



REPUBLIC OF KENYA



**In re Estate of Stephen Karuri Nderitu (Deceased) (Succession Cause
13 of 2019) [2023] KEHC 591 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 13 OF 2019
CM KARIUKI, J
FEBRUARY 9, 2023**

IN THE MATTER OF THE ESTATE OF STEPHEN KARURI NDERITU (DECEASED)

BETWEEN

DICKSON MWAI NDEGWA APPLICANT

AND

DAVID MWANGI KARURI 1ST RESPONDENT

ROSE WANGUI KARURI 2ND RESPONDENT

RULING

1. The matter before the court is an application by the Applicant dated 10th March 2021 seeking orders that:-
 - I. That the honourable court be pleased to enjoin the Applicant/interested party in this cause.
 - II. That the honourable court be pleased to amend P&A 5 Form in this cause to include the Applicant/Interested Party and Joyce Wanjiku Gitahi as beneficiaries of the estate and include LR No. Nyeri/Watuka/640 as assets therein.
 - III. That the honourable court be pleased to order the status quo to remain/be maintained pending the hearing and distribution of the estate.
 - IV. That the Petitioners/Intended Administrator/Respondent be restrained from interfering with the estate or any action that may be prejudicial to the interest of the other beneficiaries
 - V. That the honourable court do make other/further orders it deems fit to protect the interest of all beneficiaries herein
 - VI. That costs be in the cause



2. The application was founded on grounds that:-
 - I. The Applicant/Interested Party is a direct beneficiary of the estate of the deceased
 - II. The Respondents/Petitioners/Intended Administrators have deliberately failed to include all beneficiaries of the estate of the deceased and, in particular, LR No. Nyeri/Watuka/640 which is registered in the name of the deceased.
 - III. That the estate should be protected in the interest of justice and all beneficiaries.
3. The application was further grounded on the supporting affidavit deponed by Dickson Mwai Ndegwa dated 10th March 2021. He deponed that he entered into a sale agreement with the deceased herein and Gerald Theuri Kahianyu (deceased) for the sale of LR No. Nyeri/Watuka/640, the suit land herein and signed the sale agreement.
4. He averred that after making the initial deposit, they agreed that the Applicant should assume physical possession of the portion he purchased and he has since been in occupation.
5. That he made payments of purchase price to the total of over 1.8million shillings to the deceased before his demise and that before his demise the suit land was in occupation of himself and Joyce Wanjiku Gitahi (sister in law to the deceased) who has lived in the land for over 40 years and is also a beneficiary of the estate.
6. That the Respondents lodged a succession cause and in their letter from the Chief Muhotetu Location, failed and/or refused to include his and Joyce Gitahi's name as beneficiaries and also refused to avail the certificate of official search to confirm that the suit land belonged to the deceased.
7. That there is a court order in Nyeri Chief Magistrate's Court Award No. 2 of 2008 confirming that he is entitled to the estate of the deceased and that it is evident that the Respondents have deliberately failed to give a clear account of the deceased's estate and liabilities which is against The Law of Succession Act Cap 80 Laws of Kenya and therefore they should be granted the orders sought.
8. On the other hand, the 2nd administrator/Respondent filed a replying affidavit dated 15th February 2022 sworn by herself. She deponed that this court lacks jurisdiction to enforce the terms of the sale agreement dated 28th February 1995 for sale of the suit land.
9. That the aforesaid sale agreement is unenforceable in law because from the terms of the agreement, the entire purchase price ought to have been paid within 2 years and in default, the agreement would stand rescinded and the deceased would be obligated to refund part of the purchase price paid.
10. That to their knowledge the Applicant defaulted in making payments and as a consequence the agreement was rescinded on expiry of 2years and as such the Applicant ceased to possess any interests over the suit land and that the Applicant agreed to be refunded of the purchase price paid, and since then the Applicant or Joyce Wanjiku Gitahi has never used, possessed or occupied any portion of the suit land.
11. That the suit land forms part of the estate, and since the grant of letters of administration is yet to be confirmed, there is an opportunity for the administrators to include it during confirmation.
12. In view of the foregoing, both the Applicant and Joyce Wanjiku Gitahi are strangers to the estate, and as such, they should not benefit from the estate.
13. Applicant's Submissions was unavailable at the time of drafting this ruling.
14. Respondent's Submissions



15. The Respondents reiterated what was contained in their replying affidavit; they asserted that the Applicant is agitating a cause of action based on a sale agreement dated 28th February 1995, the sale agreement herein and that the current application was filed on 26th January 2022, which was 27 years from the date of the agreement. That the said agreement has been caught up by the law of limitation and is thus unenforceable and cannot be relied upon to enforce any rights to acquire any interest. Reliance was placed on [Re Estate of Mugira Ngaruni \(deceased\)](#) [2020] eKLR
16. It was argued that the Respondents have not committed any offence known by law in regards to the suit land and that they only became aware of the suit land being part of the estate after the grant had been issued.
17. They also submitted that this court lacks jurisdiction to make a determination on issues surrounding the ownership of the suit land and to enforce the sale agreement. That the main issue for determination in the application is the ownership of the suit land. They relied on Article 165(5) (b) and 162 (2) of the [Constitution](#), Rule 41 (3) of the [Probate and Administration Rules](#) & [In Re Estate of Kinogu Mukiria \(Deceased\)](#) [2022] eKLR
18. In conclusion, the Respondents asserted that the Applicant and Joyce Wanjiku Gitahi are not beneficiaries to the estate of the deceased and that the Applicant lost his right to the suit land when the sale agreement was rescinded and the purchase price was refunded. That the application has been brought in bad faith and with ulterior motives and as such, the same should be dismissed with costs.

Analysis and Determination

19. First and foremost, I would like to address the issue of jurisdiction as raised by the Respondents. They submitted that this court lacks jurisdiction to make a determination on issues surrounding the ownership of the suit land and to enforce the sale agreement and that the main issue for determination in the application is the ownership of the suit land.
20. It is trite law that if this court lacks jurisdiction, the matter will be at an end as this court will have to down its tools and take no further step as was held by Nyarangi J in [Owners of the Motor Vessel “Lilian S” vs Caltex Oil \(Kenya\) Ltd](#) [1989] KLR 1.
21. Further, in [Samuel Kamau Macharia vs KCB & 2 Others](#), Civil Application No. 2 of 2011, it was held that a court’s jurisdiction flows from either the [Constitution](#) or legislation or both.
22. Accordingly, Article 165(3) of the [Constitution](#) confers the High Court with jurisdiction and provides:-
 - (3) Subject to clause (5), the High Court shall have-
 - i. Unlimited original jurisdiction in criminal and civil matters;
23. The jurisdiction is subject to Article 165(5) of the [Constitution](#) which provides:-
 - (5) The High Court shall not have jurisdiction in respect of matters:-
 - Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - Falling within the jurisdiction of the courts contemplated in Article 162(2).



24. Pursuant to Article 162(2) of the Constitution, the Environment and Land Court Act 2011 was enacted and in Section 13 it confers the Environment and Land Court with jurisdiction as follows:-

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes-

- i. Relating to environment planning and protection, climate issues, land use plannings, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- ii. Relating to compulsory acquisition of land;
- iii. Relating to land administration and management;
- iv. Relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land; and
- v. Any other dispute relating to environment and land.

25. Moreover, The Section 47 of the Law of Succession Act provides for jurisdiction of the High Court in respect of matters falling under the Act as follows:-

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

26. Rule 41(3) of the Probate and Administration Rules provides that:-

Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate of the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.

27. Inevitably, I have carefully considered the provisions relied on by the parties and their respective arguments. I have also relied on the background facts leading to the filing of the application herein that emanates from the fact that the Applicant allegedly owned the suit land together with the deceased and another person and would therefore seek to be enjoined as a beneficiary of the deceased's estate.

28. I, therefore, disagree with the Respondent that the main issue for determination herein is the ownership of the suit land. The Environment and Land Court have jurisdiction to determine ownership of land, but where such ownership affects the interpretation and/or implementation of a grant and the estate of the deceased such issue can only be determined by this court.

29. I further rely on the case of *Priscilla Ndubi and Zipporah Mutiga vs. Gerishon Gatobu Mbu*, Meru Succession Cause No. 720 of 2013, held that:-

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where



issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the *Probate and Administration Rules* was enacted so that claims which are prima facie valid should be determined before confirmation.”

30. Accordingly, I find that this court is possessed of the requisite jurisdiction to determine the instant application without determining the issue of ownership of the suit land.
31. On that account, I will proceed to determine the rest of the issues raised herein. The Applicant asserted that he entered into a sale agreement with the deceased herein and Gerald Theuri Kahianyu (deceased) for the sale of the suit land herein and signed the sale agreement. That he made an initial deposit, and they agreed that the Applicant should assume physical possession of the portion he purchased, which he has since been in occupation of together with Joyce Gitahi for over 40 years.
32. Moreover, he stated that he made payments of the purchase price to a total of over 1.8 million shillings to the deceased before his demise. Yet, the Respondents lodged a succession cause and, in their letter from the Chief Muhotetu Location, failed and/or refused to include his and Joyce Gitahi’s name as beneficiaries and also refused to avail the certificate of official search to confirm the suit land belonged to the deceased. He also submitted that there is a court order in Nyeri Chief Magistrate’s Court Award No. 2 of 2008 confirming that he is entitled to the estate of the deceased
33. Contrarily, the Respondents averred that the Applicant is agitating a cause of action based on a sale agreement dated 28th February 1995 and that the current application was filed on 26th January 2022, which was 27 years from the date of the agreement. That the said agreement has been caught up by the law of limitation and is thus unenforceable and cannot be relied upon to enforce any rights to acquire any interest. However, I would like to reiterate that at this stage, this court, in determining the application herein, will not address the issue of ownership of the land or enforceability of the sale agreement. However, the court is interested in achieving its mandate as set out in Rule 41(3) of the *Probate and Administration Rules* herein.
34. Additionally, the Respondent asserted that the sale agreement was rescinded because the entire purchase price ought to have been paid within 2 years, and the purchase price was refunded to the Applicant. He, therefore, lost his right to the suit land and cannot be said to be a beneficiary of the estate. Since then, the Applicant or Joyce Wanjiku Gitahi has never used, possessed, or occupied any portion of the suit land.
- 35.. I have carefully perused the documents availed by the parties, and the Applicant attached the said sale agreement dated 28th February 1995 that clearly stated that if the Applicant will not have paid the balance of kshs 850,000 after two years. The deceased will refund the money the Applicant will have paid without any interest. There is also evidence of 1.8 million paid to the deceased and a certificate of official search proving that the suit land indeed belongs to the deceased.
36. Nevertheless, the Respondents did not provide any evidence to prove that the deceased indeed paid back the Applicant and that the Applicant has never been in use and possession of the said land. In any case, they averred that they only became aware of the suit land being part of the estate after the grant had been issued. My presumption then is that they had no knowledge of the suit land by the time the grant was issued, and so how would then would they know the state of the suit land in terms of use and possession if they didn’t even know of its existence?
37. There is a final curious point that stood out for me; the Applicant attached a court order made in Nyeri Chief Magistrate’s Court Award No. 2 of 2008 confirming that he is entitled to the estate of the deceased. However, I was not able to make out the same from the same. I would therefore need to



call for the file from Nyeri Chief Magistrate's Court to shed more light on the orders made therein, which I will undertake to do pending the determination of whether the Applicant is a beneficiary of the deceased's estate or not.

38. In view of the foregoing, the Applicant has laid out a proper basis for enjoining him as an interested party in this cause. I would like to reserve the issue of determination as to whether he is a beneficiary of the deceased's estate or not for a later date.
39. Moreover, since neither the Applicant nor Respondent contested the fact that the suit land forms part of the estate, the grant should be reviewed, and the same should be included as an asset of the estate forthwith.
40. In terms of restraining the administrators from interfering with the estate or from any action that may be prejudicial to the interest of the other beneficiaries, I will only allow that prayer in terms of the suit land, as the rest of the estate does not affect the Applicant in any way. Therefore, this Court, therefore, orders;
 - i. That preservative orders do issue restraining the Respondents either by themselves, their servants, or any other person acting from their authorization or control restraining them from intermeddling with LR No. Nyeri/Watuka/640.
 - ii. Further, the status quo shall be maintained in regard to the suit land until the hearing and determination of this matter or until further orders of the court.
 - iii. The deputy registrar of this court to ensure Nyeri Chief Magistrate's Court Award No. 2 of 2008 is forwarded to this court for the purposes of the determination of the instant dispute.
 - iv. Parties to bear their costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 9TH DAY OF FEBRUARY, 2023.

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CHARLES KARIUKI

JUDGE

