



REPUBLIC OF KENYA



In re Estate of the Late Gitau s/o Thinji (Deceased) (Succession Cause 1106 of 2010) [2024] KEHC 13650 (KLR) (4 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 1106 OF 2010
MA ODERO, J
NOVEMBER 4, 2024**

RULING

1. Before this court are two applications for determination as follows:-
 1. Chamber Summons dated 15th March 2023 – by which the Applicants/proposed Interested Parties namely Johanna Githinji Wachira, Idi Gitau Wachira and Lucy Nyawira Wachira seek the following orders:-
 - i. Spent
 - ii. That the court allow the application for the applicants to participate in the proceedings as members of the family of Joseph Wachira (Deceased) and that the same can be referred to mediation and be heard and determined there.
 - iii. That the Court be pleased to cancel all resultant titles from Othaya/itemeini/153 and revert them to its original status”
 2. The Summons was supported by the Affidavit of even date sworn by the 1st Applicant Johanna Githinji Wachira.
2. Summons dated 27th May 2023 filed by the same Applicants Johanna Githinji Wachira, Idi Gitau Wachira and Lucy Nyawira Wachira seeking the following orders:-
 - “1. Spent
 2. That this Honourable Court may be pleased to issue a Prohibitory Order against the land parcel Nos Othaya/itemeini/2079, 2080 and 2081 And The Land Registrar Nyeri be ordered to register the order against each land pending the hearing and Final determination of the application for the Intestrested Parties and also pending the consequences of the entire succession cause.
 3. The costs of this Application be costs in the cause.”



3. This application was also supported by the affidavit of even date sworn by the 1st Applicant Johanna Githinji Wachira.
4. The Respondents opposed the two applications vide the Replying Affidavit dated 16th November 2023 sworn by Hellen Wambui Mwangi the 1st Respondent/Administrator.
5. The court directed that the two applications be canvassed together by way of written submissions. The Applicants filed the written submissions dated 4th August 2023 whilst the Respondents relied upon their reply to written submissions dated 16th November 2023.

Background

6. This succession cause relates to the estate of the late Gitau s/o Thinji (hereinafter 'the Deceased') who died intestate on 4th June 1944.
7. According to the chiefs letter dated 22nd November, 2013 the deceased was survived by the following persons:-
 - a. Joseph Gachira Gitau - Son
 - b. Margaret Wangari Murura - Daughter In law (Deceased)
 - c. Johanna Thinji Gitau - Son (Deceased)
 - d. Richard Ndegwa Thinji - Grandson
 - e. Stephen Gitau Thinji - Grandson
 - f. James Magi Thinji - Grandson
 - g. Gerald King'ori Thinji - Grandson
 - h. Susan Wangui Thinji - Grand daughter
 - i. Winnie Wanjiru Thinji - Grand daughter
8. The estate of the Deceased comprised of only one asset being the parcel of land known as Othaya/ itemeini/153 (hereinafter 'the suit land')
9. Following the demise of the Deceased his only surviving son Joseph Gachira Gitau sought and obtained Grant of Representation to the estate which Grant was issued on 9th December 2010.
10. Following issuance of the Grant the said Joseph Gachira Gitau filed a summons for confirmation of Grant dated 19th December 2013. A grandson to the Deceased Richard Gitau Mutiria filed an Affidavit of Protest dated 11th April 2014.
11. The Protest was heard inter partes and was dismissed vide the judgment delivered on 26th April 2019 by Hon. Justice Jairus Ngaah. The Original Administrator Joseph Gachira Gitau passed away on 10th April 2014 whilst the Summons for confirmation of Grant was still pending. He was substituted by his widow Hellen Wambui Mwangi (the 1st Respondent herein).
12. Vide the judgement of 26th April 2019 the Court directed that a certificate of confirmed Grant be issued to the 1st Respondent Hellen Wambui Mwangi on 26th April 2019.
13. I will now proceed to deal with each application separately.
 1. Summons dated 15th March 2023



14. The Applicants claim to be the biological children of Joseph Gachira Gitau the Original Administrator of the estate of the Deceased by his 1st wife one Milkah Cheruto Wachira who it is alleged passed away on 20th June 2006.
15. That following the demise of the Applicants' mother, the said Joseph Gachira Gitau married the 1st Respondent.
16. The Applicants complain that they were not included in this Succession cause despite being the grandchildren of the Deceased and that they have not been provided for in the distribution of the estate. The Applicants further allege that the 1st Respondent had no authority to act for the estate of her late husband as she did not obtain Grant of representation to that estate.
17. The Applicants claim that the 1st Respondents obtained the Grant fraudulently by deliberately concealing their existence of which she was fully aware. They complain that the suit land was subdivided under mysterious circumstances into 3 portions and that no allocation was made to them as bonafide heirs of the estate of the Deceased.
18. The Applicants therefore pray to be enjoined in this succession cause as interested parties to enable them pursue their claim to the estate of the Deceased.
19. In her replying Affidavit the 1st Respondent confirms that she is the widow of the late Joseph Gachira Gitau who was a son to the Deceased in this cause. That upon the demise of her husband who had been granted letters of Administration, she was substituted as Sole Administrator of the estate and a certificate of confirmed Grant was duly issued to her on 26th April 2019, making the 1st Respondent the Sole Administrator of the estate of the Deceased.
20. The 1st Respondent denies that the applicants are the children of her late husband as he never disclosed to her that he had another wife and children She insists that her late husband was called Joseph Gachira Gitau and not Joseph Wachira Gitau, which is the name of Applicants'. Further the 1st Respondent further states that in copies of the birth certificate annexed to the application dated 17th May 2019, the Applicants father's name is given as Richard Gitau Gachira. She posits that the Applicants themselves do not seem sure of the true names of their alleged father.
21. That Richard Gitau Muteria was a Protestor who in an affidavit dated 11th April 2014 claimed that her late husband had sold to him a portion of the suit land, which protest was dismissed vide the judgment of 26th April 2019.
22. That the Applicants thereafter filed an application dated 17th May 2019 seeking to set aside the orders made on 26th April 2019, which application was dismissed vide the ruling delivered on 1st July 2021.
23. The 1st Respondent denies the Applicants' claim that she had been intermeddling with the estate of the Deceased. She urges the court to dismiss in its entirety the summons dated 15th March 2023.

Analysis And Determination

24. I have carefully considered the application by the Applicants seeking to be enjoined as Interested Parties in this matter the reply filed thereto as well as the written submissions filed by the parties.
25. In order to merit joinder in this cause, the Applicants need to satisfy the court that they have 'locus standi' in this succession cause. 'Locus Standi' is a latin term which literally means 'place of standing' and refers to the right of an individual to be heard in a particular case.



26. It is trite law that pleadings filed by a person who has no Locus Standi are void ab initio. In Ibrahim - vs- Hassan & Charles Kimenyi Macharia [2009] eKLR it was stated as follows:-

“Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, it means that party cannot be heard despite whether or not he has a case worth listening to. The issue herein is whether the Applicant lacks the requisite Locus Standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view issues regarding locus standi are critical preliminary issues which must be dealt with and settled before delving into other substantive issues. [Own emphasis]

27. It must be remembered that this is succession cause. The only persons who would have locus standi in a Succession cause would be the genuine heirs/beneficiaries to the estate, the Administrators of the estate and any creditors of the estate.

28. I have carefully perused this file. I note that on 26th April 2019 Hon. Justice Jairus Ngaah directed that a confirmed Grant be issued to Hellen Wambui Mwangi (the 1st Respondent). In coming to that decision the court noted that the Original Administrator Joseph Gachira Gitau was survived only by his widow Hellen Wambui. No mention was made of the Applicants nor did they make any representations on their own behalf.

29. This judgment of 26th April 2019 is a judgment of a court of concurrent jurisdiction. This court has no powers to review and/or alter in any manner the decision of a court of concurrent jurisdiction.

30. I further note that as pointed out by the 1st Respondent in her Replying Affidavit that the 1st Applicant Johanna Githenji Wachira did file before the High Court an application dated 17th May 2019 seeking to review and/or set aside the orders made on 29th April 2019.

31. In that application the 1st Applicant claimed that he was a grandson of the Deceased. That his late father had two wives his mother one Milka Cheruto (1st wife) and the 1st Respondent. The Applicant prayed that the court review the orders of 29th April 2019 so as to include himself and his siblings as beneficiaries of the estate of the Deceased.

32. The application dated 17th May 2019 was heard by my predecessor Hon. Lady Justice Florence, Muchemi who vide the ruling delivered on 1st July 2021 declined to review the orders of 26th April 2019 and dismissed the application.

33. This again is a decision of a court of concurrent jurisdiction. The Applicants have raised in the summons before me the very same issues which were raised and canvassed in the application dated 17th May 2019. Therefore I find that the present application is ‘Res Judicata’

34. The substantive law on res judicata is found in Section 7 of the [Civil Procedure Act](#) Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue is 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.”



35. Black's law Dictionary 10th Edition defines "res judicata" as follows:-
- "An issue that has been definitely settled by judicial decision... The three essentials are (1) an earlier decision on the issue, (2) a final judgment on their merits and (3) the involvement of same parties, or parties in privity with the original parties....."
36. In the Case of Christopher vs Salama Beach (2017) eKLR, the court clearly stated the ingredients to be satisfied when determining that a matter is res judicata thus;
- a. The suit or issue was directly and substantially in issue in the former suit.
 - b. Former suit between same parties or parties under whom they or any of them claim.
 - c. Those parties are litigating under the same title.
 - d. The issue was heard and finally determined.
 - e. The court was competent to try the subsequent suit in which the suit is raised."
37. In the Case of William Koross -vs- Hezekia Kiptoo Komen & Others [2016] eKLR the Court of Appeal stated as follows:-
- "The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too-human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go. Speaking for the bench on the principles that underlie res judicata, Y. V Chandrachud J in the Indian Supreme Court case of LAL Chan Vs. Radha Kishan, Air 1977 SC 789 stated and we agree;
- "The principle of res judicator is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue."
38. I find that this present application for enjoinder is purely an attempt to revive the application of 17th May 2019 in a roundabout way. The same is Res Judicata and amounts to an abuse of court process. The only remedy now available to the Applicant is to file an appeal against the judgment of 26th April 2019 and/or the Ruling delivered on 1st July 2021 not to file yet another application.
39. Notwithstanding my finding that this application is Res Judicata I wish to point out that the application before the court still has several shortcomings
40. The Applicants claim that they are the children of Joseph Wachira Gitau who was a son of the Deceased. As such the Applicants are not direct beneficiaries of the estate of the Deceased herein. Section 29 of the *law of Succession Act* Cap 160 Laws of Kenya defines the beneficiaries to an estate. Grand children are only included if they were dependant upon the deceased person immediately prior to his death. None of the Applicants have claimed that they were so dependant upon the Deceased.
41. Grand children of a Deceased person can only claim the share which was due to their parents. However this is only possible where the parents of the said grandchild have pre-deceased the Deceased. In such



a case the grandchildren are permitted to step into the shoes of their Deceased parents for purposes of inheritance.

42. In Re Estate Of Florence Mukari, Kinyua (Deceased) [2018] eKLR, Hon Lady Justice Matheka stated that

“A grandchild is a direct heir to the estate of the grandparents where the parent has pre-deceased the grandparents. The grandchildren get into the shoes of their deceased parents and take the parents share in the estate of their grandparents” [own emphasis]

43. In Re Estate Of Wahome Njoki Wakagoto [2013] eKLR the court held that

“Be that as it may, under Part V of the Act, grand children have no automatic right to inherit their grandparents who died intestate after 01/7/1981 when the Act came into operation. The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit from their grandparents indirectly through their own parents, the child of their grandparent. The child to the grandparent inherit first and thereafter the grandchildren inherit their parents. The only time the grandchildren can inherit directly from their grandparents is when the grandchildren’s own parents are dead. Those grandchildren can now step into the shoes of their parents and take directly the share that ought to have gone to the said parents. Needless to say, such grandchildren must hold appropriate representation on behalf of their own parents. [own emphasis]

44. The Applicants claim that the Original Administrator was married to their mother Milka Cheruto who is now Deceased. The 1st Respondent categorically denies that her late husband had another wife and children.

45. The question of whether the Applicants father was a son to Deceased herein and the question of whether the applicants are in fact the children of Joseph Gitau cannot be canvassed in this succession cause. Those are matters which can only be properly canvassed under a Succession Cause relating to the estate of the said Joseph Gachira Gitau. As such this application is misplaced as it has been filed under the wrong succession cause.

46. I have perused the judgement delivered on 1st July 2021 by Hon.Lady Justice Muchemi. In dismissing the application for review of the orders made on 26th April 2019, the Honourable Judge stated as follows:-

20. The applicant’s main contention is that the Respondent left him and his siblings out of the Succession of the grandfather’s estate. His deceased [father] Joseph Wachira is entitled to a share in Land Parcel No. Othaya/Itemeini/153 which was the only asset of the deceased in this case.

21. On the other hand, the respondent states that she and her children are the sole beneficiaries of the estate of Joseph Gachira Gitau. Further, that she was her only spouse during his lifetime and was not aware of any other family that her late husband had. On perusal of the annexures to the applicant’s application, he annexed two birth certificates for Lucy Nyawira and himself which both indicate that the name of their father is Richard Gitau Gachira. However in the application and in the replying affidavit, the deceased’s son was Joseph Wachira Gitau. The applicant further deponed that the certificate of himself and Lucy Nyawira contained



erroneous names and asked the court to expunge the document from the record. However he did not attach any affidavit of any officer from the office of Registration of Births and Deaths to support his contention that there was an error in the names. This puts the authenticity of the birth certificate in question and casts doubt on whether the applicant really knew the man he calls his late father. [own emphasis]

47. In light of the above finding by a court of concurrent jurisdiction this court cannot and will not revisit the issue. The Applicant also annexed to the supporting Affidavit copies of their national Identity Cards. Identity Cards are not proof of paternity and are of no help in determining who their father was. As stated earlier the only remedy now available to the applicants is to move to the Court of Appeal.
48. Finally based on the foregoing I find that this Applicants have no locus standi in this succession cause. The issues raised in this summons were already heard and determined vide ruling of 1st July 2021. Further the issues raised can only be canvassed under the Succession Cause relating to the estate of Joseph Gachira Gitau. Accordingly I find no merit in the summons dated 15th March 2023. The same is hereby dismissed in its entirety.
2. Summons dated 27th May 2023
49. In view of my finding related to the summons dated 15th March 2023 this application is a non-starter. The applicants are strangers to the estate of the Deceased and have no locus standi to seek any orders in respect of estate assets.
50. If the applicants wish to pursue any claim to the parcel of land known as Othaya/Itemeini/2079, 2080 and 2081, then they must file a suit in the Environment and Land Court which is the Court mandated by Article 162(2)(b) of *the Constitution* of Kenya 2010 to determine questions relating to ‘ownership, use and occupation’ of land.
51. Accordingly I find no merit in the Summons dated 27th May 2023. The same is hereby dismissed in its entirety.

Conclusion

52. Finally this court makes the following orders:-
- i. The Summons dated 15th March 2023 has no merit and is dismissed in its entirety.
 - ii. The Summons dated 27th May 2023 has no merit and is dismissed in its entirety.
 - iii. Costs of both applications will be borne by the Applicants.

DATED IN NYERI THIS 4TH DAY OF NOVEMBER, 2024.

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MAUREEN A. ODERO

JUDGE

