



**In re Estate of Kiura Kathagana (Deceased) (Succession Cause
385 of 2007) [2023] KEHC 19084 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 385 OF 2007
LM NJUGUNA, J
JUNE 14, 2023**

BETWEEN

SAMWEL NDWIGA KIURA APPLICANT

AND

HARUN NJERU KIURA 1ST RESPONDENT

BONIFACE KIURA NJERU 2ND RESPONDENT

RULING

1. Before this court is the summons dated 09.02.2023 which seeks for the orders that:
 - i. Protection orders to issue against Harun Njeru Kiura the 1st respondent and Boniface Kiura Njeru the 2nd respondent prohibiting interference and intermeddling with the assets of the estate of Kiura Kathagana (deceased) which mainly consists of Land Parcel Nos. Kagaari/Weru/514, Land Parcel No. Kagaari/Kigaa/1374 and Land Parcel No. Nthawa/Riandu/995.
 - ii. An order be issued enabling the Deputy Registrar High Court Embu to co-sign and execute all instruments and conveyancing documents pertaining to the estate of the late Kiura Kathagana especially those pertaining to Land Parcel Nos. Kagaari/Weru/514, Land Parcel No. Kagaari/Kigaa/1374 and Land Parcel No. Nthawa/Riandu/995 on behalf of Harun Njeru Kiura the 1st respondent who has refused to cooperate.
 - iii. An order be issued to the District Land Registrar – Embu directing him/her to dispense with the request to produce the original title deeds in Land Parcel No. Kagaari/Weru/514, Land Parcel No. Kagaari/Kigaa/1374 and Land Parcel No. Nthawa/Riandu/995.
 - iv. The Honourable Court do order that the OCS Police Station to provide security during the sub division and survey of the three parcels of land namely: Land Parcel No. Kagaari/



Weru/514, Land Parcel No. Kagaari/Kigaa/1374 and Land Parcel No. Nthawa/Riandu/995 by the District Land Surveyor – Embu.

- v. Any other orders that are deemed just and expedient that will meet the ends of justice including punishment of the 2nd respondents.
 - vi. Costs of this application be paid for by the said 2nd respondents.
2. The said summons is based on the grounds on its face and it's supported by the affidavit annexed to it.
 3. In a nutshell, it is the applicant's claim that the 1st respondent has without any justifiable reason refused to perform his duties as the administrator of the estate of the deceased herein to ensure that the estate goes to the intended beneficiaries. That the implementation of the grant remains incomplete for the reason that the 1st respondent, is unwilling to sign the necessary documents. Further, the administrator has continued to intermeddle in the estate despite the court having warned him against doing so. That this being an old matter, it is only just that the same should be finalized. This court was therefore urged to grant the orders sought in the interest of justice.
 4. The application is opposed by the respondents vide their replying affidavit sworn on 27.03.2023 wherein the 1st respondent deposed that the application is bad in law, incompetent, frivolous and it ought to be dismissed with costs. That he has neither failed in any way to cooperate with the administrators in this matter nor threatened to cause harm to any surveyors. That what he is opposed to, is the mode of distribution adopted in the rectified grant as it leaves out some of the beneficiaries of the estate especially Lucy Kawira, the daughter in law of the deceased and the wife of Joseph Kariuki Kiura(deceased). That one of the beneficiaries namely Ndwiga Kiura has allocated large shares of each of the parcels of land to himself, which shares belong to his brother Joseph Kariuki (deceased) who left behind a widow Lucy Kawira and a daughter Sarah Mwendu. Additionally, that Ndwiga Kiura was allocated shares of the estate belonging to their mother to the exclusion of all the other family members. In the end, the respondents urged this court to dismiss the application herein with costs.
 5. Directions were taken that the application be canvassed by way of written submissions which both parties complied with.
 6. The applicants submitted that the 1st respondent has persisted in interfering with the three parcels of land and has ensured that the status quo has remained without any lawful authority to sell or utilize the three parcels; reliance was placed on section 45 of the [LSA](#) to support the proposition. Case in point was when the District Land surveyor visited the said land with a view of demarcating boundaries, but the 2nd respondent caused a commotion leading to the abortion of the said exercise. On whether protection orders should be issued against the 2nd respondent, it was submitted that the respondents have frustrated any effort to distribute the properties listed herein and have continued to intermeddle with the same. That the buyer to whom they had sold the land irregularly is still in possession of the said land despite the court having ordered that the same revert back to the name of the deceased herein. The applicant thus relied on the case of [Veronica Njoki Wakagoto \(Deceased\)](#) [2013] eKLR.
 7. On whether the Deputy Registrar of this court should co-sign and execute all instruments and conveyancing documents, the applicants submitted that the same is necessary and that a further order should be issued to the district Land Registrar directing him to dispense with the request to produce the original title deeds for the land parcels listed herein. That the same is necessary as the 1st respondent has totally refused to hand over the original title deeds to the administrator in order to allow proper administration of the estate. Reliance to support the proposition herein was placed inter alia on Section 31 of [LRA](#), [William Juma Mbui vs Public Trustee & Another](#) [2019] eKLR.



8. The respondents on the other hand submitted that the application herein is bad in law, incompetent and therefore should be dismissed. That the applicant has not demonstrated how the respondents have interfered or intermeddled with the estate of the deceased. Reference was made to the case of *Gladys Nkirote M'Itunga vs Julius Majau M'Itunga & 3 Others* [2016] eKLR. It was submitted that the issue of intermeddling was previously dealt with by this court and given that no new evidence of intermeddling has been produced before this court to warrant such an order, then the prayer is misplaced. Further, it was stated that the applicant has not proved lack of cooperation from the 1st respondent to necessitate the Deputy Registrar to sign transmission documents on his behalf. That the applicant having failed to prove the said allegation, the application ought to fail. Similarly, the prayer that the District Registrar be ordered to dispense with production of the original title deeds for the land parcels listed herein is unfounded as the applicants have not provided evidence to support such a cause. The respondents further reiterated that the applicant's proposed mode of distribution is unfair as the same has left out some beneficiaries and accorded undue advantage to some beneficiaries. Therefore, this court was called upon to address the said inequalities before the grant herein is executed. In the end, the respondents called upon this court to dismiss the application with costs to them.
9. I have perused the application herein, the responses thereto and the submissions by the parties and I form the view that this court has been called upon to determine whether the application herein has merits.
10. On whether this court should issue the orders sought, the applicant has submitted that the administrator herein has continued to intermeddle in the estate by protecting a buyer whom they irregularly sold a parcel of land to, by ensuring that he is still in possession of the said land despite the court ordering that the same revert back to the name of the deceased herein. It is trite that court orders must be obeyed; in its ruling delivered by this court on 20.11.2018, the court was convinced that indeed the 1st respondent had intermeddled in the deceased's estate and had fraudulently deprived several beneficiaries of their rightful inheritance. As such, the order still remains valid and must be obeyed as the same has not been appealed against or set aside.
11. On whether the Deputy Registrar should be directed to sign transmission documents, it is trite that, the duties of personal representatives are fiduciary in nature [See Section 83 of the *Law of Succession Act*] and it provides that the same includes the duty (subject to Section 55) to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be [Section 83 (f)]; within six months from the date of confirmation of the grant, or such shorter period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration; [Section 83 (g)]; and to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration [Section 83 (i)].
12. In my own view, the 1st respondent is not sincere in his deposition that he has not been approached by the applicants with a view of signing the said documents or to surrender the original title deed or any other document. I say so for the reason that from the submissions, the 1st respondent is opposed to the mode of distribution adopted in the confirmed grant issued on 19.12.2019 in respect to Land Parcel No. Kagaari/Weru/514, Land Parcel No. Kagaari/Kigaa/1374 and Land Parcel No. Nthawa/Riandu/995. In his view, some beneficiaries have been left out especially one Lucy Kawira, a daughter in law of the deceased. Further, that the shares belonging to their mother, Sarah Njoki Kiura have not been distributed amongst all the nine children but have been largely allocated to Ndwiga Kiura. Of



importance to note is the fact that the alleged individuals have not in any way complained or raised an issue with the said distribution. It is not clear why the 1st respondent is complaining while the alleged parties have not raised any issue. What I glean from the above submissions is a disgruntled beneficiary/former administrator seeking to delay the process of administration of the estate for his own interest.

13. The court in *Re Estate of Wilfred Munene Ngumi (deceased)* [2020] eKLR while allowing the application for the Deputy Registrar of the court to execute completion documents thus held as follows:

“...It is evident from the Applicant’s affidavit in support of the application and oral arguments by her Advocate, Mr. Kahiga, that the Respondents have refused to sign the necessary documents to facilitate execution of the court’s judgment/decree. To prevent abuse of the court process, by the above legal provisions, this court has inherent powers to prevent such abuse. I therefore find and hold that the petitioner’s summons dated 23/9/2019 and filed on 25/9/2019 to be merited...”

14. Further, Section 47 and Rule 73 of the *Probate and Administration* makes provision that nothing 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 this court. The respondent herein has been difficult and has refused to ensure that the rightful beneficiaries inherit what is rightfully theirs.

15. I am persuaded by the above provisions of law and it is trite that court orders are never to be made in vain. The *Law of Succession Act* thus places a duty on personal representatives to complete the administration of the estate. Section 83(i) of the *Law of Succession Act* provides;

“To complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate.....”

16. Having in mind that this court is mandated to ensure that the estate of a deceased person is distributed to all the rightful beneficiaries, it is my considered view that the deputy registrar of this court ought to sign the necessary documents to ensure that the beneficiaries herein inherit what is rightfully theirs.

17. On whether this court should order that the production of the original title deed be dispensed with, the request to produce the original title deeds in Land Parcel No. Kagaari/Weru/514, Land Parcel No. Kagaari/Kigaa/1374 and Land Parcel No. Nthawa/Riandu/995. Section 73 of Probate and Administration Rules provides that: -

“73 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.”

18. But that provision notwithstanding, can this court issue the orders herein given that the process of succession is complete and now what remains is transmission?

19. In the case of *Salome Wambui Njau (suing as the Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v Caroline Wangui Kiguru*, Nairobi ELC suit NO. [2013] eKLR, the court was of the view that in matters of succession disputes touching on land, the Environment and Land Court pursuant to Article 162 (2) of the *Constitution* and the High Court as the Succession Court under section 47 of the *Law of Succession Act* would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which Court is best suited to hear and determine the dispute.



20. I hold the view that this matter touches the court as provided for under article 162 for the reason that, section 31 of the *Land Registration Act*, 2012 ("*the Act*") Act provides that unless the Land Registrar dispenses with the production of a certificate of title or a certificate of lease, the same must be produced during the registration of any dealing with the land or lease to which it relates.
21. Section 33 of *the Act* on the other hand deals with the procedure for replacement of lost or destroyed certificates of title and registers of land. It provides that, in case of loss or destruction of a certificate of title or certificate of lease, an application for replacement is to be made to the Land Registrar by the proprietor of the land or lease accompanied by evidence of such loss or destruction. If the Land Registrar is satisfied with the evidence of such loss or destruction, he shall issue a replacement thereof after expiry of 60 days of publication of the application in the Gazette and in any two local newspapers of nationwide circulation.
22. There is no provision in either section 31 or 33 of *the Act* allowing the court to intervene in the exercise by the Land Registrar of his powers under those sections of *the Act*.
23. Section 86 of the *Land Registration Act* donates authority to the court under article 162 of the *constitution* to review the exercise by the Land Registrar of the powers conferred upon him under the Act. Section 86(1) of *the Act* gives the court power to review decisions made by the Land Registrar in exercise of any power or in the performance of any duty conferred or imposed on the Land Registrar by *the Act* on an application made by an aggrieved party.
24. Section 31(1) of *the Act* allows the Land Registrar to dispense with the production of a certificate of title to land or lease during the registration of any dealing with the land or lease. The application for such dispensation should be made to the Land Registrar who shall determine whether to allow it or not. The court can intervene in the matter under Section 86(1) of *the Act* in case a party is aggrieved by the decision of the Land Registrar on the issue as already explained above.
25. A perusal of the record shows that there is no evidence before me that an application for dispensation with the production of the certificates of title of the land parcels herein had been made to the Land Registrar.
26. As I have stated earlier, section 33 of *the Act* provides for the procedure for applying for replacement of a lost or destroyed certificate of title or lease. The Act has not given the court power to direct the Land Registrar to dispense with any of the steps set out in the said section which are to be followed before a lost or destroyed title is replaced. In my view, the said steps are intended to protect the land registration system and sanctity of title. They are intended to prevent fraud and other illegal dealings with land.
27. In reference to the matter herein, the question that this court asks itself is whether this court is possessed with the jurisdiction to give such kind of orders?
28. It is important to note that, with the enactment of the *Environment and Land Court Act* of 2012, the jurisdiction to determine disputes relating to ownership and use of land is bestowed on the Environment and Land Court. It is my considered view as such that issues arising out of the instant application are not within the jurisdiction of this Honourable Court. [See the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No. 19 of 2018- paragraph 40).

This is for the reason that where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.



Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing as jurisdiction must be acquired before a case can be heard.

[See the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR].

29. Similarly, in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, where the Supreme Court held as hereunder;

A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

[Also see Articles 165 (5) and 162 (2) of the *Constitution*; and Section 13 of the *Environment and Land Court Act*].

30. From a reading of the above Sections/ Articles, it is clear that the *Constitution* intended to create special courts with special jurisdiction in land matters. That jurisdiction is not therefore donated to the High Court and as such, this court humbly down its tools.
31. On whether the OCS Police Station should provide security during the sub division and survey of the three parcel of land namely: Land Parcel No. Kagaari/Weru/514, Land Parcel No. Kagaari/Kigaa/1374 and Land Parcel No. Nthawa/Riandu/995 by the District Land Surveyor – Embu, I hold the view that the same is necessary so as to ensure the orders of this court are complied with.
32. From the above therefore, the court makes the following orders:
- i. Prayer 1, 2 and 4 on the Summons General dated 09.02.2023 are hereby allowed;
 - ii. Prayer 3 of the said application is hereby declined.
 - iii. Each party to bear its own costs.
33. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents

