 13<sup>th</sup> February, 2024, in response to the summons for revocation or annulment of grant dated 6<sup>th</sup> November, 2023 and further in support of his summons dated 17<sup>th</sup> December, 2022. He states inter alia that application dated 6<sup>th</sup> November, 2023 is incompetent, bad in law and an abuse of the court process because Judgment in this matter was delivered on 9<sup>th</sup> April, 2019 by Honourable Lady Justice L. A. Achode (as she then was) after considering all the materials and evidence presented by all the parties.
23. John Mwangi Kingori filed a Notice of Appeal against the said judgment on 19<sup>th</sup> May, 2019. On 14<sup>th</sup> August, 2019, the petitioners' then advocates M/S Gachiengo Gitau & Co. Advocates filed a notice of withdrawal of the appeal.
24. On 28<sup>th</sup> August, 2019, the petitioners filed a chamber summons application dated 27<sup>th</sup> August, 2019 seeking the Deputy Registrar of this court to facilitate the tracing of original court proceedings in Nyahururu Resident Magistrate's Court Land Case No. 4 Of 1983 And Nakuru High Court Civil Appeal No. 9 Of 1987 and that the honourable court to allow the introduction of further evidence from those two files in the interest of justice.
25. On 16<sup>th</sup> May, 2022, the petitioners applied to the Court of Appeal for extension of time in order to file and serve a notice of appeal out of time against the judgment delivered on 9<sup>th</sup> April, 2019 but their application vide Nairobi C.o.a Civil Application No. E167 Of 2022 was dismissed in a ruling by Honourable Justice of Appeal J. Mativo delivered on 28<sup>th</sup> October, 2022.
26. On 18<sup>th</sup> November, 2022, the 2<sup>nd</sup> petitioner applied to this honourable court for leave to appeal out of time against the judgment of 9<sup>th</sup> April, 2019. On 5<sup>th</sup> May, 2023, the said application was dismissed. Having exhausted all the legal tricks in the books, the petitioners decided to file the application for revocation of grant dated 6<sup>th</sup> November, 2023 in the pendency of his application dated 17<sup>th</sup> December, 2022 with obvious intention to scuttle distribution of the deceased's estate.
27. He stated that the application dated 6<sup>th</sup> November, 2023 is res judicata in view of all the aforesaid past judgment and rulings and ought to be dismissed with costs. All the issues raised in the application dated



6<sup>th</sup> November, 2023 and John Mwangi Kingori's replying affidavit have previously been addressed by this court in the past judgment and rulings and cannot arise for determination in the same suit.

28. The application dated 6<sup>th</sup> November, 2023 does not meet the legal threshold for revocation of the grants issued in their favor pursuant to their own application and full participation in the proceedings herein. The dispute over the deceased's estate he said has been existing for the last 40 years since the year 1983 and it is high time this litigation is put to rest.
29. John Mwangi King'ori has filed submissions dated 31<sup>st</sup> January, 2023.
30. Anthony Wambugu has filed submissions dated 10<sup>th</sup> February, 2023. He has placed reliance among others on *re Estate of Joel Thara Kuria (Deceased)* [2022] eKLR where the court held,

“ 15. As held in Rhoda Wairimu Karanja (supra), this court can be prompted to grant the leave sought by the Applicant herein where circumstances require such as when weighty issues arise requiring further serious judicial consideration and interrogations. If this court declines to grant the leave sought by the Applicant, then he will be at liberty to seek for the same in the appellate court. In *John Mwita Murimi & 2 others v Mwikabe Chacha Mwita 7 Another* [2019] eKLR, the Court of Appeal re-affirmed this position by holding as follows: “...Under the *Law of Succession Act*, there is not express automatic right of Appeal to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this court...”

### **Analysis and Determination**

31. I have carefully considered the applications, the responses as well as the written submissions filed by the parties and wish to address them as follows.
32. It is evident from the litany of applications and rulings that the parties have been here for almost four decades. The issue in my view was a combination of factors which the court could not assist the parties.
33. It appears for instance that the Applicants had issues with their counsels on record which necessitated that they change them and at some point decided to act alone. Their effort to seek review and leave of the court was unsuccessful because of legal technicalities.
34. I have read the rulings and judgements of Achode and Mativo JA as well as Odero J.
35. The judgement of Achode J (as she was) was never and has never been appealed against. The Applicant's efforts failed before Mativo JA
36. Their efforts before Odero J for review again failed. I therefore agree with the Respondents that the application dated 6<sup>th</sup> November 2023 is ideally res judicata. The historical background and chronology of events as well as the evidence presented in the supporting affidavits were well within their possession and knowledge when the matter was before Achode J (as she then was).
37. In effect to raise the same now is to ask the court to litigate again over the same matter which runs foul Section 7 of the *Civil Procedure Act*, that is res judicata which states;

“No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the parties under whom they are or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit



in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

38. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* (2017) eKLR, the Supreme Court outlined the elements that must be satisfied for the doctrine of res judicata to be invoked to be as follows:

“The suit or issue was directly and substantially in issue in the former suit.

That former suit was between the same parties or parties under whom they or any of them claim.

Those parties were litigating under the same title.

The issue was heard and finally determined in the former suit.

The court that formerly heard and determined the issue was competent to try subsequent suit or the suit in which the issue is raised.”

39. They ought to have appealed against the same judgement of 9<sup>th</sup> April 2019 within the time frame required. This court shall not delve into it as this court and in particular Odero J pronounced herself on 5<sup>th</sup> May 2023.
40. In the premises I think I have stated much to demonstrate that I do not find merit in the application dated 6<sup>th</sup> November 2023 and it is hereby dismissed with no order as to costs.
41. As regards the application dated 17<sup>th</sup> December 2022 I find merit on it for the simple reason that it is essentially effecting the grant already on record pursuant to the judgement dated 9<sup>th</sup> April 2019. As found above, to the extent that the grant is holding this court shall not be an impediment to it.
42. For the above reasons the application is allowed as prayed but with no order as to costs.

**DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**H K CHEMITEI**

**JUDGE**

