

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2202 OF 1997

**IN THE MATTER OF THE ESTATE OF JOHN GATENJWA *alias* JOHN GATENJWA
KINYANJUI (DECEASED)**

RULING

1. The application for determination is a summons dated 8th October 1997 for revocation of a grant of letters of administration intestate made in 1988 in Kiambu CMSC No. 130 of 1988 to Daniel Gitau Njuguna.
2. The application is brought at the instance of Sophia Muthoni and Amon Kinyanjui Gatenjwa. They aver in their joint affidavit that they are widow and son, respectively, of the deceased. They state that the deceased had married three times and had children with all three wives. They state that representation was granted to Daniel Gitau Njuguna who was not related to the deceased in any way. They assert that they had not consented to his being so appointed. They submit that the grant was obtained in defective proceedings, where fraud was practiced and there was concealment of matter from the court. They disclose that the administrator had purported to have had bought a portion of the deceased's property Lari/Magina/179, which they allege is a lie.
3. The administrator responded to the application by his affidavit sworn on an unknown date in 1998 but filed herein on 10th June 1998. He avers that he and the applicants, Sophia Muthoni Gatenjwa and Amon Kinyanjui Gatenjwa, were granted representation to the estate of the deceased on 19th September 1988. He asserts that the process of obtaining the grant was proper. The property was thereafter distributed after cautions lodged against the title Lari/Magina/1018 had been removed.
4. Sophia Muthoni Gatenjwa passed away on 28th August 1998 and was, by an order made on 5th April 2011, substituted by her son, Samuel Gatenjwa Kinyanjui, as the first applicant.
5. It was directed on 13th September 2015 that the said application would be disposed of by way of written submissions. The parties did comply with the directions and filed their respective submissions complete with authorizes. I do note however that the written submissions went beyond what ought to be contained in written submissions for they have averments on matters that are not the subject of the averments in the affidavits on record. There are also copies of documents attached, which documents were not annexed to the affidavits on record.
6. Counsel should be clear on what ought to be the subject of written submissions. Submissions are arguments derived from the affidavits on record. Nothing new should be introduced in the written submissions, be it averments or evidence. The written submission has no separate life of its own, independent of or apart from the affidavits on record. They are not an addition to the affidavits, but arguments founded on the facts deposed in the affidavits.
7. The applicants base their application on the claim that the respondent was never a child of the deceased, and had not purchased property from the deceased, and that they had not consented to his appointment as administrator.
8. The lower court file was availed. I have had occasion to peruse through it. The petition lodged in Kiambu CMSC No. 130 of 1988 on 6th July 1988 was by the respondent herein, Daniel Gitau Njuguna. Objections were raised in the matter by the second applicant herein, Amon Kinyanjui Gatenjwa. The objection was resolved on 16th September 1988, when the second applicant indicated to the court that

although the respondent had petitioned for representation without the consent of the family, the family had not refused to give the respondent the land he had bought from the deceased. Upon that submission the court granted joint representation by consent to the two original applicants in this application, that is to say, Sophia Muthoni Gatenjwa and Amon Kinyanjui Gatenjwa, and the respondent, Daniel Gitau Njuguna, on the understanding that the family would give the respondent, at the confirmation of the grant, the portion of Lari/Magina/179 that he was claiming. A grant of letters of administration intestate was accordingly issued to Sophia Muthoni Gatenjwa, Amon Kinyanjui Gatenjwa and Daniel Gitau Njuguna on 19th September 1988.

9. The grant made on 16th September 1988, and issued on 19th September 1988, was confirmed on 3rd June 1991 and a certificate of confirmation thereof duly issued on 5th July 1991. The only asset of the estate, Lari/Magina/179, was distributed equally between Sophia Muthoni Gatenjwa and Daniel Gitau Njuguna.

10. Prior to the confirmation of the grant the lower court conducted a trial to determine whether the respondent herein had bought a portion of Lari/Magina/179 from the deceased. The court received oral testimonies from Daniel Gitau Njuguna, Kamau Kariuki, Njuguna Rugiri, Sophia Muthoni and Amon Kinyanjui. A judgment was delivered on 3rd June 1991, where it was found that Daniel Gitau Njuguna had bought two acres of Lari/Magina/179 from the deceased in an agreement entered into on 3rd August 1981. The said agreement was witnessed by, among others, the second applicant herein, Amon Kinyanjui. It was then directed that Lari/Magina/179 be shared equally between Sophia Muthoni Gatenjwa and Daniel Gitau Njuguna.

11. From the record of the lower court it is clear that the issues raised in the application dated 8th October 1997 were raised before the lower court and resolved. It is dishonest of the applicants to claim that the respondent had not acquired a portion of Lari/Magina/179 from the deceased yet the lower court did find that second applicant herein, Amon Kinyanjui, was one of the witnesses to the said sale. The second applicant was also party to the proceedings conducted by the lower court where a verdict was returned in favour of the respondent. There is also the record which indicates that the applicants had consented to the appointment of Daniel Gitau Njuguna as co-administrator. Clearly, the issues in the application dated 8th October 1997 are *res judicata*. There is on record a determination on those questions by a court of competent jurisdiction. That determination has not been overturned either on appeal or review. This court cannot possibly conduct a second trial on the same point. The applicants cannot re-litigate over the same point before this court. What they ought to have done was to challenge the determination of the lower court through appeal, or even seek review of the said decision if grounds existed for the same.

12. The other point is that Daniel Gitau Njuguna was appointed co-administrator with the original applicants in 1988, yet the applicants had to wait until 1997 to mount the present application. There is therefore the question as to the application was brought within reasonable time. The applicants are no doubt guilty of laches. No explanation has been offered for this lengthy delay.

13. In view of all that I have said above, there cannot be any merit in the application dated 8th October 1997. The same awaits dismissal, and I do hereby dismiss it with costs to the respondent, Daniel Gitau Njuguna. The file in Kiambu SPMSCS No. 130 of 1988 shall be returned to the lower court, while the instant file shall be closed. The respondent shall have the costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 20TH DAY OF JANUARY, 2017.

W. MUSYOKA

JUDGE