



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**SUCCESSION CAUSE NO.11 OF 2017**

**IN THE MATTER OF THE ESTATE OF GATHARIKA KAMAU GAKURU (DECEASED)**

**- A N D -**

**JAMES NJENGA NGUGI.....APPLICANT/OBJECTOR**

**- V E R S U S -**

**JOHN KIMATHI GATHARIKI &**

**9 OTHERS.....RESPONDENTS/PETITIONERS**

**R U L I N G**

Before me for determination are three applications dated 28/9/2018 and another dated 18/2/2019. Both applications are filed by the 1st respondent/applicant – John Kimathi Gathariki.

In the application dated 28/9/2018, the applicant seeks the following orders:

(1) .....

(2) *The court do grant an order that no one should intermeddle with the estate of the deceased Gathariki Kamau Gakuru pending determination of this matter;*

(3) *That the respondents do produce and deposit in court Kshs.840,000/= got from cut trees.*

In that application which was supported by the applicant's affidavit, he averred that Henry Njoroge Gathariki has cut 60 trees worth Kshs.18,000/= for trees all totaling Kshs.840,000/= without permission from the other beneficiaries and that he should account.

In the 2nd application, the prayers were all is mixed up but what I can glean from the record is that the applicant seeks about three prayers:

(4) *That the court cancel the titles of the respondents;*

(5) *That the title deed issued in the name of Henry Ngigi Gathariki curved out of the deceased's estate be cancelled;*

(6) *The 2nd respondent's account for Kshs.700,000/= obtained after sale of the land to Lydia Nyanja Mwaura.*

In the grounds and the lengthy affidavit of 63 paragraphs in support of the application, the contents therein are not facts in support of the application but allegations and accusations against the 2nd respondent's advocate and even this court. Most of the allegations do not add value to this application. The 1st respondent also filed a supplementary affidavit (60) paragraphs making many irrelevant statements, accusations against Mr. Waichungo – counsel for the 2nd respondent and yet another 33 paragraphs affidavit dated 15/3/2019.

Mr. Wakiaga, counsel for the objector, James Njenga Ngugi indicated that he had filed his papers by internet but the same were not placed on record. In response to the applicant's application, Mr. Wakiaga admitted that some trees had been cut and there was therefore intermeddling with the deceased's estate. He also supported the prayer account of Kshs.700,000/= for the land sold to Lydia, contrary to the confirmed grant.

The applications were opposed. The 2nd respondent swore an affidavit dated 27/6/2019. He deponed that he swore it on behalf of the 4th, 5th, 6th, 7th, 9th and 10th respondents. He urged the court to ignore the bulk of the applicant's affidavits which are derogatory, demeaning

and insulting.

As to cutting of the trees, the 2nd respondent deponed that the report was made to the police by the applicant's daughter who should be invited to shed light on the issue. He denied to having cut any trees.

On the question of title deeds, he deponed that upon the deceased's demise, the 1st and 2nd respondents petitioned the court for grant of letters of administration but that the first respondent tried to trick their mother, Tabitha Wamucii to issue him with a power of attorney authorizing him to deal with *LR.Nyandarua/Leshore Karaguini 1/14* exclusively, but when the mother found out, she filed an application for substitution where grant was issued to her alone. That on 28/9/2012, the whole estate was transferred to their mother (HNG3) and she later subdivided the land with the daughters getting an acre each while the sons got 2 acres each and she sold some; that each paid for and collected their respective titles and the 1st respondent never objected to it. The 2nd respondent denied selling land to Lydia Nyanja and challenged the applicant to avail evidence to prove it. He also denied cutting trees and urged the applicant and objector to let the matter go to full trial to prove the allegations.

I have considered the applicant's affidavits in support and submissions on record. The applicant seeks cancellation of titles issued to the respondents. This is an interlocutory application based on affidavit evidence. Besides, the 2nd respondent contends that the mother, who administered the deceased's estate distributed the land before her death.

I have seen a certificate of confirmation of grant dated 27/7/2011 issued to Tabitha Waruai and the whole of deceased's estate devolved to her. The 2nd respondent avers that the land was subdivided amongst the beneficiaries and some land sold and titles have since been issued. They are exhibited as HNG3. In light of these averments, the titles cannot be cancelled at this stage without the applicant convincing this court that the issuance of the titles was fraudulent or that it is the 2nd respondent who caused the land to be transferred as a result of which the titles were issued.

As regards the sale of said to one Lydia Nyanja, so far the applicant and objector have not laid any evidence before this court to demonstrate that it is the 2nd respondent who sold the land to Lydia. The said Lydia's title was annexed. It was issued on 17/10/2013. The applicant ought to prove their allegation against 2nd respondent. As of now, it remains a mere allegation.

*Whether trees were cut;*

In light of the 2nd respondent's evidence, it would be necessary to establish whether this estate is distributed or not. If so, where were the trees cut if at all? The applicant and objector can only complain if the estate is still whole and hence the whole estate would be affected by the cutting of trees if at all it has happened. Again apart from a report to the police that trees had been cut, there is no evidence to establish that fact. Did the police go to the scene or Chief of the area and were photographs taken of the scene? Maybe, those allegations need to be proved at a full hearing.

Mr. Waichungo, counsel for the 2nd respondent had filed grounds of objection to the application to the effect that the application is frivolous, inept and an abuse of the court process and that the prayers sought can only be issued after a full hearing; that the supporting affidavit to the application contains scandalous, derogatory, demeaning and irrelevant matters and ought to be struck out with costs; that the application is a delaying tactic and should be struck out.

As pointed out, the applicant's supporting affidavit is made up of 63 paragraphs. A further affidavit dated 15/3/2019 of 33 paragraphs and supplementary affidavit dated 15/3/2019, 60 paragraphs. I agree with the grounds of opposition that the affidavits contain many paragraphs which are derogatory, scandalous and demeaning. For example at paragraph 4 of the affidavit dated 18/2/2019, in describing his brother, the applicant deponed: "...reasons being that ahead of him my father had sired a pitch black son in the name of Joseph Kihuri Gathariki, the 9th respondent. But the son had become a drunkard, a womanizer, violent and as rude as a fighter's bull...."

At paragraph 15 referring to J. Emukule "...I asked him right away how he expected me to administer the estate in cahoots with the criminal whom the 2nd respondent had manifested himself to be..."

Paragraph 26 "...The advocate for the respondent is thus on record to be an inherent liar and a deceiver, who continues to lie and deceive the 2nd respondent that he is able to act as a shield to the impunity of the 2nd respondent..."

The court had a mind of striking out most of the affidavit but being a party acting in person, the applicant is sternly warned that he must stick to the facts of the case and stop using such language in pleadings. Otherwise, if it is repeated, the court will not hesitate to strike out the pleadings. The court is surprised that the applicant a man of the cloth, can use such insulting and derogatory language.

In conclusion, I find no merit in the applications filed by the applicant and they are hereby dismissed with costs being in the cause.

All that the court can do at this stage is to move under its inherent power under Section 47 of Law of Succession Act and order that the estate be preserved by all beneficiaries. They should not deal with the estate in any manner that will be prejudicial to other beneficiaries, for example, cutting trees or selling any part thereof or removing the soil, e.t.c. This is pending the hearing of the matter interpartes and hence each party should strive to comply.

The court is of the view that this matter should be fixed for hearing so that these issues can be determined at once.

**Dated, Signed and Delivered at Nyahururu this 16<sup>th</sup> day of November, 2019.**

.....

**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Mr. Waichungo for 2nd – 9th respondents

1st respondent in person

Mr. Wakiaga – for objector– absent

Soi – Court Assistant

Objector – present