



REPUBLIC OF KENYA



**Gakami v Location & 2 others (Miscellaneous Application E058 of 2022)  
[2023] KEHC 22449 (KLR) (Family) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22449 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E058 OF 2022  
MA ODERO, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**JOSEPHINE NJERI GAKAMI ..... APPLICANT**

**AND**

**THE CHIEF, RUIAI LOCATION ..... 1<sup>ST</sup> RESPONDENT**

**THE PUBLIC TRUSTEE ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before this Court is the Summons dated March 21, 2022 by which the Applicant Josephine Njeri Gakami seeks the following orders.

- “1. Spent
2. That this Honourable Court be pleased to summon the Chief of Ruai Location to attend court to explain the reasons why he has not informed the Public Trustee of the Death of John Chumia Ng’ang’a (Deceased) after he was notified that his estate has remained un-administered for a period of over one month after his death.
3. That this Honourable Court directs that the Chief of Ruai Location to inform the Public Trustee of the state of affairs surrounding the estate of John Chumia Ng’ang’a (Deceased) one year after his death.
4. That this Honourable Court orders that the Public Trustee to apply for a Grant of letters of Administration ad litem with respect to the estate of



John Chumia Ng'ang'a (Deceased) upon the compliance with prayer three (3) hereinabove.

5. That this Honourable Court grants such other orders or reliefs as may be in the interests of Justice.
  6. That the costs of this Application be in the cause”.
2. The application was premised upon Section 45, 46, 47 and 66 (c) of the Law of Succession Act and under Rules 49 and 73 of the Probate and Administration Rules and was supported by an Affidavit of even date sworn by the Applicant.
  3. The 1<sup>st</sup> Respondent Chief Ruai Location and the 3<sup>rd</sup> Respondent The Honourable Attorney General both opposed the application and filed Grounds of opposition dated September 15, 2022 raising the following grounds:-
    1. That the 1<sup>st</sup> Respondent is not seized of such information in this instant case and that no report on the fact of the death of the Deceased was made to the sub-chief of the sub-location or to the Chief of Administrative officer of the area.
    2. That the application offends the doctrine of exhaustion of available remedies which includes citation. The same would have gone a long way in securing the interests of the Applicant as well as expeditious finalization of the pending suit.
    3. That Section 22(1) of the Probate and Administration Rules makes the provision that a citation may be issued at the instance of any person who would himself/herself be entitled to grant in the event of the person cited renouncing his right thereto.
    4. That in the present circumstances herein, the court has the requisite jurisdiction to issue a limited grant of representation of the intended citee for the purposes of representation in the pending suit before the Environment and Land Court concerning the estate of the Deceased.
    5. That its evidently clear from the Applicant’s pleadings that the Deceased (John Chumia Ng'ang'a) died barely two months before the said summon was instituted.
    6. That the 1<sup>st</sup> Respondent is apprehensive of likelihood that the family of the Deceased might be in the process of initiating process of taking over the Administration of the Deceased property considering that the nature of such process entails in-depth family consultation and deliberations.
    7. That the application seeks to enforce remedies which contravenes the express provision or the order of priority as set out in Section 66 of the Law of Succession Act in which case the Respondent does not rank first in priority and cannot therefore be compelled to cause the estate in the manner pleaded in the application, since the Deceased is likely to have left behind her own property and that the Respondents have no superior right to administer the estate.
    8. That the summons lack the requisite threshold set out under Section 46 of the Law of Succession Act, and the prayers sought by the Applicant are not tenable.
    9. That the application is an abuse of the court process.
    10. That the application is misconceived, incompetent, bad in law and fatally defective and contrary to the mandatory legal provisions.



4. The 2<sup>nd</sup> Respondent The Public Trustee also opposed the application through the Replying Affidavit dated May 20, 2022 sworn by Lucy W. Mugo, the Deputy Public Trustee.
5. The matter was canvassed by way of written submissions. The Applicant's submissions are dated November 4, 2022, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents submissions are dated December 14, 2022 whilst the 2<sup>nd</sup> Respondent relied upon the written submissions dated December 9, 2022.

## **Background**

6. The Applicant had filed in the Environment and Land Court, Case No 118 of 2020: Josephine Njeri Gakami -vs- John Chumia Ng'ang'a, Joseph Miringu Ng'ang'a and The Chief Land Registrar. A copy of the Plaintiff appears as Annexure 'JNG1' to the Applicant's Supporting Affidavit. In that suit the Applicant sought the following orders as against the three Defendants:
  - “(a) An order directing the 3<sup>rd</sup> Defendant to cancel the registration of land parcels No Nairobi Block 105/6957 and Nairobi Block 105/6961 in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively.
  - (b) An order directing the 3<sup>rd</sup> Defendant to register the Plaintiff as the owner of land parcels No Nairobi Block 105/6957 and Nairobi Block 105/6961.
  - (c) An order of eviction do issue forthwith against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from Nairobi Block 105/6957 and Nairobi Block 105/6961.
  - (d) A permanent injunction restraining the Defendants, their servants and/or agents from remaining thereon, putting up any structures, using or otherwise howsoever from interfering with Plaintiff's ownership, possession and/or occupation of Nairobi Block 105/6957 and Nairobi Block 105/6961.
  - (e) The 3<sup>rd</sup> Defendant, or their successors in office, to pay to the Plaintiff exemplary damages
  - (f) General damages
  - (g) The OCS Ruai Police Station to enforce the orders of eviction.
  - (h) Costs of the suit
  - (i) Interest on (e), (f) and (h) above
  - (j) Any other order that the court may deem fit”.
7. During the pendency of the hearing the 1<sup>st</sup> Respondent John Chumia Ng'ang'a passed away in October, 2021. As such the Environment and Land Court suit could not proceed until letters of Administration in relation to the estate of the 1<sup>st</sup> Defendant were taken out.
8. The Applicant then filed an application dated 5<sup>th</sup> October, 2021 seeking an injunction to bar the family of the 1<sup>st</sup> Defendant from interring his remains on the suit land being LR Nairobi Block 105/6957.
9. However, the court declined to issue the injunction orders sought and the remains of John Chumia Ng'ang'a were interred on Nairobi Block 105/6957.
10. That no person came forward to petition for a Grant in respect of the estate of the Deceased. After one month the Applicant took steps to inform the Chief of Ruai Location of the demise of the 1<sup>st</sup>



- Defendant who was a resident of his area. The Chief vide a letter dated January 27, 2022 was requested to report the demise of the 1<sup>st</sup> Defendant to the Public Trustee but he failed and/or declined to do so.
11. The Applicant further avers that the Public Trustee was informed of the demise of the 1<sup>st</sup> Defendant but have to date taken no action. The Applicant wants the Public Trustee to petition for a Grant ad colligenda Bona in respect of the estate of the 1<sup>st</sup> Defendant so as to facilitate the continuance of this suit which is still pending in the Environment and Land Court.
  12. The office of the Public Trustee avers that they are total strangers to this matter and are not party at all to any matters relating to the estate of John Chumia Ng'ang'a. According to the 2<sup>nd</sup> Respondent the Public Trustee does not rank first in administration of the estate. Priority is to be given to the legal beneficiaries and the Public Trustee is an Administrator of last resort.
  13. According to the Public Trustee, the Applicant has not exhausted all available legal avenue to compel the surviving beneficiaries to obtain letters of Administration, thus, they contend that this application is premature and ought to be dismissed.
  14. As stated earlier the 1<sup>st</sup> and 3<sup>rd</sup> Respondents also opposed the application through their grounds of opposition dated September 15, 2022. They submit that this present application offends the legal doctrine of exhaustion.

### **Analysis and Determination**

15. I have carefully considered the application filed before this court, the replies filed thereto as well as the written submissions filed by both parties. The only issue for determination is whether the present application has merit and ought to be allowed.
16. The Applicant indicated that she had filed a suit in the Environment and Land Court being suit No 118 of 2022 in which she had sued John Chumia Ng'ang'a (now Deceased) over ownership of the parcel of land known as Nairobi Block 105/6957.
17. Unfortunately, the 1<sup>st</sup> Defendant passed away during the pendency of the Environment and Land Court suit which has now stalled. To date no person has petitioned for a Grant of Representation in respect of the estate of the 1<sup>st</sup> Defendant.
18. Section 66 of the *Law of Succession Act* Cap 160 Laws of Kenya provides as follows:-

“When a Deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference –

  - a. The surviving spouse or spouses, with or without association of other beneficiaries;
  - b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
  - c. The Public Trustee; and
  - d. Creditors...”
19. Thus, the persons who have priority in petitioning the court for letters of Administration are the surviving spouse/spouses, children and other beneficiaries of the Deceased.



20. The Applicant is not a beneficiary to the estate of the Deceased. Her only concern is the continuance of the suit which she filed against the Deceased in the Environment and Land Court. That suit stalled upon the demise of the 1<sup>st</sup> Defendant and cannot proceed until somebody takes up letters of Administration in respect of the estate.
21. The Applicant has sued the Public Trustee demanding that they act in the matter yet the Public Trustee comes a distant- third in order of priority under Section 66.
22. The Applicant's moves to enjoin the Chief of Ruai Location is ludicrous as the Chief is certainly not a beneficiary of the estate and his only role would be to receive notice of the demise of a resident in his area of jurisdiction and to issue a burial permit. The Chief has no role to play in the administration of the estate.
23. The correct procedure is for the Applicant to file a citation against the relatives as the said John Chumia Ng'ang'a asking that they take up letters of Administration.
24. Rule 22(1) of the *Probate and Administration Rules* is explicit that:

“A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto”.

In Josiah Muli Wambua – deceased, Nairobi Succession Cause No 2557 of 2012 (2014) eKLR W Musyoka – J stated the following at paragraph 9 of his ruling:-

“In intestacy, citation issue only in cases where no petition has been lodged in court. Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the persons entitled to apply are not willing or are slow in moving the court in that behalf. The Citor should not be a person who has himself already applied for the grant, for the Citor should only apply for grant after the cite fails to so apply”. [own emphasis]

25. The Applicant in my view has jumped the gun in filing this application. Instead of pursuing the legal heirs/beneficiary of the Deceased she is pursuing peripheral parties
26. The Doctrine of Exhaustion requires that a party take the first legal remedy available. This application offends that doctrine.
27. The Applicant has not demonstrated that she has made any attempt to trace and issue a citation against the relatives of the Deceased.
28. Finally, I find no merit in this application. The same is dismissed with entirety. Costs will be met by the Applicant.

**DATED IN NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**MAUREEN A. ODERO**

**JUDGE**

