



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE NO 151 OF 2007

IN THE MATTER OF THE ESTATE OF THE LATE GATHI MWATE (DECEASED)

JOHNES MWANGI GATHI.....PETITIONER/RESPONDENT

-VERSUS-

PETER NJOROGE MWANGI.....OBJECTOR/APPLICANT

RULING

1. The Objector/Applicant (**PETER NJOROGE MWANGI**) has by a chamber summons application dated 9th day of December, 2019 seeking:

a) **THAT** there be stay of execution of court order for demolition of structures and or rental house on parcel numbers **Gachororo plot Nos. 171, 210** and the same be set aside. (PARTIALLY SPENT)

b) **THAT** the Petitioner/Respondent (**JOHNES MWANGI GATHI**) be restrained by a temporary order of an injunction from pulling down and or demolishing structures and or houses and or evicting the tenants from parcel numbers **Gachororo plot Nos. 171, 210**.

c) **THAT** preservatory orders do issue in respect of the estate of the late **GATHI MWATE** and in particular the permanent and semi-permanent houses on parcel numbers **Gachororo plot Nos. 171, 210 and 215** until the hearing and determination of revocation and or annulment of grant.

d) **THAT** the grant made on **26th December, 2007** and confirmed on the **15th June, 2009** to the petitioner be revoked and or annulled on grounds:

i. That the grant was obtained fraudulently by making false statement and by concealment from the court of facts that are material to the case.

ii. The petitioner left out other beneficiaries to wit the objector, and her late sister.

iii. The grant was obtained by means of an untrue allegation of facts essential in a point of law to justify the grant.

iv. The petitioner/respondent omitted the objector/applicant during confirmation of the grant.

v. The petitioner misled the court by not giving the correct information.

1. THAT the shares and dividends at **GACHORORO FARMER LIMITED SHOULD NOT BE PAID TO THE PETITIONER** and this order be served upon the **Officer Commanding Station, O.C.P.D, JUJA POLICE STATION AND THE CHAIRMAN GACHORORO FARMERS LIMITED,**

The applicant in the supporting affidavit states that the respondent has singly taken their late father's estate, the exclusion of all the other beneficiaries, and intends to demolish and/or destroy permanent and semi-permanent houses constructed by the applicant, and is at the verge of disinheriting the applicant. That there is a permanent storey building with 20 rooms, and 17 semi-permanent rooms. That GACHOROR PLOT No 215 is not a parcel of land but shares and dividends which should not be paid to the respondent, but ought to be shared equally among all the beneficiaries. That the respondent has failed to recognize what was given out *inter vivos* to other beneficiaries

In opposing the application, the Petitioner/Respondent by a replying affidavit dated 6th January, 2020 deposes that the application is without

merit, based on falsehood, misleading, uncalled for and the applicant is being economical with the truth as the applicant has been provided for in the distribution of assets as reflected in the certificate of grant.

The matter was disposed of through written submissions where the applicant argues that the respondent took the entire parcel numbers **KIGANJO/HANDEGE PLOT T/96 and KIGANJO/HANDEGE/669. PLOT No 171 measuring 0.35 acre, and shares in PLOT No.215**. He is categorical that in the year 2013, he has constructed permanent and semi-permanent houses on parcel **Nos. GACHOROR PLOT 171 and 210**, which belong to their late mother **MARY WAIRIMU GATHI (died on 31st JULY 2016)**, who had authorized the construction during her lifetime.

He further submits that the distribution was not fairly done - beneficiaries were not given equal shares and that the respondent assigned himself the lion's share, and now seems to be mixing issues because he is not the administrator of the estate of their late mother, and/or her late **MARGARET NJERI NJUGUNA**. He urges the court to exercise its unfettered discretion under **section 76 of the Law of Succession**, and order the revocation of the confirmed grant, insisting that the grant was fraudulently obtained by making of a false statement, and in any event, the person to whom the grant was made has failed to either diligently administer the estate and/or the grant has become useless and inoperative through subsequent circumstances, as he has failed to provide. The court is urged to be guided by the decision in **JOSEPH SHISUNDI LIKHANGA FERDINAND LISUTSA SHIBUKU & ANOR [2019] eKLR and PURITY KAARI GILBERT & ANOR vs DAVID NJERU MUGWIKI [2017] eKLR**

Issues for determination

- a) Whether the orders of demolition granted on the 30th day of July, 2019 should be set aside;
- b) Whether a temporary order of an injunction should be issued stopping execution of the demolition order and or evicting the tenants from parcel numbers **Gachororo plot Nos. 171, 210**;
- c) Whether this court should issue preservative orders in respect of the estate of the late **Gathi Mwate** and in particular the permanent and semi-permanent houses on parcel numbers **Gachororo plot Nos. 171, 210 and 215** until the hearing and determination of revocation and or annulment of grant;
- d) Whether the grant issued in favour of the Petitioner /Respondent on the **26th day of December, 2007 and confirmed on the 15th Day of June, 2009** should be revoked and/ or annulled.

It is not disputed that the applicant and the respondent are biological brothers and the respondent is the administrator of the Estate of the late **Gathi Mwate**. The respondent points out that the applicant has failed to prove his claim by evidence and what appears in submissions cannot come to his aid, as submissions are generally parties **"marketing language..."**. That the hackneyed principle is that litigating parties are bound by their pleadings, the court is unequivocally an umpire that does not step into and/ or engage in the litigation arena as re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs Nigeria Breweries PLC SC 91/2002** where **Adereji, JSC** expressed himself thus on the importance of pleadings:-

"...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments goes to no issue and must be disregarded..."

"... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

Also cited is **Sir Jack Jacob** states the importance of pleadings in his article **"The Present Importance of Pleadings"** published in (1960) which article was quoted with approval by the Supreme Court of Malawi in **Malawi Railways Limited v Nyasulu [1998] MWSC 3**,

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves (emphasis ours). It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised in the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice..."

In the adversarial system of litigation therefore, (which Kenya pursues) it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

That the afore-going position has been adopted and embraced by the Kenyan Court of Appeal with approval in the case of **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR**.

The Court of Appeal in **Daniel Toroitich Arap Moi & another v Mwangi Stephen Murithi & another [2014] eKLR** held that:

“submissions cannot take the place of evidence. The respondent had failed to prove his claim by evidence what appeared in submissions could not come to his aid—submissions are generally parties “marketing language...”

I cannot fault this critical analysis on the issue of the place of pleadings vis-a-vis submissions, and I do not think there is anything useful I would add to spice it more.

a) Whether the orders of demolition granted on the 30th day of July, 2019 should be set aside

The order dated 30th July, 2019 states that neither the Objector/Applicant nor his advocate who was duly served attended court on the 29th day of July, 2019 for hearing of the Petitioner/Respondent's application for demolition of the illegal structures erected on land parcels numbers **171, 210 and 215**. The court thus deemed the application seeking demolition of the structures as unopposed, and granted the prayers. The applicant alleges that his previous counsel on record did not inform him or his current legal counsel and the failure by the previous counsel to attend court which he contends is a mistake should not be visited to him.

It is the respondent's contention that the applicant has been indolent, having had ample time to respond to the application dated 17th July, 2019 leading to the grant of the demolition orders. That it is evident from the court record that the applicant was served with the application, and he even had legal representation. However, that having legal representation does not grant him leeway to abscond his duties as a party to this suit which duties include: the expeditious disposal of matters before a court of law. That in any event, a case belongs to the litigant and not their counsel regardless of the rank of such counsel.

In support of this submission on debunking the averment that the mistake of counsel should not be visited on a litigant the respondent cites the celebrated case of **Murai v Wainaina [1979] eKLR** where Madan JA. observed:

“A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought to certainly to do whatever is necessary to rectify it if the interest of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. (Emphasis mine) Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress”.

The position taken by Justice Madan was later applied by the court of appeal in **Donald O. Raballa v Judicial Service Commission & another [2018] eKLR** where the court dismissed a reference for extension of time to file an appeal out of time. The facts before this court in the present application are described as being similar to the **Raballa** case (supra) as both seek the setting aside of orders already made which in essence mean the end of litigation and the successful party should be allowed to enjoy the fruits of their decision.

That a mistake should be differentiated from the inaction on the part of an advocate, as was espoused in **Rajesh Rughani v Fifty Investment Ltd & another [2005]** where the court of appeal pronounced itself thus:

“It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter.”

The upshot is that there exists no mistake on the part of the former counsel for the applicant, and the fact that both counsel as well as his instructing client failed to attend court indeed is not a mistake, but an inaction which this court cannot shut its eyes to. The position taken by Justice Madan was later applied by the court of appeal in **Donald O. Raballa v Judicial Service Commission & another [2018] eKLR** where the court dismissed a reference for extension of time to file an appeal out of time. The facts before this court in the present application are described as being similar to the **Raballa** case (supra) as both seek the setting aside of orders already made which in essence mean the end of litigation and the successful party should be allowed to enjoy the fruits of their decision.

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Indeed, there are avenues to be pursued by the applicant in scenarios such as the one he has encountered and I cannot ignore the fact that the applicant disregarded these rules and directions of the court and should thus bear the consequences. The Court of Appeal in **Grofin Africa Fund LLC & another v Namsi Limited t/a Nobilia East Africa & 2 others [2018] eKLR** equated an advocate-client relationship as that of a principal and an agent. “It follows therefore that when a counsel as an agent is vested with authority to perform some duties and does not perform the duty as directed by the principal, such principal should bear the consequences.” Similarly in **Bains Construction Co. Ltd v John Mizare Ogowe [2003] eKLR** the court observed that:

“It is to some extent true to say that mistakes of counsel as in the present case should not be visited upon the party. But it is equally true that when counsel as agent is vested with authority and trust to perform some duties for his client as principal and does not perform it, surely such principal should bear the consequences otherwise he would never learn from his folly.”

Whereas the respondent's submission that that the orders made on the 30th day of July, 2019 [the record shows 29/7/2019] are valid, for all purposes hold a lot of water, the contestation does not end here, nor would it bring the matter to conclusion as there remains the issue of whether the grant that was confirmed ought to be revoked, and whether an order of injunction ought to issue. This is because were the two issues to be resolved in favour of the applicant, then the order of 30th July 2019 would crash like a ton of bricks.

INJUNCTION ORDERS AGAINST THE DEMOLITION/EVICTION ON PARCEL NUMBERS GACHORORO PLOT NOS. 171, 210;

The applicant claims that he was directed by their late mother Maria Wanjiru Gathi to alter the status of the parcels of land bequeathed to her after the confirmation of grant made on the 15th day of June, 2009. However, the respondent questions whether the applicant has any lawful authority to deal with the property of their late mother in whatever manner from the date of her demise. The question as to whether the authority to construct on the parcels was rightfully granted, and whether it lapsed upon the death of their mother is vehemently contested by the respondent who contends is that, no person is allowed to deal with any such property unless and until one petitions and is granted authority by a court of law of competent jurisdiction.

The respondent points out that the applicant has further acknowledged that he is in possession, occupation and control of the buildings forming part of the estate of our late mother, and is perpetuating an illegality then comes to seek the protection in perpetuating such illegalities. That it is trite law that courts cannot, do not and are not in the business of sanctifying illegalities. This court is urged to dismiss the application as the applicant has confirmed that he is engaging in illegalities to the detriment of all other beneficiaries of the estate of **Gathi Mwate**.

The respondent has taken the position that authority with respect to an estate of a deceased person can only be administered by a personal representative who has the backing of the law, and that in the present case, he is the sole administrator of the **Estate of Gathi Mwate**. He maintains that the properties that have now formed part of the **Estate of Maria Wanjiru Gathi** were previously part of the **Estate of Gathi Mwate**, and as he had the legal authority to administer the estate of **Gathi Mwate**, he went ahead and prayed for order of demolition of structures erected on the Estate of **Gathi Mwate**.

The applicant is accused of hindering the respondent's my efforts to administer the Estate of **Gathi Mwate** to the benefit of all other beneficiaries as he took over the whole of the parcels which the late **Mary Wanjiru Gathi** was a beneficiary save for just a portion of it. I notice that the respondent very carefully circumvents the question regarding when the structures he seeks to demolish were constructed by the applicant during their mother's lifetime, and with her consent.

Further, although the contested properties being contested initially formed part of the estate of **Gathi Mwate**, their status changed upon confirmation and distribution where they were assigned to the late **Mary Wanjiru Gathi**. They cannot be deemed to revert to the estate of **Gathi Mwate**. The grant did not limit their mother's right over the properties to a life interest as would have been expected under the provisions of **section 35 of the Law of Succession Act**, and which would any event only be applicable if she had remarried-if that had happened then the respondent's argument would be valid. **Section 35 of the Law of Succession provides as follows:**

Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one

surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine

upon her re-marriage to any person.

As far as the record goes, the distributed/contested property now form part of the estate of **Mary Wanjiru Gathi** and the same argument being used by the respondent in defence to his actions, and poking holes at the applicant's lamentations applies to the property in respect of their late mother's estate. The respondent has not obtained grant of letters of administration to administer their late mother's estate. The issues about the illegality of the applicant's presence on the said property cannot therefore be resolved in this matter, the parties ought to file a cause relating to the estate of their late mother, and raise their contestation in that new cause.

The Court of Appeal in **Grofin Africa Fund LLC & another v Namsi Limited t/a Nobilia East Africa & 2 others [2018] eKLR** equated an advocate-client relationship as that of a principal and an agent. **"It follows therefore that when a counsel as an agent is vested with authority to perform some duties and does not perform the duty as directed by the principal, such principal should bear the consequences."**

Similarly, in **Bains Construction Co. Ltd v John Mizare Ogowe [2003] eKLR** the court observed that:

"It is to some extent true to say that mistakes of counsel as in the present case should not be visited upon the party. But it is equally true that when counsel as agent is vested with authority and trust to perform some duties for his client as principal and does not perform it, surely such principal should bear the consequences otherwise he would never learn from his folly."

The principles of granting an injunction was adequately dealt with, in the celebrated case of **Giella v Cassman Brown [1973] EA 358** where a court faced with such an application has to consider:

- i. Is there a prima facie case with a probability of success;
- ii. Does the applicant stand to suffer irreparable harm/injury that cannot be adequately compensated by an award of damages;
- iii. On which side does the balance of convenience tilt.

Should preservatory orders issue in respect of the permanent and semi-permanent houses on parcel numbers Gachororo plot Nos. 171, 210 and 215 until the hearing and determination of revocation and or annulment of grant;

in **Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] E.A. 86 at page 89**, where it was held that:

“the sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly, where the court is in doubt it will decide the application on a balance of convenience. See Giella v Cassman Brown & Co. Ltd (supra) at page 360 letter E. These conditions are sequential so that the second condition can only be addressed if the 1st one is satisfied and when the court is in doubt the third condition can be addressed.”

I think the applicant has ably demonstrated that he has an arguable prima facie case which has probable chances of success, and it is open for any eye to see that unless an injunction is issued, the applicant stands to suffer great loss as the structures he has erected on the disputed parcels will be demolished. He is thus deserving of the orders sought

WHETHER THE GRANT SHOULD BE REVOKED AND/ OR ANNULLED.

The applicant has sought that the grant be annulled or revoked, on grounds that it:

- a) was obtained fraudulently/ by concealment of material facts, by misinforming the court
- b) the petitioner left out other beneficiaries of the estate namely the objector and his late sister,
- c) the applicant was omitted during confirmation.

Under section **76 the Law of Succession Act** a grant may be annulled or revoked on grounds that:

- a) that the proceedings to obtain the grant were defective in substance;**
- b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**
- c) That the grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**
- d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either-**
 - i. To apply for confirmation of the grant within one year from the date hereof, or such longer period as the court has ordered or allowed; or**
 - ii. To proceed diligently with the administration of the estate; or**
 - iii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**
- e) That the grant has become useless and inoperative through subsequent circumstances.**

The certificate of confirmation of a grant was confirmed on 15th June, 2009 although the record does not indicate that it was in the presence of all the beneficiaries. It shows that the estate was distributed in the following manner:

NAME	DESCRIPTION OF PROPERTY	SHARES
SAMUEL KAMAU KAPSABET/KAPSABET BLOCK 1 (YAMUMBI)	361	2.0 ACRES
MARY WANJIKU GATHI	„ „ „	2.0 ACRES

MARY WANJIRU GATHI	GACHORORO PLOT NO 210	WHOLE
JOHNES MWANGI GATHI	GACHORORO PLOT NO 171	0.35 ACRES
JOSEPH HINGAH	” ”	0.35 ACRES
JAMES WAINAINA	” ”	0.35 ACRES
PETER NJOROGE	” ”	
NAME	DESCRIPTION OF PROPERTY	SHARES
SAMUEL KAMAU	GACHORORO PLOT NO 171	0.35 ACRES
MARGARET NJERI	” ” ”	0.35 ACRES
MARY WANJIRU GATHI	” ” ”	0.35 ACRES
JOHNNES MWANGI GATHI	KIGANJO/HANDEGE PLOT T/96	WHOLE
JOHANES MWANGI GATHI	KIGANJO/HANDEGE/669	WHOLE
JOHANES MWANGI GATHI	SHRES NO. 215	WHOLE

The respondent contends that the applicant is economical with the truth as he is included in the distribution and that all other beneficiaries have also been given a share from the deceased's estate. Further, that all the beneficiaries were present at the confirmation of the grant, and consented to the now contested mode of distribution

The respondent points out that the applicant has benefited from the Estate of Gathi Mwate as is evident from the certificate of confirmed grant at number 7. That their late sister **Margaret Njeri** was also considered in the distribution of the Estate to which she was given **0.35 acres** parcel of land parcel **No Gachororo plot no. 171** as beneficiary number 9 on the schedule of distribution. That other beneficiary has been named as having been left out of the estate in the pleadings. That none of the grounds for revoking or annulling a grant as enumerated above have been met nor is there any no iota of evidence furnished to convince the court to grant such orders. That the prayer is coated with sinister motive which the applicant his unable to tell this honourable court.

That the last prayer regarding shares and dividends at **Gachororo Farmer Limited** has no basis and should therefore be disallowed. That the applicant has not given reasons why the distribution of the estate should be altered let alone revoking or annulling.

Certainly the applicant is not being truthful that there are other beneficiaries himself included that were left out of the list so as not to benefit, because from the list of distribution set out in the certificate of grant of confirmation, the applicant (**PETER NJOROGE**) is the beneficiary of 0.35 acres of land being part of land parcel registration number **GACHORORO PLOT NO. 171**. However, it is evident that the respondent got the lion's share, and no reason was recorded in the court proceedings, nor has the respondent offered any explanation even at this hearing for this skewed manner of distribution, if it was not to defraud the other beneficiaries. Even if all the beneficiaries were considered in coming up with the mode of distribution, there is no evidence that they were present and confirmed to the court that it was their intention the Estate be distributed as it was. I am satisfied that the grant was not properly obtained and in all probability there was none disclosure of the distribution so as intended to deprive the other beneficiaries of the bulk of the estate. Consequently, the grant which was issued and confirmed, be and is hereby revoked. The costs of this application are awarded to the applicant

E-Delivered and dated this 4th day of May 2020 at Eldoret

H.A. OMONDI

JUDGE