



REPUBLIC OF KENYA



**In re Estate of Charles Gathecha Kigwe (Deceased) (Succession Cause
256 of 1980) [2023] KEHC 569 (KLR) (Family) (3 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 569 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 256 OF 1980
MA ODERO, J
FEBRUARY 3, 2023**

BETWEEN

**GRACE NYAMBURA KIARIE APPLICANT
SUING AS AN ADMINISTRATOR OF THE ESTATE OF JECINTA NJERI
KIARIE – DECEASED**

AND

**GEORGE MUHOHO 1ST RESPONDENT
DAVID WAIGANJO KIGWE 2ND RESPONDENT
PETTY WANJIKU GATHECHA 3RD RESPONDENT
SUED AS THE ADMINISTRATORS OF THE ESTATE OF PAUL GATHECHA
KIGWE & KEZIAH NJAHIRA KIGWE RESPECTIVELY**

RULING

1. Before this court for determination is the notice of preliminary objection dated October 18, 2022 and the summons dated August 28, 2019. The court directed that the two would be heard and determined together and were to be canvassed by way of written submissions.

Background

2. This matter concerns the estate of the late Charles Gathecha Kigwe(hereinafter ‘the Deceased’) who died intestate on 1st February, 1974. The Deceased survived by three (3) wives namely Gladys Wambui Kigwe (1st wife), Kezia Njahira Kigwe (2nd wife) and Selah Mumbi Kigwe (3rd wife). The Deceased was also survived by twenty – six (26) Children.



3. The estate of the Deceased comprised of Coffee Estates which were managed by East African Acceptances Ltd. Following the demise of the Deceased Njenga Karume and George Muhohwere appointed as the Administrators of the Estate vide a Grant issued to the two on September 13, 1980. The Grant was duly confirmed on June 27, 1986.
4. The applicant herein Grace Nyambura Kiarie is a Granddaughter to the Deceased. The applicant is the eldest daughter of Jecinta Njeri Kiarie a daughter of the Deceased (from the 2nd house) who passed away on April 19, 2010. A copy of the Death Certificate Serial Number 127532 is annexed to the supporting Affidavit dated August 28, 2019.
5. The applicant filed in this proceedings a summons dated August 28, 2019 seeking the following orders:-
 - “ 1. That the Estate of Jecinta Njeri Kiarie (Deceased) is entitled to 676.8 Acres out of the Estate of the deceased herein as per the certificate of confirmation of grant issued in this matter.
 2. That the respondents be and are hereby ordered to transfer 626.8 Acres out of the Estate of the deceased to the applicant and or the Estate of Jecinta Njeri Kiarie herein within ninety (90) days from the date of this Order.
 3. That in default of prayer (b) herein above, the respondents do pay the applicant and or the Estate of Jecinta Njeri Kiarie herein the current value of 625.8 Acres and judgement entered jointly and severally against the Respondents accordingly.
 4. That the court be pleased to issue appropriate punitive Order under section 45, 94 and 95 of the Law of Succession Act cap 160 Laws of Kenya against the respondents.
 5. That the 1st respondent do render just and true accounts of the Estate of the above mentioned deceased from the year 1980 to date.
 6. That the respondent jointly and severally be ordered to pay damages and loss occasioned to the Estate of Jecinta Njeri Kiarie (Deceased) and or the Applicant herein.
 7. That the court be pleased to award punitive and exemplar damages against the Respondents jointly and severally as it deems fit and just to grant.
 8. That the cost of this summons be borne by the Respondents.
 9. That the cost of this application be provided for.”
6. The summons which was premised upon sections 45, 47, 94 and 95 of the Law of Succession Act cap 160, Laws of Kenya, Rules 49 and 73 of the Probate and Administration Rules, article 165 (3) (a) of the Constitution of Kenya 2010 and all enabling provisions of law was supported by the Affidavit of even date sworn by the Applicant.
7. In her supporting affidavit the applicant deposed that her late mother Jecinta Njeri Kiarie was entitled 676.8 acres out of the estate as the Deceased as per the Certificate of Confirmed Grant. The applicant went on to allege that the respondents had converted land that was due to the 1st House to their own private property and have disposed of the same. That the 2nd respondent and his brothers transferred thousands of acres of the estate to themselves and only gave out 50 acres to the sisters.



8. The applicant further averred that the 3rd respondent Petty Wanjiku Gathecha took out letters of Administration to the estate of Keziah Nyahira Kigwe (the 1st wife of the Deceased herein) and transferred estate property to third parties.
9. Finally the applicant alleged that the 1st respondent George Muhoho who is the only surviving administrator of the estate of the Deceased has never given a true account to the beneficiaries regarding his management of the estate.
10. This application filed by the Applicant was opposed by the 2nd respondent David Waiganjo Kigwe who is a son of the Deceased through a replying affidavit dated April 8, 2021 and the further affidavit dated June 3, 2021.
11. The 2nd respondent avers that the applicants late mother received her share of 50 acres of land and that during her lifetime the said Jecinta Njeri Kiarie never raised any issue regarding the mode of distribution of the estate. That the 1st House were given their share of the estate which the 1st wife Keziah Nyahira Kigwe distributed to her children as she wished.
12. The 3rd respondent Petty Wanjiku Kigwe filed a replying affidavit dated November 5, 2021 denying the averments made by the applicant in her supporting affidavit.
13. The 1st respondent George Muhoho in response to the summons dated August 28, 2019 filed a Notice of Preliminary Objection dated October 18, 2022, which was premised upon the following grounds:-
 1. The applicant Grace Nyambura Kiarie has no locus standi to commence the application herein.
 2. The applicants application is statute barred.
 3. The applicants application is in any event instituted improperly and or brought under the wrong provisions of the law.
 4. The issues raised are *res judicata* vide NRBI HCCC N 3977 of 1982 Hon James Njenga Karume & George Muhoho v Gladys Wambui Kigwe & 28 others.”
14. Pursuant to directions issued by the court the Applicant filed the written submissions dated September 1, 2022 and November 18, 2022 whilst the 1st respondent relied upon his written submissions dated November 11, 2022.

Analysis and Determination

15. I will first dispose of the notice of preliminary objection by which the 1st Respondent sought to have the summons dated August 28, 2019 struck out. I have considered the written submissions filed by both parties.
16. The definition of a preliminary objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA where the court states as follows: -

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”.....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 facts



pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”

17. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court of Kenya stated as follows:-

“a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

18. Therefore in order for a preliminary objection to succeed the following tests must be satisfied.
- (i) The preliminary objection should raise a pure point of law.
 - (ii) The preliminary objection must be argued on the assumption that all the facts pleaded are correct.
 - (iii) The preliminary objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
 - (iv) A valid preliminary objection ought if successful dispose of the entire suit.” (Own emphasis)
19. This preliminary objection raise two issues. Firstly that the Applicant lacks locus standi to act in this matter and secondly that the application dated August 28, 2019 is ‘res judicata’.

Locus Standi

20. The term *locus standi* is a Latin term which literally means “a place of standing”. It refers to the capacity of a party to file suit or to act in a particular matter. Where a party has no ‘locus standi’ in a matter then their action is automatically null and void.
21. It is common ground that the applicant herein is the granddaughter of the Deceased. She is not one of the beneficiaries who was named and recognized in the Petition for Grant of letters of Administration Intestate. In the confirmed Grant dated June 27, 1986 the estate of the Deceased was to be distributed as follows:
- i. Gladys Wambui Kigwe’s House
George Gathecha Kigwe
Annah Njahira 1/8 each of L.R No. 10821
Joseph Wathua Kigwe
Gabriel Muritu Kigwe
Salome Njeri 1/8 each of L.R No. 10821
Pauline Muthoni
Joyce Wachuka
 - ii. Keziah Njahira’s House
Pauline Gathecha Kigwe
Lucy Wanjiru
Margaret Wanjiku



David Waiganjo Kigwe
John Muritu Kigwe
Jacinta Njeri 1/11 each of L.R No. 10823
Virginia Wanjiku
Francis Kariuki Kigwe
Bennadete Wachuka Kigwe
Christopher Kangethe Kigwe
Selina Wambui

iii. Salome Mumbi's House

Maria Njahira
Rosemary Wanjiku
Cecilia Njeri
James Gathecha Kigwe 1/7 each of L.R No. 10822
Patrick Kibathi Kigwe
Margaret Wachuka
Jane Waruiru

22. The applicant purports to be acting on behalf of the estate of her late mother Jacinta Njeri Kiarie who was a daughter of the 2nd wife of the Deceased. Therefore the Applicants interest in the estate is confined to the distribution of the property known as LR No. 10823 where her mother was entitled to a 1/11th share of the said parcel of land.
23. In order for the applicant to lawfully represent the estate of her late mother she must produce in court a confirmed Grant naming her as one of the Administrators of the estate of the late Jacinta Njeri Kiarie.
24. In the case of *Otieno v Ougo* [1986 – 1989] EA 468 the court stated that:-
- “ An administrator is not entitled to bring any action as administrator before he has taken out letters of Administration. If he does the action is incompetent as of the date of its inception.”
25. The applicant herein has not produced in this matter a certificate of confirmed Grant naming her as one of the Administrators of the estate of her late mother. In her supplementary affidavit the applicant has stated that she was by consent named as an administrator of her late mothers estate and she has annexed a copy of a summons for confirmation of Grant dated June 28, 2018. This will not suffice. No evidence has been annexed to show that the Grant issued on January 24, 2018 was ever confirmed. As such, the Applicant cannot be deemed to be the legal representative of the estate of Jacinta Njeri Kiarie and has no legal capacity to act on behalf of the said estate.
26. In the case of *Gabriel Simali & 7 others v George Oduor Oloko* [2020] eKLR Hon Justice Kiarie stated as follows:



11. The second instance is where the grandchild can stake his claim on his/her parents' right to inherit. Musyoka J. in the case of *Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR described such a right in the following terms: -

.....grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents. Whereas I agree with the learned judge, such must be clothed with legal powers to do so; he/she must first out seek and obtain letters of administration of their parents' estate. This is when he can claim his/her parents inheritance from the estate of the deceased. In the instant case the appellants have not demonstrated that they have obtained letters of administration to allow them to stake any claim in the estate of the Deceased.” (own emphasis)

27. The same situation pertains here. The applicant is staking a claim to the estate of the Deceased (her grandfather) on behalf of the estate of her late mother. Such a claim can only be entertained where the applicant demonstrates that she has been validly appointed as the legal representative of the estate of the her late mother. No such proof has been tendered by the applicant.
28. The filing of a summons for confirmation of Grant will not suffice nor is a consent to the confirmation of Grant signed by the other beneficiaries sufficient. The only legal instrument that will allow the applicant to act for the estate of her late mother is a certificate of confirmed Grant issued in her name.
29. The Applicant acted in haste. She ought to have obtained the confirmed Grant before filing the application in this matter. In the circumstances I find that the Applicant has no *locus standi* in this matter. She filed the Summons dated August 28, 2019 without the requisite legal capacity to do so. Accordingly summons dated August 28, 2019 is therefore a non-starter and is hereby struck out.

Res Judicata

30. Having determined that the applicant has no *locus standi* in this matter there is need for the court to consider the issue of whether the application is res judicata

DATED IN NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

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MAUREEN A. ODERO

JUDGE

