



REPUBLIC OF KENYA



**In re Estate of Kungu Waigi (Deceased) (Succession Cause
13 of 2017) [2023] KEHC 1621 (KLR) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 13 OF 2017
MM KASANGO, J
MARCH 10, 2023**

RULING

1. Kungu Waigi (deceased) whose estate this succession cause relates died on July 4, 1977. The case continues to linger on upto today.
2. For this Court's consideration is the application dated November 3, 2021. That application is filed by John Njuguna Kungu (hereafter John). John seeks variation or review of this Court's order of October 25, 2021 by which this Court confirmed the grant and distributed the estate's property.
3. Some background of this succession is necessary. John filed petition for grant of letters of administration before the Kiambu magistrate's court in December, 1997. He listed the beneficiaries of the deceased as:-
 - a. John Njuguna Kungu (himself)(son).
 - b. Nyathira Njenga (daughter in-law)
 - c. Njoki Kungu (wife)
4. In the petition John listed parcel No Limuru/Ngecha/654 as the only asset of the deceased.
5. A grant was issued to John, following gazette, on March 9, 1998. That grant was confirmed on January 21, 1999.
6. Ephraim Waigi Kungu (now deceased) applied for revocation of the grant by application dated February 10, 2003. This file was transferred to the High Court to determine that application. Revocation was sought on the basis that John had concealed the deceased's beneficiaries. Ephraim (deceased) listed eight beneficiaries who survived the deceased of this estate.
7. On October 29, 2014 Ephraim deceased passed away and his son who bears a similar name to him who is hereafter referred to as Ephraim Waigi applied to substitute him in the application dated April 8, 2016. Substitution was allowed and the court heard the revocation application by viva voce evidence.



8. The Ruling of the revocation application was on September 25, 2020. By that Ruling, the grant issued to John was revoked. The court ordered a grant to be issued jointly to Ephraim Waigi and Nyathira Njenga. A grant was issued as ordered by that Ruling on September 25, 2020.
9. By summons for confirmation of that grant, the administrators prayed for the deceased property to be shared between John, Ephraim Waigi and Nyathira Njenga, each getting $\frac{1}{3}$ share each.
10. It is the confirmation of that grant which is in issue in the application under consideration. John by that application seeks revision of grant on the ground that the deceased had given a gift intervivos of parcel Limuru/Ngecha/622 to Ephraim (deceased). As stated before Ephraim (deceased) was the father of Ephraim Waigi.
11. The application is opposed on two fronts. Firstly, that John has failed by his application to bring the said application within the ambits of Order 45 of the *Civil Procedure Rules* (hereafter the Rules) and secondly, that John's application is res judicata. Ephraim Waigi also opposed the application by filing a preliminary objection dated March 18, 2022. The objection is that the application is res judicata.
12. A preliminary objection consists of pure point of law and which if successful may dispose the action. I shall first determine whether the preliminary objection has merit before substantially considering the application. What constitutes a preliminary objection was considered by the Supreme Court in the case *Aviation & Allied Workers Union Kenya V Kenya Airways Ltd & 3 Others (2015) eKLR* where it was stated:-

'Thus 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.'

13. Ephraim Waigi submitted that the issue of gift intervivos was previously before the court and the court considered it and delivered its ruling on September 25, 2020. It is on that ground he raised the preliminary objection to the application stating that the application is re judicata. Section 7 of the *Civil Procedure Act* (hereafter the Act) expounds on what is the doctrine of res judicata. That Section provides:-

' No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they 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.'

14. The main ground upon which John has hinged his application for review is the allegation that deceased gave gift inter vivos to his brother Ephraim (deceased). Is that issue res judicata before me?
15. It is clear, as one reads through the Ruling of September 25, 2020, that John's main objection to the revocation of grant application filed by Ephraim (deceased) was that Ephraim (deceased) obtained gift intervivos from the deceased. This is clear from the following excerpts of the aforesaid Ruling, as follows: -

3. On August 11, 2014 John Njuguna Kungu (Respondent) filed a replying affidavit in opposition to the amended summons. He listed members of the family of the deceased, including the deceased's four wives and their respective children. It was his contention that the deceased distributed his estate comprising of the suit land during his lifetime by assigning the first and second wives received three acres each while the third and fourth wives who had no children received three acres between them. He deposed that the applicant herein received his



mother's whole share while he received the third and fourth wives' share having taken care of them as instructed by the deceased. He contended that the applicant is not entitled to any more share as fair distribution of the estate has already been achieved.

42. By his affidavits and oral evidence, the respondent appeared to justify the exclusion of the late Ephraim among others in the succession cause by stating that Ephraim had already benefited from gifts from the deceased and did not deserve more. He proceeded to assert without tendering any proof, that his father had granted him the inheritance of about 3 acres which ought to have gone to the two widows of the deceased who had no children; that the late Ephraim having taken over the share earlier given to his mother's house in the lifetime of the deceased, was not entitled to any further inheritance.
 43. Listening to the respondent's testimony, it appeared that he had determined in advance who was to share in the sole remaining asset of his father – the original land parcel No 654, and filed his petition accordingly.'
16. The above makes it patently clear that John did previously raise the issue of gift *inter vivos* and that issue was discussed by the court in its Ruling.
 17. In the case *In re Estate of David Wang'ang'a Gichuhi (deceased) 2020 eKLR* the court stated that when a court is confronted by an issue of *re judicata* it should consider and be satisfied that the following elements are present, that is:-
 - a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.'
 18. Considering the above elements, the reality is that all those elements are satisfied in this matter: that is the issue of gift *inter vivos* was before the court while considering the application for revocation of grant, that application was between the same parties that are presently before this Court in the present application and the issue was heard and determined by a competent court. The court as seen above excerpts of the Ruling made a finding that John had failed to prove the gift *inter vivos*.
 19. It is this Court's finding that the issue on whether or not Ephraim (deceased) was given gift *inter vivos* by the deceased is *res judicata*. The preliminary objection dated March 18, 2022 therefore succeeds and accordingly, the application dated November 3, 2021 is hereby struck out with costs.

Disposition

20. The final orders of this Court are that the application dated November 3, 2021 is struck out with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF MARCH, 2023.

MARY KASANGO

JUDGE

Coram:



Court Assistant : Mourice/Julia

Instructed by C.M. Ngugi Rebero & Co. Advocates:- Mr. M. Ngugi
for John Njuguna Kungu:- Mr. Njuguna

