



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 92 OF 2002

IN THE MATTER OF THE ESTATE OF M'MUGAMBI MUTINDI (DECEASED)

ANGELO KINOTI

GERALD M'NGARUTI MBATIA PETITIONERS

-VERSUS-

DANIEL MURUNGI M'MUTHAMIA (Suing as

Guardian Ad Litem for Koome Gituma &

Purity Makena Gituma) APPLICANT

-AND-

GIBSON WAMBUGU NYAGA (DCD).....1ST PROTESTOR

JOHNSTONE MBAYA2ND PROTESTOR

JOSEPH KIRUMBI M'MBUI (DCD)3RD PROTESTOR

TABITHA MUKIRI.....4TH PROTESTOR

LUCY NKOROI5TH PROTESTOR

JULIA KANGAI6TH PROTESTOR

M'MBOGORI M'MUGAMBI (DCD)7TH PROTESTOR

JOHN MWITI M'MARETE (DCD)8TH PROTESTOR

MARTHA KITHUKU M'MUTHAMIA9TH PROTESTO

RODGERS KOOME MURANGIRI.....1ST ADMINISTRATOR

PHILOMENA GACER GEOFFREY2ND ADMINISTRATOR

J U D G M E N T

1. On 25th October, 2018, this court made a ruling determining 11 applications that had been pending in this matter for close to 10 years. One of those applications was by the original petitioners for the confirmation of grant issued on 30th June, 2008.

2. By that ruling, the court revoked the grant which had been issued to **Angelo Kinoti and Gerald M'Ngaruti M'Mugambi** and issued a fresh grant to **Rogers Koome Murangiri and Philomena Gaceri Geoffrey**.

3. The court found that the land belonging to the deceased, who died in 1934 had not only changed hands from his children to his grandchildren, great grandchildren and other purchasers who had now settled on that property for years on. For that reason, the court was of the view that 84 years was so long a period for any orders to be made that would disrupt the social fabric.
4. In this regard, the court directed that the district Surveyor with the assistance of the Assistant County Commissioner do visit the subject property and ascertain the occupation and developments thereon.
5. The court stated that it would deal with the issue of the daughters of the deceased after the report of the Surveyor has been made. The record shows that the Surveyor visited the subject property on 25th April, 2019 and carried out the exercise in the presence of the area Assistant County Commissioner, area chief and all the interested parties.
6. In the said ruling of 25th October, 2018, The court made a finding that the deceased had four sons and two daughters. One son had been given his own land and was not to participate in the distribution. The remaining three sons had distributed the land amongst themselves to the exclusion of the daughters as they had been married and were not living on the land.
7. One of the daughters, **Martha Kithuku** filed an application dated 19th October, 2012 for the revocation of the grant on the grounds that the two daughters of the deceased had not been disclosed in the petition. She however, died before prosecuting that application and was never substituted.
8. I will now consider the position of the daughters. Firstly, the deceased died in 1934, way before the current **Law of Succession Act, Cap 160 of the Laws of Kenya, ("the Act")** came into effect in 1981. By dint of **section 2 of the Act**, the law applicable is the customary law of the deceased. The deceased was a Meru. Under Meru customary law, daughters were not allowed to inherit from their parents. It is for this reason that as early as after the demise of the deceased, the two daughters were not included in the distribution of the deceased's land.
9. Of course, the Meru customary law was discriminative and would run foul of **Article 27 of the Constitution**. However, considering that 68 years had already lapsed by the time this Cause was being lodged, a lot had changed on the ground. Those in possession, were no longer the sons of the deceased but his grandchildren, great grandchildren and other persons who had purchased interests from the sons of the deceased or his grandchildren. Such persons had been in occupation for so long as, in law, to have defeated any interests thereon.
10. While rendering its said decision, this court observed thereon: -

“Before considering the above issues, I wish to make some observations here which will guide the court in the determination of this matter. The deceased died approximately 84 years ago. None of his children are alive. This matter meant to succeed his estate was lodged in 2002 and has remained unconcluded for 16 years. As a result, the direct beneficiaries of the deceased have all died. Those who have remained are grandchildren and great grandchildren of the deceased.

Over time, either the direct beneficiaries or their children have sold portions of the estate property to 3rd parties who have entered the property, taken possession thereof and have developed parts thereof. The issue of land is not only emotive in this country, but excessively emotive in this area. It is the one single cause of the many criminal matters that are pending in the courts in this region, which range from assault to murder.

For the foregoing reason, delay in concluding disputes such as these not only leads to injustice but spirals and clogs the wheels of justice in the courts in this region. It is for that reason that in the interests of justice, such disputes require decisive action with a view to bringing them to conclusion with an eye on fairness and justice”.
11. None of the daughters of the deceased or any of their children or grandchildren was in occupation of the estate land then or presently. The application by **Martha Kithuku** was not only belated but was never prosecuted during her lifetime or was anyone substituted on her behalf to prosecute the same. Accordingly, for the foregoing reasons, the failure to include the daughters of the deceased in the petition did not in any way affect the grant.
12. While the report of the Surveyor was being awaited, **Daniel Murungi M’Muthamia** filed an application dated 27th March, 2019 for the revocation of grant under **section 47 of the Law of Succession Act, CAP 160 Laws of Kenya, Rule 73 of the Probate and Administration Rules** “together with any other enabling provisions of the law”.
13. In that application, the applicant sought among other orders that the grant of letters of administration issued to the administrators vide the ruling of 25th October 2018 be revoked and a fresh grant be issued to him. He contended that the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material. Thus, the grant was obtained by means of untrue allegation of fact.
14. He further contended that the 1st petitioner was not related to the deceased since he masqueraded as the son of the deceased and had only changed names from Festus Koome Gituma to Rogers Koome Murangiri.
15. The administrators opposed the application vide their grounds of opposition dated 25th June, 2019. They contended that the application lacked merit as it was an attempt to review or set aside the ruling of 25th October 2018 and that it did not meet the threshold for revocation of the grant.
16. The applicant filed his submissions which the court has keenly considered. The administrators did not file any despite an order for them to do so.

17. Although the applicant did not cite **Section 76 of the Law of Succession Act** which provides for the revocation of grants, I will nevertheless deal with matter in view of **Article 159 (2) (d) of the Constitution**. That section sets out the grounds upon which a grant may be revoked. These include, 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 and, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

18. In the present case, the applicant states that he is a grandson of the deceased. He obtained a limited grant of letters of administration *ad litem* for the estate of the late **Martha Kituku** limited to pursuing this Cause.

19. According to the applicant, he sought revocation for reason that there is existence of paternity/parental fraud. That the 1st administrators had changed his name from **Festus Koome Gituma to Rogers Koome Murangiri** and pretended to be a son of the deceased.

20. From the record, the 1st administrator never at any time present himself to be a son of the deceased. In his Supporting Affidavit sworn on 15th May, 2018 upon which the court appointed him a joint administrator, he deposed that the deceased was his great grandfather. He was therefore a great grandson of the deceased. The applicant's assertion therefore is false.

21. Further, the record shows that, as early as 10th June, 2002, the applicant had signed an authority in this Cause to act on behalf of the 1st administrator and his sister who were minors at the time. He recognized them as great grandchildren of the deceased. It therefore defeats logic, that 17 years later, the 1st administrator has become an imposter!

22. It should be recalled that, in its ruling of 25th October, 2018, the court dismissed 4 applications by the present applicant wherein he had objected to the making of the grant purporting to act for the 1st administrator and his sister. The court made a finding that; there was no order appointing the applicant as some guardian ad litem of the two and that the two were already adults. The applicant has now turned around to circumvent those orders and seek to be appointed the administrator of the estate of the deceased.

23. On the issue of the identity of Rogers Koome the court identified that he and Festus Koome are one and the same person. Regarding the limited grant of letters of administration *ad litem*, the applicant had not acquired it. He sought and acquired the limited grant on 23rd November 2018 after the said ruling.

24. To my mind, this court did deal with all the matters the applicant is now raising in its ruling of 25th October, 2018. To that end, this court is *functus officio*. **The Black's Law Dictionary Tenth Edition** at page 767 defines *functus officio* as:-

"[having performed his or her office]" (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

25. In **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] Eklr**, the Supreme Court stated:-

"We, therefore, have to consider the concept of "functus officio," as understood in law. Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832, has thus explicated this concept:

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

This principle has been aptly summarized further in Jersey Evening Post Limited v. A1 Thani [2002] JLR 542 at 550:-

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available" [emphasis supplied].

26. To my mind, on the material on record, the court having addressed all the necessary issues that required determination in this matter whereby it made its findings in the said ruling of 25th October, 2018, the court became *functus officio* in relation to those matters. To my mind, any party aggrieved thereby could only appeal to the Court of Appeal and not otherwise. Consequently, the applicant's application is for dismissal.

27. On the issue of distribution, the Surveyor filed his report dated 17th May 2019 showing the occupation of the estate, **LR. No. Ntima/Ntakira/985**. On 27th June, 2019, **Mr. Kaumbi** prayed that the grant be confirmed along the lines of the survey report. On the other hand, **Mr. Muthomi** counsel for the administrators stated that **Jane Thurairaja Gatabi** has not paid the entire consideration.

28. As pointed out in the ruling of 25th October 2018, the deceased died in 1934 and none of his children are still alive. Those who have remained are grandchildren and great grandchildren. Thus, over the years the direct beneficiaries or their children have sold their portions to 3rd parties who have occupied and developed their respective portions without any objection.

29. The Surveyor's report shows that **LR No. Ntima/ Ntakira/985** has been subdivided into four portions, **Nos. 3823 to 3826** of which, two resultant parcels have undergone subsequent subdivisions giving rise to new numbers. The report pointed out the occupants of the land parcels. I am of the view that upsetting the status quo would be to court chaos and fresh disputes. Although the subdivisions had not been authorised or sanctioned by the court, for reasons contained in the ruling of 25th October, 2018, I will retain them. This court's opinion is that the estate be distributed according to the report.

30. As for the issue that **Jane Gatabi Thurania** has not finished paying the consideration, that is a matter that can only be tackled in another forum as this forum has no jurisdiction to deal with such matters.

31. Accordingly, the court makes the following orders: -

a) the application dated 27th March 2019 be and is hereby dismissed with costs to the joint administrators.

b) the grant of letters of administration intestate issued to Rodgers Koome Murangiri and Philomena Gaceri Geoffrey on 25th October 2018 be and is hereby confirmed with the estate being distributed as follows: -

i) Ntima/Ntakira/3823 (0.704Ha)

Angelo Kinoti

ii) Ntima/Ntakira/3963 (0.20Ha)

Johnstone Mbaya

iii) Ntima/Ntakira/3962 (0.20Ha)

Speranza Karimi

iv) Ntima/Ntakira/3964 (0.18 Ha)

Esther Gauku

Peter Gikundi to share equally

Joanina Riinya

v) Ntima/Ntakira/3966 (0.393 Ha)

Philomena Gacheri

vi) Ntima/Ntakira/3965 (0.405 Ha)

Jane Gatabi Thurania

vii) Ntima/Ntakira/3826 (0.797 Ha)

Purity Makena - ¼ acre

Moses Muriithi - 1/8 acre

Rodgers Koome - Balance

It is so decreed.

DATED and DELIVERED at Meru this 19th day of September, 2019.

A. MABEYA

JUDGE