



**In re Estate of Ann Njeri Gichuru (Deceased) (Probate & Administration  
2800 of 2003) [2025] KEHC 15338 (KLR) (Family) (31 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15338 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
PROBATE & ADMINISTRATION 2800 OF 2003  
H NAMISI, J  
OCTOBER 31, 2025  
IN THE MATTER OF THE ESTATE OF ANN NJERI GICHURU (DECEASED)**

**BETWEEN**

**ANTHONY RITHO NDUNGI ..... APPLICANT**

**AND**

**WANJIRU NDUNGI ..... RESPONDENT**

**RULING**

1. A succession cause, much like the memory of the departed, does not truly die. It may lie dormant, gathering the dust of years in the court's archives, its pages yellowed by the slow passage of seasons. Yet, the duties it records and the rights it bestows retain a latent pulse, a quiet insistence that justice, though long delayed, must one day be done. The final testament of the dead is a solemn pact, a whisper across the veil that the living are bound to honour. When that pact is broken, the whisper can, after more than two decades, become a roar that demands the ear of this Court.
2. Long before this succession cause, James Samuel Gichuru and his wife Rahab Wambui Gichuru were blessed with children. Among them were Joan Njoki Ndungi and Ann Njeri Gichuru, the Deceased herein. While Ann Njeri Gichuru may not have had children of her own, her sister, Joan Ndungi, had children. Among them were Florence Wanjiru Ndungi, Susan Muthoni Ndungi and Andrew Ritho Ndungi.
3. Ann Njeri Gichuru passed away on 24 August 2003. She died testate, with a Will dated 23 January 2001. As fate would have it, she appointed her nieces, Wanjiru Ndungi and Muthoni Ndungi as Executrixes/Trustees. The Grant of Probate of Written Will was issued on 4 December 2003 to Wanjiru Ndungi And Muthoni Ndungi (now Deceased). The Grant was subsequently confirmed on



- 16 November 2004. The Will dated 4 December 2003 names Andrew Ritho Ndungi, the Applicant herein, as the sole beneficiary of the estate.
4. In short, the battle herein is between siblings, over the estate of their aunt. Before me are two such echoes from the past, framed as applications.
  5. In the Summons dated 20 May 2025, the Applicant seeks the following orders:
    - i. That this Honourable Court be pleased to order and direct that the Executor of the Estate, namely Wanjiru Ndungi do produce before this Honourable Court within Thirty (30) days from the date of service of these summons or within such a period as the Court shall order a full and accurate inventory of the assets and liabilities of the deceased estate and a full and accurate account of all dealings therewith up to the date of the account.
    - ii. That this Honourable Court be pleased to order and direct that the Executor of the Estate namely Wanjiru Ndungi Transfer Lr No Nairobi/BLOCK 72/1256 and DAGORETTI/RIRUTA/2514 (now Nairobi Block 66/2514) to the Applicant/Beneficiary.
    - iii. That costs of this application be paid out of the estate.
  6. In response thereto, the Respondent has filed Grounds of Opposition, Replying Affidavit and also raised a Preliminary Objection dated 10 June 2025. The Preliminary Objection is on the following grounds:
    - i. That Summons seeking similar orders dated 13 May 2024 was withdrawn by the Beneficiary/Applicant vide Notice of Withdrawal dated 25 April 2025 pursuant to the provisions of Order 25 of the Civil Procedure Rules 2010. An attempt by the Beneficiary/Applicant to refile similar summons seeking similar orders is an outright abuse of the due process of this Honourable Court. Therefore, the Summons dated 20 May 2025 ought to be struck out entirely with costs to the Executrix/Respondent;
    - ii. That the law firm of Parseina Soinee & Company Advocates is not properly on record since no leave of Court had been sought and granted for them to represent the Beneficiary/Applicant after the Confirmation of Grant on 16 November 2004. The instant application is, therefore, defective and ought to be struck out with costs for failing to comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules.
  7. Parties were directed to canvass the Application and Preliminary Objection together, by way of written submissions.
  8. A Preliminary Objection raises pure points of law, which if successful, would have the effect of disposing of the Summons in limine. It is a well-established principle of judicial procedure that where a preliminary objection is raised which may dispose of the matter, it ought to be determined first. This principle, famously articulated in the landmark case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd EA 696, ensures the efficient use of judicial time and resources. Accordingly, this Court shall first proceed to determine the merits of the Preliminary Objection dated 10 June 2025.

### **Preliminary Objection**

9. The Respondent contends that the Summons dated 20 May 2025 is an abuse of the court process and is res judicata. The basis for this contention is that the Applicant previously filed Summons dated 13 May 2024 which sought orders identical to those in the present Application. That prior Summons was subsequently withdrawn vide Notice of Withdrawal dated 25 April 2025. The Respondent argues that the effect of the withdrawal is to terminate the suit, and to file a similar application is to engage



in vexatious litigation. In support of this proposition, the Respondent cited the decisions in *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR and *Rutto v Maritim KEELC 15958* [2023] (KLR), for the principle that a suit once withdrawn cannot be revived or re-litigated.

10. Secondly, the Respondent objects that the Applicant's current Advocates, Parseina Soniei & Company, are improperly on record. It is argued that the Grant of Probate in this cause was confirmed on 16 November 2004, an event which, in the Respondent's view, constituted a final judgement and concluded the matter. Consequently, any change of Advocates thereafter must comply with the mandatory provisions of Order 9, Rule 9 of the Civil Procedure Rules, which require that such a change be effected by an order of the Court, either upon application or by consent of the outgoing and incoming Advocates. It is submitted that since no such leave was sought or granted, the firm of Parseina Soinei & Company Advocates is not properly on record, and the Summons filed is, therefor, defective and ought to be struck out.
11. The Applicant opposes the Preliminary Objection on several grounds articulated in the submissions dated 27 June 2025. First, on the effect of the withdrawn Summons, the Applicant submits that the Notice of Withdrawal dated 25 April 2025 was legally ineffectual and a nullity. It is pointed out that by the time the said Notice was filed, the matter had already been set down for hearing on 30 April 2025. In such circumstances, the applicable law is not Order 25, Rule 1, which allows for withdrawal by notice before a hearing date is set, but Order 25, Rule 2, which requires that a suit set down for hearing may only be discontinued with the written consent of all parties or with the leave of the Court. As neither the consent nor leave was obtained, the notice was defective and did not terminate the initial application. The Respondent relies on the Court of Appeal case of *Beijing Industrial Designing & Research Institute vs Lagoon Development Ltd* [2015] eKLR.
12. Regarding representation by his Advocates, the Applicant's primary submission is that Order 9 Rule 9 is not applicable to succession proceedings. He argues that Rule 63 of the Probate & Administrations Rules provides a specific and exhaustive list of the provisions of the Civil Procedure Rules that are imported into succession practice. Order 9 is conspicuously absent from that list. The Applicant relied on the decisions in *In the Matter of the Estate of Ongeti Omiti*, Kisii High Court Succession Cause No. 197 of 2000 eKLR and *In re Estate of Ruth Chepkemoi Kemei alias Chemogurgei w/o Kemei*, Kericho High Court Succession Cause E003 of 2021 KEHC 2387 (KLR), where the Court held that Order 9, Rule 9 is not one of the rules directly imported into and applicable to succession cases. Therefore, a simple notice of change of advocates suffices.
13. This Court has carefully considered the rival submissions and the authorities cited by both parties. The law on what constitutes a preliminary objection is settled.
14. With respect to the first limb of the objection, *res judicata* is a legal principle applied in Civil & Common Law jurisdictions. It is a principle meant to prevent abuse of court process, multiple decisions on similar issues injustice and unnecessary confusion. In the case of *res judicata* to be invoked in a civil matter the following elements had to be demonstrated:

*John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR), the Supreme Court stated that for

- i. there was a former judgment or order which was final;
- ii. the judgment or order was on merit;
- iii. the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and



- iv. there had to be between the first and the second action identical parties, subject matter and cause of action.
15. Based on the foregoing principles, it goes without saying that, based on the fact that the previous Application was withdrawn before being heard and determined on merit, the present Application cannot be considered to be *res judicata*.
16. The second limb of the objection relates to the applicability of Order 9 Rule 9 Civil Procedure Rules to succession matters. Rule 63(1) of the Probate & Administration Rules is explicit in its importation of specific orders of the Civil Procedure Rules into succession practice. The Court is persuaded by the consistent line of authorities, as cited by the Applicant, that Order 9 Rule 9 does not apply to succession proceedings.
17. Furthermore, the very premise of the Respondent's argument – that the confirmation of Grant on 16 November 2004 was a final judgement that concluded the cause – is a misapprehension of the nature of succession proceedings. A succession cause is not concluded upon Confirmation of Grant. The Court retains supervisory jurisdiction over the estate to ensure that the administration is completed in accordance with the law and the terms of the Grant. The duties of a personal representative, particularly the duty to account under section 83 (g) of the *Law of Succession Act*, arise after confirmation. It is precisely for the enforcement of such post-confirmation duties that a succession file remains open. Therefore, the foundation of this ground of objection is, with respect, built on sand.
18. For the foregoing reasons, this Court finds that the Preliminary Objection is devoid of merit.

### **Summons**

19. The Respondent avers that it has been over two decades since the Grant was confirmed and the Respondent has completely failed to complete the administration of the estate, has never rendered any account of her dealings with the estate assets, and has failed to transfer to him the assets he is entitled to. The primary assets listed in the petition for the grant were two parcels of land: L.R. No. Nairobi/Block 72/1256 and L.R. No. Dagoretti/Riruta/2514 (now known as L.R. No. Nairobi/Block 66/2514). The Applicant has since discovered, through official searches, that the Respondent and her late co-Executrix transferred these properties into their joint names and subsequently sold them to third parties. The Applicant, therefore, seeks an order compelling the Respondent to provide full and accurate account of the estate and a further order compelling the Respondent to transfer the two properties to him.
20. The Respondent's response, contained in her Replying Affidavit, Grounds of Opposition, Affidavit sworn by their mother, Joan Ndungi, is candid. The Respondent does not deny that the properties were sold. She explains that the sales were conducted by her late sister and Co-Executrix, Susan Muthoni Ndungi. The Respondent states that the proceeds of the sale, which she claims amounted to Kshs 1.8 million, were used to fund legal expenses in a separate, protracted succession dispute concerning the estate of their grandfather, the late James Samuel Gichuru, in High Court Succession Cause No. 20 of 1983.
21. The rationale provided the Respondent is that the Estate of Anne Njeri Gichuru was a beneficiary in the Estate of James Samuel Gichuru. At one point, a court order had excluded Anne Njeri's estate from inheriting. The Respondent, with the support of her mother, Joan Njoki Ndungi (who is the administratrix of the Gichuru estate), successfully applied for a review of that order, thereby restoring the entitlement of Anne Njeri's estate. The Respondent argues that the sale of the properties and the use of the proceeds were necessary to preserve the larger inheritance. The Respondent undertakes



to render a final account and ensure that the residue devolves to the Applicant only after the final distribution of the estate of James Samuel Gichuru is concluded. This position is supported by their mother, Jian Njoki Ndungi.

### **Analysis & Determination**

22. There are three issues for determination herein:
- i. Whether the Respondent has breached her statutory and fiduciary duty to account for the estate of the Deceased.
  - ii. Whether the sale of the estate's immovable property and the application of the proceeds to fund litigation in another, separate estate was a lawful exercise of the Respondent's powers.
  - iii. What remedies, if any, are available to the Applicant in the circumstances.
23. The duty of a personal representative to account for their administration of an estate is not a matter of discretion; it is a mandatory, statutory and fiduciary obligation of the highest order. Section 83 of the *Law of Succession Act* sets out the duties of personal representatives in unequivocal terms. Specifically, Section 83(e) requires them, within six months of the grant, to produce a full and accurate inventory and account of all dealings. Section 83(g) requires them, within six months of the confirmation of the grant, to complete the administration and produce a full and accurate account of the completed administration. Section 83(h) empowers the court, on its own motion or on the application of any interested party, to demand such an account at any time.
24. The Grant herein was confirmed on 16 November 2004. By the Respondent's own admission, no account has ever been rendered to the Applicant or to this Court. The period of default is not a matter of months, but of more than two decades. This represents a flagrant and prolonged dereliction of the core statutory duty.
25. The Court has repeatedly emphasized the trustee- like nature of the role of a personal representative. In *re Estate of Julius Mimano (Deceased)* [2019] KEHC 10103 (KLR), the Court held thus:
- “Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will, in cases of testate succession, and those identified at confirmation of grant, in cases of intestacy. They would also be holding it for the benefit of creditors and any other persons who might have a valid claim against the estate. That would mean that they are trustees of the estate, and, indeed, the *Trustee Act*, Cap 167, Laws of Kenya, defines trustees to include executors and administrators. In the circumstances, therefore, the personal representative would stand in a fiduciary position so far as the property is concerned, and owes a duty to the beneficiaries to render an account to them of their handling of the property that they hold in trust for them. The duty to render accounts to beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on behalf of the beneficiaries.”
26. The Respondent's submission that she will render an account at some indeterminate point in the future, after the conclusion of another estate's administration, is untenable in law. Her duty to account for the estate of the Deceased herein is independent and not contingent upon the affairs of the estate of James Samuel Gichuru. The Applicant has an immediate and undeniable right to be informed of the stewardship of the assets to which he is entitled. The Respondent has been in continuous breach of



this duty since May 2005. According, this Court finds that the Respondent is in grave breach of their duties under section 83 of the Act.

27. On the second issue, the Respondent justifies the sale of the properties by invoking the powers of a personal representative under section 82 of the Act and the need to pay legal expenses and preserve a larger inheritance.
28. Section 82(b) grants personal representatives the power to sell or otherwise turn to account all or any part of the assets vested in them, as they think best. However, this power is not absolute. It must be exercised in the execution of their duties. The duties are those prescribed in Section 83, which include paying the funeral expenses, debts, and reasonable expenses of administration of the deceased's estate.
29. The two estates – that of Ann Njeri Gichuru and that of James Samuel Gichuru- are separate and distinct entities. The Respondent holds a grant of representation for the former, and not the latter. Her powers and duties are, therefore strictly confined to the administration of the estate of Anne Njeri Gichuru. The term “reasonable expenses’ as contemplated in section 83(c) if the Act refers to refers to expenses incurred in the direct administration of that specific estate, such as costs of obtaining the grant, legal fees for administration, valuation fees, and costs of preserving the assets of that estate.
30. The decision to liquidate the entire real property of one estate to finance speculative litigation in another, separate estate, is a manifest overreach of an executor's powers. It amounts to an unauthorized conversion of trust property. The Respondent took a certain, tangible asset belonging to the Applicant and converted it into an uncertain chose in action – a potential future inheritance from another estate. This was not an act of persevering an asset; it was an act of risking an asset for a potential gain elsewhere. Such a decision, which fundamentally alters the nature of the trust property, could only have been lawfully made with the fully informed consent of the sole adult beneficiary or with the express sanction of this Court. Neither was sought or obtained. The fact that the litigation was ultimately successful does not retrospectively validate the initial breach of trust. The lawfulness of a trustee's action is judged at the time it is taken, not by its outcome.
31. Furthermore, the Respondent's attempt to distance herself from the sale by attributing it to her deceased co-Executrix is of no legal consequence. The law is clear that co-Executors are jointly and severally liable for the administration of the estate. One cannot escape liability by delegating a duty to another and turning a blind eye. As a joint tenant of the properties post-transmission, her consent and signature would have been required for any lawful sale.
32. This Court, therefore, finds that the sale of properties L.R. No. Nairobi/Block 72/1256 and Dagoretti/Riruta/2514 for the purpose of funding litigation in High Court Succession Cause No. 20 of 1983 was an unlawful misapplication of estate assets and a profound breach of the Respondent's fiduciary duties.
33. The Applicant prays for an order compelling the transfer of the properties to him. However, the properties were sold to third parties years ago. In the absence of any evidence that these third parties were party to the Respondent's breach of trust, they are presumed to be bona fide purchasers for value without notice. Under Section 26 *Land Registration Act*, the title of such a proprietor is indefeasible. This Court cannot, therefore, unwind those transactions and order the transfer of the properties as prayed.
34. The remedy for the Applicant in such circumstances lies not in tracing the asset into the hands of an innocent third party, but in holding the errant trustee personally liable to restore the trust property or its value. This is a foundational principle of equity, as affirmed in the case of Gulam Mohammed Noor v Bahadul Noor Mohammed Gulam & another [2017] KEHC 8182 (KLR). The Respondent,



having dissipated the estate's primary assets in breach of her duty, must personally make good the loss occasioned to the Applicant.

35. This begs the question: what is the measure of that loss? It is not, as the Respondent might suggest, KShs 1.8 million allegedly realised from the sales over a decade ago. The loss to the Applicant is the value of the properties he would have owned today had the Respondent lawfully discharged her duty to assent to the vesting of the residue of the estate in him upon confirmation of the Grant in 2004. He is entitled to be put in the position he would have been in had the breach not occurred.
36. Before I pronounce the final orders of this Court, I am constrained to make one final observation. It is a source of profound sorrow to see siblings, a brother and a sister, arrayed against each other in a bitter and protracted dispute over inheritance. The office of an executor, particularly when held by a close family member for the benefit of another, is not merely a legal construct; it is a sacred trust, a final act of faith placed by the departed in the integrity of the living. That this trust has been so thoroughly broken, necessitating years of litigation to compel the performance of what should have been a simple and loving duty, is a tragedy that no court order can fully remedy. The assets of an estate can be valued and restored, but the currency of familial love and confidence, once squandered, is not so easily recovered. This Court has been called upon to enforce the cold letter of the law where the warm spirit of kinship has failed. It is my hope that, beyond the enforcement of the orders that will follow, the parties may yet find a path to reconciliation, for no inheritance is worth the permanent loss of a sibling.
37. Invoking the inherent jurisdiction under Rule 73 of the Probate & Administration Rules and the wide powers under section 47 of the *Law of Succession Act*, I make hereby make such orders as may be expedient for the ends of justice, fashioning a remedy that is both equitable and practicable. I hereby order as follows:
- i. The Preliminary Objection dated 10 June 2025 is hereby dismissed.
  - ii. The Summons dated 20 May 2025 is allowed in terms of prayer 1. The Respondent is directed to file in this Court and serve upon the Applicant, within 60 days of the date hereof, a full, accurate and verified account of the administration of the Estate of the Deceased herein, detailing all assets, all liabilities ascertained and all receipts and disbursements made from the date of her appointment to date;
  - iii. A declaration is hereby made that the Respondent is personally liable to make good the loss occasioned to the estate by the unauthorised sale and misapplication of the proceeds of properties known as L.R. No. Nairobi/Block 72/1256 and Dagoretti/Riruta/2514 (now Nairobi/Block 66/2514);
  - iv. The parties shall, within 30 days from the date hereof, agree on the appointment of a single joint valuer to determine the current open market value of the properties known as L.R. No. Nairobi/Block 72/1256 and Dagoretti/Riruta/2514 (now Nairobi/Block 66/2514). In default of agreement, the Deputy Registrar shall appoint the said valuer;
  - v. The valuer's report shall be filed in Court within 90 days of the date of this order, with the valuer's fees being met by the Respondent.
  - vi. Upon filing the valuation report, the matter shall be mentioned for final orders on the quantum of the Respondent's personal liability to the estate, which shall be the aggregate current market value of the two properties less any expenses proven in the account under order (ii) hereinabove to have been lawfully and reasonably incurred in the direct administration of the estate of the Deceased herein;



vii. This being a family matter, each party shall bear their own costs.

**DATED AND DELIVERED AT NAIROBI THIS 31 DAY OF OCTOBER 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For Applicant: Ms. Parseina

For Respondent: Mr. Lawrence Mbabu

Court Assistant: Lucy Mwangi

