



REPUBLIC OF KENYA



**Gathaka substituted by James Wanyaga Gathaka v Mwangi (Succession Cause 435 of 2014) [2023] KEHC 18908 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18908 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 435 OF 2014  
FN MUCHEMI, J  
JUNE 15, 2023**

**BETWEEN**

**ELISHIBA NJOKI GATHAKA SUBSTITUTED BY JAMES WANYAGA  
GATHAKA ..... APPLICANT**

**AND**

**TERESA NJERI MWANGI ..... PETITIONER**

**RULING**

**Brief Facts**

1. The application dated November 2, 2022 brought under Rule 73 of the *Probate and Administration Rules* seeks for orders for removal of Land Parcel Number Aguthi/Gaititu/3678 from the Certificate of Confirmation of Grant as it does not comprise part of the estate of the deceased and the removal of the restriction placed on the said parcel of land owing to its fraudulent inclusion in the succession cause.
2. The respondent did not oppose this application despite having been served on January 25, 2023.

**The Applicant's Case**

3. The applicant states L R Aguthi/Gaititu/3678 was included as part of the estate of the deceased using a fraudulently obtained title by the deceased during his lifetime. Upon realization of the same, the applicant states that his mother, filed Summons for Revocation of the grant based on the grounds that the petitioners had included her parcel of land L R No Aguthi/Gaititu/3678 for which she still had the original title. The Summons for Revocation of grant sought for orders of restriction to be placed on the parcel of land. The court on November 1, 2022 granted orders for stay of the grant in this cause only in regard to the land parcel in issue.
4. The applicant states that owing to the fraudulent title in the name of the deceased, he filed a case in the magistrate's court being Nyeri Chief Magistrate Court Environment and Land Case CM ELC Case



No 178 of 2018. The court delivered its judgment on June 21, 2019 and ordered that the registration of the deceased as the owner of the said property be cancelled. Consequently, it is only just that following the cancellation of title in respect of the deceased, the restriction that had been placed through an order by the court be removed and the parcel Aguthi/Gatitu/3678 be removed in the schedule of the certificate of confirmation of grant.

5. The applicant further states that without the removal of the restriction, he is unable to register the order cancelling the registration of the deceased as the owner of the said parcel of land. The applicant states that since his interest in the succession cause was only on the wrongful inclusion of the said property as the property of the deceased and since the Environmental and Land Court ordered cancellation, he has no further interest in the succession cause and he should be discharged from the same.
6. Parties put in written submissions disposing of the application. The respondent failed to put in written submissions despite being given more time to do so on three (3) instances.

### **The Applicant's Submissions**

7. The applicant reiterated what he deposed in his affidavit and prayed that the application be allowed as prayed as it is unopposed.

Whether the applicant has presented sufficient evidence to warrant removal of the restriction.

8. The placement and removal of a restriction is provided in Section 76 – 78 of the [Land Registration Act](#). Section 76 provides:-

1. For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.
2. A restriction may be expressed to endure:-
  - a. For a particular period;
  - b. Until the occurrence of a particular event; or
  - c. Until the making of a further order is made, and may prohibit or restrict all dealings or only the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.

9. Section 78 (2) of the Act provides for the removal of the restriction as follows:-

Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar the court may order a restriction to be removed or varied or other order as it deems fit and may make an order as to costs.

10. The applicant is the mother to the deceased one David Mwangi Gathaka who joined this cause through filing Summons for Revocation of grant dated October 28, 2016 on the basis that the grant was obtained fraudulently by making false statements to the court particularly the fact that the parcel of land Aguthi/Gatitu/3678 formed part of the deceased's estate.
11. The magistrate's court rendered its judgment in CM ELC No 178 of 2018 on June 21, 2019 and found that the registration of the late David Gathaka as the registered owner of the suit land was obtained by fraud. Consequently, the court ordered that the said title and registration of David Gathaka be



cancelled forthwith. It was also ordered that a restriction be placed over the suit property by the Land Registrar, Nyeri.

12. The judgement evidently shows that the restriction order was issued by the presiding magistrate in the CM ELC case No 178 of 2018 and not by this court. As such the applicant ought to approach the magistrate court for removal of the restriction.
13. In regard to prayer 2 of the application, the judgement of the learned magistrate is still valid and was to the effect that the deceased in this cause did not own L R No Aguthi/Gatitu/3678. I am therefore satisfied that the applicant has established that the said land does not form part of the deceased's estate.
14. I find this application partly merited and I hereby allow it in terms of prayer 2 of the application. The land parcel L R No Aguthi/Gatitu is hereby removed from this cause as an asset of the deceased and from the grant issued on June 30, 2017.
15. Each party to meet its own costs.
16. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 15<sup>TH</sup> DAY OF JUNE, 2023.**

**F MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEO LINK THIS 15<sup>TH</sup> DAY OF JUNE 2023.**

