



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 979 OF 2000**

**IN THE MATTER OF THE ESTATE OF JACOB KAMAU KIRAGU (DECEASED)**

**HANNAH GATHONI MWAURA .....ADMINISTRATOR/APPLICANT**

**VERSUS**

**FRANCIS KAHORA KAMAU.....ADMINSTRATOR/RESPONDENT**

**R U L I N G**

1. This matter relates to the estate of Jacob Kamau Kiragu who died on 30<sup>th</sup> of March 1971 intestate. He was survived by the following;

- a. Stephen Mwaura Kamau deceased (1972) survived by Anna Gathoni Mwaura.
- b. Joseph Gitau Kamau – Deceased
- c. Stanley Muturi Kamau – Deceased
- d. Francis Kahora Kamau
- e. Joram Gitau – Deceased
- f. Wanjiku Kamau – (Deceased) - 1<sup>st</sup> widow
- g. Wangu Kamau – (Deceased) – 2<sup>nd</sup> widow
- h. Nyambura Kamau – (Deceased) – 3<sup>rd</sup> widow

2. A Grant of Letters of Administration Intestate was issued to Francis Kahora Kamau and Joram Gitau Kamau by the Senior Resident Magistrate Court Kiambu vide **Succession Cause No. 129 of 1990**. It was confirmed on 27<sup>th</sup> May 1991. The petition filed by the Respondents indicated that the deceased died intestate and was survived by Nyambura Kamau - wife, Joram Gitau Kamau- son and Francis Kahora Kamau - son.

3. Summons for revocation of the said grant was sought on the grounds that; the grant was obtained by concealment of material facts crucial to the case; the grant was obtained without filing the requisite consent from the other beneficiaries and; that the grant was made contrary to a consent court order that was made on 13<sup>th</sup> July 1982 before Honorable Muli J. in High Court Civil Case No. 381 of 1982.

4. The said summons was argued before Koome J. (as she then was) and in her judgment dated the 11<sup>th</sup> of February 2005, she made a finding that the application had merit. The Judge revoked the said grant, nullified all the consequential transactions effected thereto namely, the transfer of L.R. No. Ndeiya/Ndeiya/434 and issued a fresh grant to Francis Kahora Kamau, Hannah Gathoni Mwaura and Joseph Gitau Kamau jointly. She ordered that the deceased's estate be distributed according to the consent order made on 13<sup>th</sup> July 1982 and that the application for Confirmation be brought as soon as possible, even before the mandatory 6 months due to the age of the matter.

5. The consent order made on 13<sup>th</sup> July 1982 was as follows;

a. To the house of Wanjiku Kamau 4 acres, to be registered in joint names of Mrs. Annah Gathoni Mwaura I.D No. 3081860/66 and her elder son Mr. James Kariuki Mwaura I.D No. 6242748/69 in trust for themselves and the other sons of Mwaura.

b. To the house of Wangu Kamau 4 acres of the suit land, to be registered in the joint names of Joseph Gitau Kamau I.D No. 6438190/69 and his brother Stanley Muturi Kamau absolutely in common in equal shares.

c. To the house of Nyambura 5 acres to be registered in the names of Mr. Joram Gitau Kamau I.D No. 360345/63 and Francis Kahora Kamau I.D No. 3429052/66 jointly in common in equal shares.

d. That the land surveyor do visit the land and survey for sub division appropriately in accordance with this order preserving as far as possible the existing structures.

6. What is now before the court is a preliminary objection dated 10<sup>th</sup> October 2014 brought by the Administrator/Respondent Francis Kahora Kamau in respect of the summons for revocation of grant dated 9<sup>th</sup> July, 2013 brought by the Co-Administrator/Applicant Hannah Gathoni Mwaura. It raises the following grounds:

a. That the application is fatally defective in form and substance and ought to be struck out with costs.

b. That the application is an abuse of the process of court as there is another application on the same issues by the applicant dated 6<sup>th</sup> December, 2011 which is still pending before Court.

c. That there is a massive error apparent on the face of the record.

d. That the certificate of the Confirmed grant is based on a judgement of this Court in this matter and the same cannot be reviewed, set aside or varied without reviewing the Judgment in this matter.

e. That this Honorable Court lacks the jurisdiction to hear and determine the application without reviewing the Judgment in this matter.

f. That the certificate of Confirmed Grant herein is fatally defective and incapable of being effected due to such defect and the non-effecting thereof should not be attributed to the respondent or visited against him.

### **Respondent's Submissions**

**7. On the issue of Locus Standi;** Mr. Nyoro Njogu, learned Counsel for the Respondent submits that it is common ground that one of the Co-Administrators JOSEPH GITAU KAMAU is deceased yet his estate has not been served with this application. That for the application to be properly before the court the deceased administrator's estate must be served and the deceased Administrator substituted in these proceedings, otherwise the Applicants lack locus standi to bring the application against JOSEPH GITAU KAMAU the co-administrator.

**8. On the issue of Jurisdiction** counsel contends that this matter was initiated in the High Court vide Summons for Revocation of Grant dated 22<sup>nd</sup> May, 2000 which was heard and determined by Koome J as she then was. That the grant herein is based on the judgment of Koome J dated 11<sup>th</sup> February, 2000. That it would therefore be untenable to interfere with the grant without first interfering with the judgement by way of review or setting aside. He has described the application as misconceived. He relies on the case of **Charles Kibe Karanja (deceased) (2015) eKLR Succession cause No. 339 of 2001 Nairobi**.

9. Counsel also avers that the said judgement was the outcome of the 1<sup>st</sup> application for revocation of grant herein which matter was finally determined. Accordingly the court is *functus officio* on the issue of revocation of the grant herein.

10. Counsel asserts that if the Applicant was of the view that the grant was defective, the defects must find their source from errors on the record emanating from the said judgement and the remedy thereto lies in reviewing or appealing the said judgment, neither of which the applicant has done. Counsel submits that from the foregoing the Court lacks the jurisdiction to entertain the application and ought to strike it out with costs.

11. Counsel has invoked the doctrine of *Res Judicata* and submits that in light of the fact that the 1<sup>st</sup> summons for revocation of grant was determined fully, the 2<sup>nd</sup> summons for revocation of grant dated 9<sup>th</sup> July, 2013 being between the same parties as in the first one and dealing with the same issues, is clearly *Res Judicata*. Accordingly the application is fatally defective in form and substance and ought to be struck out.

12. Counsel submits that the application is an abuse of the process of court as there is another application on the same issue by the Applicant dated 6<sup>th</sup> December, 2011 which is pending before court, although the Applicant purported to withdraw it without addressing the issue of costs. He therefore urges that in light of the foregoing, the application is fatally defective as the Court lacks jurisdiction to entertain it and consequently it ought to be struck out with costs.

### **Applicant's Submissions.**

13. Mr. Njenga Mbugua learned Counsel for the Applicants has given a chronology of events from the 8<sup>th</sup> October, 2013 when the application dated 9<sup>th</sup> July, 2013 came before the judge for direction, up to 10<sup>th</sup> October 2014 when the Preliminary Objection was filed. He contends that this is a clever way of the Respondent obviating the fact that they had not filed a response to the application and therefore it was unopposed.

14. Counsel avers that although the parties were directed to negotiate by Muchelule J on 13<sup>th</sup> October, 2014 the Respondents had taken a hard line position since the status quo favors them; hence they are in no hurry to have this matter concluded. That the Respondent continues to control the Estate of the Deceased to the detriment of 45 other beneficiaries and has never filed submissions or a response to the impugned application.

15. It is Counsels submission that the application is proper in form and substance and deserves to be exhaustively heard and determined in Court. He relied on the case of **Karanja Kabage -vs- Joseph Kiuna Kariambegu Ng'ang'a & 2 Others (2013) eKLR** where the learned Judge Anyara Emukule relied on **Section 72 of the Interpretation and General Provisions Act (Cap 2, Laws of Kenya)**. The said section 7 provides as follows:

***“Save as is otherwise expressly provided, whenever a form is prescribed by written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.”***

That the grant is not defective as the Respondent wishes the court to believe.

16. The Applicant also based her contention on the decision of Ringera J. (as he then was) in **Microsoft Corporation vs Mitsumi Computer Garage Ltd & Another (2001) KLR 470** where the learned Judge held that:—

*“Deviation from or lapses in form and procedure which do go to jurisdiction of the Court or prejudice the adverse party in fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its higher calling to do justice by saving the proceedings in issue.”*

17. She also relied on the decision in **Raila Odinga and Others vs. Independence Electoral and Boundaries Commission and 3 Others (2013) eKLR (Nairobi Petition No. 5 of 2013)** where the Justices of the Supreme Court observed that a Court of Law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best cause.

**18. On the issue of the application being an abuse of the court process as there is another application pending;** Counsel submit that the Summons for Rectification dated 6<sup>th</sup> December, 2011 is based on the fact that one of the administrators representing the second house, Joseph Gitau Kamau had died and needed to be replaced. On 25<sup>th</sup> February, 2013 after a lot of difficulty in getting the file before a judge the matter came up for hearing and advocates indicated as being for the Respondent were still not on record. They refused to accept service of papers and the court directed that the Respondent be served personally which was done.

19. Grounds of Opposition were filed on 24<sup>th</sup> May, 2013. On 28<sup>th</sup> May, 2013 when the matter came up for hearing, Mr. Njogu, Counsel for the Respondent applied for an adjournment on grounds that his client had filed an appeal against the Confirmation of grant which needed to be dealt with first. Counsel contends that the Notice of Appeal referred to was filed on 17<sup>th</sup> February 2005 as a delaying tactic since from that time to date, a decade later the Respondent is yet to file the Record of Appeal.

20. Counsel said the reason for filing of the current application for revocation of grant was that the 1<sup>st</sup> Administrator/Respondent herein had since become difficult and was wantonly intermeddling with the estate. That there was need to revoke the grant and issue fresh letters of Administration to the other Administrators. Counsel avers that there is no other pending application before the court since the earlier application was withdrawn by Counsel for the Applicant on 26<sup>th</sup> May, 2015 for reasons that it had been overtaken by events.

21. Counsel relies on the case of **Pacis Insurance Company Ltd -vs- Gabriel Muthama Kithika (2014) eKLR**, where Justice Mabeya held inter- alia that:-

*“It is alleged that there exists another suit, being Milimani CMCC No. 5745/2013, that the issues as well as parties in that suit are similar to the present suit. To my mind, that is a fact that requires evidence. The pleadings in that suit should have been produced by way of Affidavit evidence.”*

The Applicant has not attached evidence of the existence of another application.

**22. On the issue that the Certificate of Confirmed Grant was based on a judgement of this Court and that the same cannot be reviewed, set aside or varied without reviewing the Judgement.** It was Counsel’s contention that there is no dispute that the judgment referred to above was the basis of the mode of distribution of the Estate in this matter. The sticky point is that over a decade now the

Respondent has enjoyed the estate to the exclusion of all other beneficiaries hence they seek review of the shares given to the Respondent and a change of the Administrators.

23. Counsel argues that the purportedly defective grant was confirmed on 12<sup>th</sup> May 2005 and a decade later the Respondent being the 1<sup>st</sup> Administrator has done nothing to correct whatever defect he alludes to.

### **Analysis**

24. Preliminary Objection was discussed in the recent decision of this Court in the case of **Kenya Council Of Employment Migration Agencies v Nyamira County Government & 10 others [2015] eKLR**, where the court stated that:

“The ingredients of a preliminary objection are well established in the celebrated authority of **Mukhisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Company Limited, (1969) E.A. 696** as follows:

*“So far as I am 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 a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

*Further,*

*“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 the judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”*

Having said that I will now discuss each of the points raised in the Preliminary Objection by the Respondent;

**25. On whether the application is fatally defective in form and substance and ought to be struck out with costs:** The Respondent submitted that for the application to be properly before court the deceased administrator’s estate must be served and the deceased administrator substituted in these proceedings otherwise the applicants lacked locus standi to bring the application against Joseph Gitau Kamau the Co-administrator. The Respondent submitted that the application was proper in form and substance and deserved to be exhaustively heard.

26. Under the provisions of **Section 76(d) (ii)**, if the person to whom the grant was made has failed, after due notice and without reasonable cause to proceed diligently with the administration of the estate, the aggrieved party is entitled to bring an application to court. Prima facie the grant issued by Koome J, on 11<sup>th</sup> February 2005 and confirmed on 12<sup>th</sup> May 2005 has not been employed to distribute the estate to the beneficiaries to date.

27. The grounds for the first summons for revocation of grant which birthed the judgment of Koome J dated 11<sup>th</sup> February 2005 were different from the one before court now. The applicant being one of the beneficiaries had the *locus standi* to bring the application dated 9<sup>th</sup> July 2013.

**28. That the application is an abuse of the of court as there is another application on the same issues by the applicant dated 6<sup>th</sup> December, 2011 which is still pending before Court.** There is no evidence of another pending application before the court since the earlier application was withdrawn by Counsel

for the Applicant on 26<sup>th</sup> May, 2015 for reasons that it had been overtaken by events. The application adverted to was withdrawn by the Applicant on 26<sup>th</sup> May, 2015 for reasons that it had been overtaken by events.

29. Counsel has invoked the doctrine of *Res Judicata* and submits that in light of the fact that the 1<sup>st</sup> summons for revocation of grant was determined fully, the 2<sup>nd</sup> summons for revocation of grant dated 9<sup>th</sup> July, 2013 being between the same parties as in the first one and dealing with the same issues, is clearly *Res Judicata*. Accordingly the application is fatally defective in form and substance and ought to be struck out. The principle of *res judicata* is provided for in **Section 7** of the **Civil Procedure Act** provides as follows:

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

The judgment of Koome J has not been impugned in the current application. It is the noncompliance with the said judgment which is the main issue. The present application dated 9<sup>th</sup> July 2013 can therefore not be locked out by the principle of *res judicata*.

**30. On the massive error apparent alleged to be on the face of the record.** I will not belabor this point since the Respondent did not attach any evidence to support his allegations of a massive error on the face of the record.

**31. That the certificate of the Confirmed grant is based on a judgement of this Court in this matter and the same cannot be reviewed, set aside or varied without reviewing the Judgment in this matter** and that this court lacks jurisdiction. This is a forty-six years old dispute over the Estate of the late Jacob Kamau Kiragu. After a long dispute over issuance of grant in the estate, a grant was issued jointly to Francis Kahora Kamau, Hannah Gathoni Mwaura and Joseph Gitau Kamau by a judgment of Koome J dated 11<sup>th</sup> February 2005 with orders that the deceased's estate be distributed according to the consent order made on 13<sup>th</sup> July 1982 before Muli J (as he then was).

32. It is therefore not disputed that the judgment referred to above was the basis of the mode of distribution of the Estate in this matter and that it has been over a decade since the confirmation of grant and the Respondent has not distributed the estate to allow the other beneficiaries to enjoy their share of the Estate. The Applicants are therefore entitled to file Summons for Revocation and in any case at the hearing they will have to prove their claim that the administrators have failed to proceed diligently.

33. In the end, I find that the Notice of Preliminary Objection dated 10<sup>th</sup> October 2014 in respect of the application dated 9<sup>th</sup> July, 2013 lacks merit and is hereby dismissed with no orders as to costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 7<sup>th</sup> DAY OF March, 2017.**

**L. ACHODE**

**JUDGE**

**In the presence of:**