



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 1678 OF 2018**

**IN THE MATTER OF THE ESTATE OF JOSEPH GITHARA**

**GATHIRIMU alias GITHARA S/O GATHIRIMU (DECEASED)**

**BETWEEN**

AGNES WACHEKE GITHARA.....1<sup>ST</sup> APPLICANT

SUSAN WAIRIMU HAHANYU.....2<sup>ND</sup> APPLICANT

**AND**

NANCY WANJIRU NGANGA.....1<sup>ST</sup> RESPONDENT

RUTH KABUI GITHARA.....2<sup>ND</sup> RESPONDENT

STEPHEN THIONGO GITHARA.....3<sup>RD</sup> RESPONDENT

GRACE WAMBUI GITHARA.....4<sup>TH</sup> RESPONDENT

FRANCIS MBURU GITHARA.....5<sup>TH</sup> RESPONDENT

HANNAH NYOKABI GITHARA.....6<sup>TH</sup> RESPONDENT

ESTATE OF PETER NJOROGE GITHARA.....7<sup>TH</sup> RESPONDENT

**RULING**

1. On 19<sup>th</sup> September, 2019 the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents filed a Notice of Preliminary Objection to the Petition for Letters of Administration filed by the Applicant's herein. The Notice is dated 10<sup>th</sup> September, 2019. The Respondents seek that the Petition of Letters of Administration and all other applications filed hereto be dismissed with costs on the grounds that:

1) The Applicants having not been accorded Letters of Administration *Ad Colligenda Bona* or Letters of Administration to the estate of the Late Joseph Githara Gathirimu alias Githara son of Gathirimu are total strangers and therefore lack capacity and *locus standi* to prosecute the impugned Petition for grant of the Letters of Administration.

2) The subject of the Applicants' impugned Petition being the property known as LR Number 15003/2, having been transferred to the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondents by the deceased on 17<sup>th</sup> July, 2019 and consequently registered as IR Number 117099/2, was a gift *inter vivos* to the Respondents and the court therefore has no jurisdiction to adjudicate upon a non-existent estate.

3) The Petition for the grant of Letters of Administration does not constitute a valid and competent Petition under the provisions of the **Law of Succession Act** for failure to comply with the orders of this Honourable Court of 10<sup>th</sup> June, 2019.

4) The absence of a letter from the requisite Chief disclosing the deceased's marital status, Copy of Certified Death Certificate of the deceased, Death Certificate of the Late Peter Njoroge Githara named as the 7<sup>th</sup> Respondent and the lack of Consent from all the

survivors have the effect of rendering the impugned Petition totally incapable of advancing the process for the issuance of Letters of Administration as those requirements are mandatory under the Law of Succession for a Petition for Letters of Administration to be deemed valid and competent for the Court to entertain it.

5) There is no competent and valid Petition for this Court to entertain the impugned proceedings due to its non-compliance with the mandatory requirement of the provisions of the Law of Succession as filed by the Applicants.

6) The impugned proceedings do not constitute a suit or a valid or competent Petition which would anchor the application by way of Notice of Motion for the grant of an injunction.

7) An application for a temporary injunction or for injunctive relief is not available in succession proceedings and the impugned Amended Summons are therefore incompetent, null and void and should be dismissed forthwith.

8) The impugned proceedings are null and void and should be struck out for the inclusion of the 7<sup>th</sup> Respondent who is deceased and in respect to whose estate no Administrator or Executor has been enjoined in these proceedings.

9) The impugned Amended Summons are irregular, vexatious and misconceived for purporting that an order of this Honourable Court dated 10<sup>th</sup> June 2019 allowed any amendment as no such order was issued.

10) The impugned Amended Summons are incompetent, null and void and mischievous in introducing the 7<sup>th</sup> Respondents in an interlocutory application when they are not even named as parties in the impugned substantive petition.

2. There are three (3) applications filed by the Applicants herein:

I. A Petition for Letters of Administration Intestate dated 28<sup>th</sup> October, 2018 and filed on 11<sup>th</sup> December, 2018.

II. A Petition for Grant of Letters of Administration Ad litem dated 28<sup>th</sup> October, 2018 and filed on 11<sup>th</sup> December, 2018.

III. Summons dated 12<sup>th</sup> May, 2018 and Amended on 26<sup>th</sup> June, 2019 brought under **Article 40(1)** of the **Constitution, sections 47 and 82(b)(iii)** of the **Law of Succession Act** and **rules 49,59, 63 and 73** of the **Probate and Administration Rules** seeking injunctive relief against the Respondents, their employees, servants or otherwise from selling, disposing off, transferring, interfering with or otherwise dealing with the suit property Land Reference number 15003/2.

3. On 8<sup>th</sup> October, 2019 learned Counsel Mr. Kamau filed written submissions dated 4<sup>th</sup> October, 2019 on behalf of the Respondents in support of the Preliminary Objection in which he asked the court to dismiss the impugned petitions with costs, stating that they cannot crystallize a cause of action.

4. It was Mr. Kamau's submission that the Applicants have no limited grant to prosecute both the Impugned Petition and the Summons nor a full grant to act in respect of any matter arising out of the deceased's estate. Counsel urged that the Applicants therefore lacked the *locus standi* and capacity to institute the impugned proceedings in the first instance. To this end, Counsel referred to the decisions in **Ibrahim vs. Hassan & Charles Kimenyi Macharia, Interested Party Succession Cause No. 36 of 2017 [2019] eKLR** and **Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama Civil Appeal No. 30 of 2013 [2014] eKLR**.

5. Mr. Kamau contended on behalf of the Respondents that the deceased had during his lifetime transferred the suit property being LR 150003/2 to the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondent on 17<sup>th</sup> July, 2009 and the property therefore vested in the said Respondents as of that date. Counsel asserted that the deceased having died on 26<sup>th</sup> July 2010, one (1) year after the property was transferred, the property constitutes a gift *inter vivos* by the deceased to his three (3) children. He urged that the property cannot therefore be the subject of proceedings under the **Law of Succession Act**.

6. It was Mr. Kamau's statement that the Applicants did not contest the deceased's decision to transfer the suit property to the Respondents during his lifetime. Counsel referred to the decision in **Re Estate of M'Raiji Kithiano (deceased) Succession Cause No. 419 of 2006 [2017] eKLR**, and submitted that the courts have held that it would be improper for whoever feels aggrieved with such a decision to wait until the deceased dies in order to raise issues of discrimination or unfairness.

7. Mr. Kamau argued that this court lacks jurisdiction to entertain this matter since there is no property belonging to the deceased's estate. He asserted that lack of jurisdiction is an important preliminary point of law which if successfully argued would dispose the matter at hand once and for all. Counsel pointed out that the guiding principle is that once the court lacks jurisdiction to hear and try the matter then the suit would be deemed as a nullity. That the court must therefore down its tools by dismissing the impugned proceedings.

8. It was Mr. Kamau's contention that the Applicants are in flagrant breach of an order of this court of 10<sup>th</sup> June, 2019 which directed them to file copies of the Chief's letter disclosing the marital status of the deceased, the deceased's Death Certificate, the late Peter Njoroge Githara's Death Certificate and a Consent signed by all the beneficiaries. That by failing so to do, the Applicants failed to comply with the provisions of **rule 7** and **rule 26** of the **Probate and Administration Rules** and the impugned petition is therefore incompetent and cannot form the basis of a successful petition for issuance of letters of administration.

9. I note that contrary to the Respondent's assertion, there is on record the deceased's death certificate and a letter from the Senior Chief of Roysambu location indicating the beneficiaries of the deceased's estate. The letter does not however disclose the marital status of the

deceased.

10. Mr. Kamau argued that in the absence of a competent petition, any application filed by the Applicants either by way of Summons or Notice of Motion is null, void and incompetent as it has no anchor upon which it would be based. Further that the Applicant's purported Amended Summons seeks a prayer for injunctive relief which is not available under the provisions of the **Law of Succession Act** and the **Probate and Administration Rules**. To buttress his argument, Counsel referred to the decision in **Re Estate of Ngángá Njoroge Njuguna (deceased) [2013] eKLR** and **Re Estate of Anastacia Mbula Kilungu (deceased) [2002] eKLR**.

11. In opposition, Mr. Wambua filed written submissions dated 14<sup>th</sup> November, 2019 on behalf of the Applicants in which he submitted that the Preliminary Objection lacks merit and should be dismissed with costs. Counsel asserted that the Preliminary Objection has been filed in bad faith with a view to enable the Respondents to continue intermeddling in the deceased's estate.

12. Mr. Wambua raised four (4) issues for determination before this court:

- a. Whether the Preliminary Objection raised by the Respondents meet the standards set for a Preliminary Objection;
- b. Whether the Applicants have the *locus standi* to prosecute the petition herein and the proceedings thereto;
- c. Whether the Petition for letters of Administration Intestate is valid; and
- d. Whether this Honourable Court has the jurisdiction to issue injunction orders as sought in the amended application dated 26<sup>th</sup> June, 2019.

13. It was Mr. Wambua's statement that the Preliminary Objection dated 10<sup>th</sup> September, 2019 does not meet the standards required of a Preliminary Objection as set out in **Mukisa Biscuit Co. Manufacturing Ltd vs. West End Distributors Ltd (1969) EA 696**. Counsel asserted that the Preliminary Objection fails to meet the muster because:

- i. This court has the jurisdiction to hear and determine this matter.
- ii. The facts raised by the parties herein differ and the court has to consider the facts raised and determine their truthfulness or otherwise.
- iii. The Preliminary Objection does not have the ability to dispose of the entire suit as the Applicants have the *locus standi*.

14. Mr. Wambua submitted that the jurisdiction of this court is defined by **Article 165(3) and (6) of the Constitution, section 5 of the High Court Organization and Administration Act No. 27 of 2015 and section 47 of the Law of Succession Act**. That in particular, **section 47 of the Law of Succession Act** provides:

**“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:**

**Provided that the High Court for the purpose of this section be represented by the Resident Magistrates appointed by the Chief Justice.”**

15. Counsel further submitted that **rule 49 and 63 of the Probate and Administration Rules** grant this court the jurisdiction to issue injunction orders. Counsel pointed out that **rule 63** provides for the application of **Order 40 of the Civil Procedure Rules 2010** which stipulates the law on grant of injunctions.

16. Mr. Wambua asserted that the Applicants filed their Petition for Letters of Administration Intestate pursuant to **section 51 of the Law of Succession Act** and **rules 7 and 8 of the Probate and Administration Rules, 1980** and their Petition for Letters of Administration Ad litem under **section 51 and paragraph 14 of the Fifth Schedule to the Law of Succession Act** and **rule 12 of the Probate and Administration Rules**. That the Petitions were therefore duly filed before this court. Further that by virtue of the order of preference provided under **section**

66 of the **Law of Succession Act**, the Applicants have the *locus standi* to prosecute the Petitions filed hereto.

17. According to Mr. Wambua, the facts raised by the parties are not agreed upon. He urged that these differing factual standpoints will have to be considered by the court and a finding made on whether they are merited or not.

18. Mr. Wambua submitted that the Petitions filed by the Applicants meet the requirements specified under **rule 7** of the **Probate and Administration Rules** and are therefore validly filed. Counsel stated that contrary to the Respondents' allegations, the Applicants attached copies of the deceased's death certificate and a letter from the Chief.

19. On the failure to attach the consent, Mr. Wambua stated that **rule 7(7)** of the **Probate and Administration Rules** envisages that the consent or renunciation should be issued where there is a beneficiary of a rank prior to that of the Applicant. He contended that the rule does not envisage a case where beneficiaries are of equal rank. He urged that since the Applicants and the Respondents have an equal entitlement to administration, the rule cannot assist the Respondents to impugn the Petitions. He however stated that the Respondents are entitled to commence objection proceedings in accordance with **rule 17(1)** of the **Probate and Administration Rules**.

20. It was Mr. Wambua's submission that the issuance of notices to persons of equal or prior preference before a grant can be issued is dealt with under **rule 26** of the **Probate and Administration Rules** but that the rule does not dictate the form of Notice to be issued. He asserted that the petitions were served upon the Respondents as acknowledged in paragraph 2 of their Replying Affidavit dated 28<sup>th</sup> June, 2019. That the Respondents cannot therefore purport that they were not served or that they were unaware of the existence of the Petitions.

21. Mr. Wambua urged that **rules 7 and 26** of the **Probate and Administration Rules** do not provide for the non-compliance of the rules. That as such, if there was any non-compliance, such non-compliance does not affect the validity of the Petitions since no prejudice has been demonstrated to have been occasioned to the Respondents. He asserted that this case is therefore distinguishable from a case where the grant had been issued previously and which grant would have to be revoked or annulled pursuant to **section 76** of the **Law of Succession Act**.

22. Having considered the pleadings and submissions filed by the parties hereto as reproduced above, I find that the key issue for determination is whether the Preliminary Objection succeeds.

23. The law pertaining to a Preliminary Objection is settled. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Co. Ltd [1969] EA 696** Law JA rendered himself thus on the question of preliminary objection:

**“So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

24. Similarly Sir Charles Newbold in the above cited case of **Mukisa Biscuit** observed thus:

**“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”**

25. The basis of the preliminary objection filed by the Executors is that the Applicant lacks *locus standi* to file an application for confirmation of grant. The definition of the term *locus standi* in the **Black's Law Dictionary 9<sup>th</sup> Edition** is, **“the right to bring an action or to be heard in a given forum.”**

26. The issue of *locus standi* raises a point of law that touches on the jurisdiction of the court and it should therefore be resolved at the earliest opportunity. (See - **Mary Wambui Munene vs. Peter Gichuki Kingara and Six others, Supreme Court Petition No. 7 of 2013; [2014] eKLR.**)

27. The deceased herein was survived by his children, the Applicants and the Respondents herein, having been predeceased by his wife. By virtue of **section 38 and 66** of the **Law of Succession Act**, the Applicants' entitlement to petition for Letters of Administration Intestate and Letters of Administration ad litem for the estate of the deceased therefore ranks equally with that of the Respondents. By virtue of being children of the deceased and therefore beneficiaries under intestacy, the Applicants have the *locus standi* to petition for a grant of letters of administration to the estate of the deceased.

28. I note, however, that having not been issued with a grant of letters of administration intestate or a grant *ad litem* in relation to the deceased's estate, the Applicants lack the *locus standi* to bring a suit seeking injunctive relief as against the Respondents.

29. Both the Applicants and the Respondents propound different theories of how the suit property L.R. No. 15003/2 was dealt with during the deceased's lifetime.

30. According to the Applicants, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents together with one Peter Njoroge Githara (now deceased) illegally and fraudulently, without the consent of the deceased, transferred the property to themselves and have been selling the subdivisions to Third Parties. It is their case that the deceased did not have the mental capacity to execute the transfer on 14<sup>th</sup> July, 2009 when the transfer is

purported to have been executed and registered in favour of the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondents.

31. On their part, the Respondents state that the deceased distributed his property amongst his children and disposed others off by way of sale during his lifetime. Their case is that the deceased donated a Power of Attorney to the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondents granting them authority to deal with all his properties including the suit property L.R. No. 15003/2.

32. The deceased herein died on 26<sup>th</sup> July, 2010 as indicated in the death certificate of serial number 539272 filed hereto. There is on record an Instrument of Transfer made on 14<sup>th</sup> July, 2009 between Githara s/o Gathirimu, the deceased herein, on one hand as Transferor, and Ruth Kabui Githara, Nancy Wanjiru Nganga and Peter Njoroge Githara on the other hand as Transferees. The Transfer duly registered in the Nairobi Land Titles Registry on 17<sup>th</sup> July, 2009 was for the transfer of L.R. 15003/2 measuring 12.99 Ha to the Transferees for a consideration of the sum of Kshs. 5,000,000/=. Upon transfer, the property was registered as IR No. 117099/2 which has been further subdivided and transferred to Third Parties.

33. The suit property which is listed as the sole asset of the deceased's estate having been transferred and duly registered during the deceased's lifetime is therefore not available for distribution.

34. In light of the existence of an Instrument of Transfer duly executed and registered during the deceased's lifetime, transferring the suit property to Ruth Kabui Githara, Nancy Wanjiru Nganga and Peter Njoroge Githara, I find that the property cannot constitute the deceased's intestate estate. Having been the sole asset listed in the Petition for Letters of Administration Intestate, the Petition cannot therefore proceed.

35. The Applicants have alluded to fraud in the transfer of the suit property into the names of the Respondents, I note however that this is not the appropriate forum to raise this issue. In my view, the issue surrounding the ownership of the suit land is an issue to be addressed before the Environment and Land Court which by dint of **Article 162** of the **Constitution** and the **Environment and Land Court Act** is clothed with jurisdiction to hear and determine disputes relating to occupation, ownership and title to land.

36. Whereas this court is clothed with jurisdiction under the **Law of Succession Act** to hear and determine an application on intestacy for grant of letters of administration intestate or grant of letters of administration *ad litem* it cannot do so upon a non-existent estate as in the instant case. I therefore find that there is no competent and valid Petition for Letters of Administration Intestate before this court.

37. The upshot of the above is that the Preliminary Objection is found to have merit but only with respect to the Petition for Letters of Administration Intestate dated 28<sup>th</sup> October, 2018 and the Summons dated 12<sup>th</sup> May, 2018 and Amended on 26<sup>th</sup> June, 2019 seeking injunctive relief.

38. In respect of the Petition for Grant of Letters of Administration *ad litem*, I hereby allow it and direct that it shall be limited only to instituting a cause of action in relation to the deceased's estate and does not in any way grant the Applicants authority to otherwise deal with the deceased's estate. It is so ordered.

**SIGNED DATED AND DELIVERED IN OPEN COURT THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2020.**

.....

**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of .....Advocate for the Applicants.**

**In the presence of .....Advocate for the Respondents.**