



REPUBLIC OF KENYA



**In re Estate of Daudi Kirunga Muchiri (Deceased) (Succession Cause
154 of 1989) [2023] KEHC 697 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 697 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 154 OF 1989
TM MATHEKA, J
FEBRUARY 2, 2023**

**IN THE ESTATE OF DAUDI KIRUNGA MUCHIRI (DECEASED)
AND IN THE MATTER OF AN APPLICATION
FOR REVOCATION OR ANNULMENT OF GRANT**

BETWEEN

GRACE WANJIRU GICHARI 1ST PETITIONER

PETER MUCHIRI GAKURU 2ND PETITIONER

AND

STEPHEN MAINA MUCHIRI RESPONDENT

RULING

1. The Petitioners filed the Summons for revocation of grant dated May 24, 2022 under certificate of urgency pursuant to Article 159(2)(d) of the *Constitution* of Kenya, 2010, Section 47 & 76 of the *Laws of Succession Act*, Cap 160, Rule 44 of the *Probate and Administration Rules*, Order 40 Rule 1,2,3,4,10 of the *Civil Procedure Rules*, 2010 and Section 3A of the *Civil Procedure Act* seeking orders that:-
 1. Spent
 2. Spent
 3. Spent
 4. The confirmation of grant of the letters of Administration made to the Respondents' late mother Cecilia Wanjiku Kirunga on 17th October 1989 revoked and/or annulled.
 5. The Estate of the Deceased David Kirunga Muchiri be distributed afresh amongst the rightful beneficiaries as it relates to the property LR No: Loc.8/Gatara/412.



6. The title deed for LR No: Loc.8/Gatara/412 issued in favour of the Respondent on 2nd February, 2022 be cancelled and re-issued in the names of the Applicants in their capacities as Administrators of the estates of Joseck Macharia Kimani and Joseph Gichari Thuku respectively.
 7. Costs of this Application be borne by the Petitioner/Respondent.
2. This court on 26th May, 2022 granted orders of temporary injunction restraining the Respondent by himself, his agents and or servants from trespassing onto, or in any other way interfering with the Applicants and their families possession and use of the property LR No.Loc.8/Gatara/412 pending the hearing and determination of the summons.
 3. The Respondent filed a Notice of Preliminary Objection dated 20th June, 2022 raising 5 points. Namely;
 1. That this Honourable Court is devoid of jurisdiction to entertain and determine the application herein
 2. That the jurisdiction of this Honorable Court is expressly ousted by the provisions of Section 13 of the *Environment and Land Court Act* No. 19 of 2011.
 3. That the application herein is time barred by dint of section 4(1)(a) of the *Limitation of Actions Act* as the same is predicated on a contract purportedly done on the 28th July, 1997.
 4. That the Applicants herein lack the requisite locus standi to institute and/or litigate the instant application.
 5. That the entire application is otherwise an abuse of the due process of the court.
 4. Parties dispensed of the Notice of Preliminary objection should t through written submissions.

The Petitioners'/Applicants' Submissions

5. The Applicants framed five questions for determination. Namely:
 1. Is the Notice of preliminary Objection merited?
 2. Does this Honorable Court have jurisdiction to entertain the summons application dated 24th May, 2022?
 3. Is the Petitioners' Summons Application time barred?
 4. Do the petitioners have locus standi to bring the present Application?
 5. What are the appropriate orders to give in respect of the Notice of Preliminary Objection?
6. Regarding the first issue, the Applicants relying on *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA. 696 where the court stated that a Preliminary objection should raise a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any facts has to be ascertained submitted that the preliminary objection herein lacks merit since the facts are disputed by each party and can only be determined upon hearing evidence from both side.
7. On the second issue, the petitioners submitted that the respondent's contention that this matter falls under the jurisdiction of the Environment and Lands Court as it is based on a contract of purchase is misplaced. They argued that prayers number 4, 5, 6 & 7 on the face of the application have been made



pursuant to the express powers donated by sections 47& 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. They further argued that the sale agreement annexed to their supporting Affidavit is exhibited as a basis of how they and their families are on the property as heirs of their own parents who dealt with the deceased Daudi Kirunga Muchiri and thus have beneficiary interest in the suit property. To support this position reliance was placed on In re Estate of M'Muriani M'Mugwika (Deceased) [2019] eKLR where the court held that the function of a probate court is to facilitate collection and preservation of the estate identification of survivors and beneficiaries and distribution of the assets.

8. They submitted that they confined themselves to the ambits of the law and the procedure defined for seeking the annulment of the grant which is within the jurisdiction of this court.
9. On the third issue, the petitioners submitted that this matter is not time barred as they have not come to court to claim that they purchased the suit property from the deceased but claim that they inherited land that they have been using for the last 45 years.
10. They argued that this court is required to establish whether the late Cecilia Wanjiku Kirunga ignorantly or inadvertently presented the suit property to court as part of the estate of her late husband Daudi Kirunga while in fact the same had been alienated to 3rd party's long before that hence affecting their rights.
11. They argued that their application is not time barred by the rule under contract or recovery of the land as it is indeed a special category of rights and fair adjudication reserved for the Law of Succession.
12. With respect to the fourth issue, the petitioners submitted that they have brought the present application in their capacity as respective Administrators of the Estate of Joseck Macharia Kimani and Gichari Thuku by dint of grant issued to them by Muranga Senior Principal Magistrate's Court Succession Cause No.317 of 2001 and Muranga Principal Magistrate's Court Succession Cause No.286 of 2003 respectively.
13. On the last issue, the petitioners prayed that the notice of preliminary objection be dismissed with costs.

Respondent's Written Submissions

14. The Respondent submitted that this Court lacks jurisdiction to determine this Application. He referred this court to the locus classicus case on jurisdiction of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR where it was stated that jurisdiction is everything, without it, the court has no power to make one more step and the case of Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others [2012] eKLR where it was stated that the court's jurisdiction flows from either the Constitution or legislation or both and that the court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.
15. The respondent also cited the case of Priscilla Ndubi & Zipporah Mutiga v Gerishon Gatobu [2013] eKLR where it was held that a primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries.
16. In view of the above, he argued that the Applicants' claim in the instant case is predicated on the impugned sale agreement and not on claim over the estate as beneficiaries of the estate. The respondent cited the provisions of Article 162(2) of the Constitution and the case of In re Estate of Kinogu Mukiria (Deceased) [2022] eKLR where the court held that dispute as to ownership of land can only be determined by the Environment and Land Court and that once ownership is determined the probate court can proceed to distribute the property to the rightful beneficiaries.



17. On whether the application herein is time barred by dint of section 4(1)(a) of the [Limitation of Actions Act](#), the respondent referred this court to the provisions of section 4(1)(a) and 7 of the [Limitation of Actions Act](#) and stated that in the instant case the applicants purport to have purchased the suit property from the late Daudi Kirunga Muchiri vide a sale agreement dated 27th July, 1977 and the deceased was not able to conclude the transaction due to his demise.
18. The Respondent urged this court to be persuaded by findings of court in [Benson Oketch Okello v Benson Nyandiga Onguru](#) [2019] eKLR. In this case the plaintiff on 19th March 2014 filed a suit against the defendant seeking for inter alia a declaration that the refusal by the Defendant to transfer a portion of the suit premises to the plaintiff was illegal and unlawful and in breach of the contract and sought directions that the defendant to facilitate the transfer of the suit premises to the him by signing the transfer forms and obtaining the necessary consent to transfer. It emerged that the plaintiff on 28th September, 1999 had entered into a sale agreement with the defendant (who was the deceased's son and at the time had not been appointed as an administrator of his estate) for a purchase of the premises which was still registered under the deceased name. When the defendant subsequently obtained grant he declined to transfer the suit portion of suit premises to the plaintiff. The court held that the plaintiff lacked legal capacity to enter into the agreement as it is trite law that the estate of the deceased is vested in the legal representative of the deceased as provided for under section 79 of the Law of Succession Act. he concurred with the defendant that the suit was time barred by dint of sections 4 and 7 of the [Limitation of Actions Act](#) (Cap 22) and sections 6 of the [Land Control Act](#) (Cap 302), that it disclosed no reasonable cause of action and constituted an abuse of the due process of the court.(the facts of this case are distinguishable from the instant matter, prayers sought are different too and as such it is my view that this case is inapplicable herein).
19. The respondent further argued that in the event this court was to find the petitioners have a valid claim against the deceased's estate their cause of action arose on 19th February,1982 when the grant was confirmed and as such over 40 years have lapsed since then yet the applicants have failed to explain the inordinate delay.
20. The respondent urged this court to find that the application is time barred as it is predicated on a contract purportedly done on 28th July, 1977.
21. The respondent also submitted that Applicants lack locus standi to institute this Application. That in [Alfred Njau & 5 others v City Council of Nairobi](#)[1983] eKLR The court defined the term locus standi as a right to appear in Court and or be heard in such a proceeding.
22. He submitted that the applicants failed to demonstrate that they have a right or expectancy in the estate since in their affidavit they averred that they transacted with a beneficiary, one John Mwangi (deceased) who did not have legal capacity to transact. The respondent argued that the Applicants therefore have no direct claim against the estate of the deceased herein and that their claim can only be sustained against the estate of the Late John Mwangi. To bolster this position reliance was placed on [In re Estate of Alice Mumbua Mutua \(Deceased\)](#) [2017]eKLR where the court stated that claims by and against third parties meaning persons who are neither survivors of the deceased nor beneficiaries are for resolution outside the framework set out in the Law of Succession Act and Probate and Administration Rules; and [In re Estate of Kimilu Nzau Kivati \(Deceased\)](#) [2020] eKLR where the court held that Where a person has purported to purchase a portion thereof of the estate other than in accordance with the law, that person can only lay his claim against the person from whom he purported to purchase the same either by laying a claim in damages or by seeking a transfer of that other person's entitlement to the estate once the distribution is completed.



23. The respondent prayed to be awarded costs pursuant to Section 27 of the [Civil Procedure Act](#).

Analysis & Determination

24. The only issue before this court for determination is whether the Preliminary objection is merited hence warranting a dismissal of the applicants' summons.

25. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, 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.”

26. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of *Oraro v Mbaja* [2005] 1 KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

27. It was the Applicants' submission that in this case the facts have been disputed that will require evidence to be adduced by both parties and as such the objection raised does not fit the description of Preliminary objection as described in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (supra).

28. The Respondent has raised three issues in his preliminary objection. Namely; jurisdiction, limitation and locus standi on the part of the applicants.

29. The issue of jurisdiction is a pure point of law not because without Jurisdiction the court must down its tools. It is not in doubt that the issue of limitation goes to the jurisdiction. The Court is only required to determine what the law says and whether indeed the suit is statute barred by the law on limitation of actions law.

30. In the case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. It is therefore evident if the Court was to find that the Applicants have no locus standi, then the Applicants cannot be heard and that point alone may dispose of the suit.

31. The respondent submitted that the Applicants' application falls under the jurisdiction of the Environment and Lands Court and not this court as the Applicants' claim is not about the estate as beneficiaries but it is based on a disputed land sale agreement. The applicants on their part argued that the sale agreement annexed to their supporting Affidavit is exhibited to show how they and their families came to be on the property as heirs of their own parents who dealt with the deceased Daudi Kirunga Muchiri and thus have beneficiary interest in the property.

32. The Summons for revocation of grant is brought under s. 76 of the [LOSA](#) whose opening lines are; A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-. See *Musa Nyaribari Gekone & 2 others v Peter Miyienda & Another* [2015]eKLR. Hence for starters limitation of actions



law will not be applicable to an application for revocation or annulment of a grant. The applicant only has to establish their interest in the estate. This provision of the law has been interpreted in many cases. *In Re: Estate of Devchand Legdir Shah (Deceased)* (2018) eKLR Muchelule J agreed with Musyoka J as I do *in Re Josephine Magdalena* in the following words: -

“The *Limitation of Actions Act* prescribes periods for limitations of actions and arbitrations. The actions to which that statute applies do not include succession causes, or, at any rate, causes or actions governed by the *Law of Succession Act*. It covers such matters as actions founded on contracts and torts, actions to recover land and rent, actions to recover money, actions in respect of trust property or movable property of a deceased person, and related causes. In short, it envisages ordinary civil suits brought within the framework of the *Civil Procedure Act and Rules*. It does not envisage the special proceedings governed by such statutes as the *Law of Succession Act (In re Estate of Josephine Magdalena Motion (Deceased) [2016] eKLR)*.

I find therefore that the substantive law governing succession cause under section.76 Law of Succession Act does not provide any limitation to the filing of a summons for revocation of the grant. Innocent parties who may have transacted with the personal representative appointed under the Act have a special protection under S. 93. That is a matter for evidence. Obviously there is a reason for not providing the limitation. If fraud is discovered, should it be limited by time? If the parties lied to court, should they benefit from their lies because of the lapse of time? If some minor was disinherited should that be stamped with okayness by the lapse of time? If the estate is never administered or the grant becomes imperative, should the estate be left in limbo because of time? Time may clarify issues, facts etc, but time cannot cover up some things..

22. It is clear that the act provides no limitation and hence the Cap 22 is not applicable to the Summons for Revocation of Grant.”

33. Looking at the application, the applicants contended that the deceased sold his parcel Loc.8/Gatara/412 to his brothers Joseck Macharia Kimani & Githari Thuku vide sale agreement dated 27th July 1977. They took possession of the said property Loc.8/Gatara/412 and upon their demise they left the land to their respective families who continued to occupy the same to date. When their sister in law Cecilia Wanjiku Kirunga obtained grant of letters of administration on her husband's and their brother's estate, she did not disclose to court that the said property had been sold to their parents or that they were in occupation. They never got a chance to establish their beneficial interest in the estate. These are facts in dispute and cannot be stilled by the Preliminary Objection. Evidence must be taken from each side to establish the truth.
34. The argument that this is a matter for the Environment and Land Court is misplaced. It is a matter squarely within the jurisdiction of the Probate and Administration Court despite the fact that it is about land. It is not about the issues within the purview of the ELC court but about inheritance. for instance in *Santuzza Billoti Alias Mei Santuzza (deceased) v Giacarrio Balasconi* [2014] eKLR it was held:

“Further, a Succession Court can order a cancellation of a title deed if a deceased's property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before the grant is confirmed...”

There is no rule that any issue touching on land must be heard by the Environmental and Land Court even if the land is a subject of succession proceedings. Majority of succession cases involve the



distribution of land. Where the deceased land has been sold before distribution is done, the succession court can hear both the administrator and the registered owner to determine whether the land is part of the estate or was lawfully sold...”

35. In *Re Estate Of Alice Mumbua Mutua (Deceased)* [2017] eKLR as follows:

“.....The *Law of Succession Act*, and the Rules made there under, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

36. Evidently from the facts set out in the Summons the applicants want to demonstrate to court that they are beneficially entitled to the Estate of the Deceased herein. The applicants deponed that they have beneficial interest over Property Loc.8/Gatara/412 as the same was sold to their parents by the deceased herein and that they have been in occupation of the said land for the last 45 years. They fall within the very wide description of an interested party set out by Section 76 of the *Law of Succession Act*. Under Section 47 this court shall have jurisdiction to entertain any application and determine any dispute under the Law of Succession Act and to pronounce such decrees and make such orders therein as may be expedient. Rule 73 of The *PE&A Rules* that Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

37. Having considered the affidavit evidence, the submissions and the law, and in view of the provisions of Section 76 of the *Law of Succession Act*, the applicants have established that they have an interest in the deceased’s estate in particular LR No: Loc.8/Gatara/412. The respondent and his family did not disclose that to the court they filed the cause out of which they seek to evict them.

38. In the circumstances whether or not the grant ought to be revoked and the titles already issued canceled will depend on the evidence placed before the court. For these reasons the preliminary objection cannot stand and the same is dismissed.

39. Costs to the applicants.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF FEBRUARY 2023.

MUMBUA T MATHEKA

JUDGE

CA Jennifer

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