

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE NO. 336 OF 2011
IN THE MATTER OF THE ESTATE OF HARRISON
MURANGI GAKINYA (DECEASED)

BETWEEN

CATHERINE N G GAKINYA 1ST

PETITIONER

TERESA WANGUI GAKINYA 2ND

PETITIONER

AND

CATHERINE MARIGU

NJERU 1ST APPLICANT BRIAN

GAKINYA MURANGI 2ND

APPLICANT

RULING

1. The matter relates to the estate of the late Harrison Murangi Gakinya (Deceased), herein after referred to as the deceased. However, the dispute appears to relate to who was the original registered owner of the suit property, the estate of Gakinya Murangi (deceased), herein referred to as the late patriarch.

2. Grant of letters of administration intestate was confirmed on 3.12.2002, on the application of two daughters of the late patriarch. The late patriarch was the father of the deceased

herein in a polygamous setting. However, the parties were engaged in skullduggery, chicanery, legerdemain and subterfuge instead of helping to further the administration of justice.

3. The truth was known to the parties all along. Still, they chose the path of lies, prevarication, mendacity, perfidy, falsity, calumny, and equivocation to lead the courts down the garden path. As a result, the dispute has been in court for a solid 14 years. This was a prolongation of the oblong war that started with the demise of the patriarch in and the later death of the deceased herein in 16.08.2003 at a young age of 36 years. The chief, rather strangely, indicated in the letter dated 4.07.2011, that the deceased had leased part of his land before his demise. The only dependents indicated were two sisters, Catherine N G Gakinya and Teresa Wangui Gakinya, the respondents herein.
4. The deceased herein became a co-registered proprietor of the suit property on 19.06.1996. On 31.01.2003, a transfer was effected whereby the deceased acquired the share previously held by Murangi Gakinya. The deceased passed away approximately seven (7) months thereafter. Subsequently, the respondents, Catherine N. G. Gakinya and Teresa Wangui Gakinya, petitioned for letters of administration in which they named themselves as the sole administrators and beneficiaries

of the estate. The grant of letters of administration was confirmed on 03.12.2002.

5. The applicants, through their advocates, moved this Court by way of an application for revocation of grant pursuant to section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. They contended that the grant, which was confirmed on 16.03.2012, was obtained through the concealment of material facts. In particular, it was alleged that the applicants, who were the rightful beneficiaries of the estate of the deceased herein, were deliberately excluded from the succession proceedings. It was further alleged that the respondents relied on the impugned grant to evict the applicants from Land Parcel Number Embu Municipality/112. These allegations necessitated a re-examination of the Chief's letter, with new enlightenment.
6. They sought that the said parcel of land be distributed to the applicants, Catherine Marigu Njeru and Brian Gakinya Murangi, in trust for themselves and Gladys Muguru Murangi. She stated that she had built and operated a shop on one-third of the land parcel number in Embu Municipality 112. They stated that the applicants have since become registered owners of the suit property, namely 1/3 of land parcel number Embu municipality 112.

7. The applicants made an application dated 4.11.2019 for the transfer of the cause to Embu. The court dismissed the said application, in ruling reported as **In re Estate of Harrison Murangi Gakinya** (Deceased) [2022] KEHC 14358 (KLR), in the following terms:

I have perused the court record and it is apparent from the pleadings that the respondents instituted the cause in Nyeri and they carried out the succession proceedings and were issued with a Certificate of Confirmed Grant dated March 16, 2012. As such, they are the legal representatives of the deceased's estate. Although the applicants contend that they are wife and son of the deceased, only a succession court can determine that. It is also apparent from the record that the estate of Murangi Gikanya which the respondents state is the original registered owner of the suit property Embu Township/112 was instituted in Nairobi High Court and not Nyeri High Court as alleged by the respondents. In that regard, I find that the applicants have not made out a case to warrant the transfer of the matter to Embu. The matter was already concluded by the instant court and in the interests of justice it would be prudent for the applicants to contest the proceedings while the matter is in Nyeri. In addition to that, the applicants have not

demonstrated what hardships they will experience if the matter is determined in the instant court. In any event, no one shall be locked out of the proceedings if the cause remains in Nyeri as Section 76 of the Law of Succession Act allows any interested party to revoke or annul a grant.

8. In other words, the court directed that this court, which issued the orders, was best suited to deal with revocation. The court will subsume the contents of the affidavits in the proceedings. The court directed that the matter proceed by way of viva voce evidence.

Evidence

9. The first applicant, Catherine Marigu Njeru testified on 5.2.2025. She said that the deceased was her husband and they had 2 children, Brian Gakinya Murangi and Gladys Muguru Murangi. She filed the instant application, which she adopted as evidence in chief. This was mainly because the respondent concealed material facts that the applicants were the beneficiaries of the deceased's estate. She adopted a statement dated 17.07.2023, which repeated almost verbatim the contents of the supporting affidavit. She produced 10 exhibits in the list of documents dated 19.07.2023.

10. On cross-examination, she stated that she did not hear the tribunal stating that she was a tenant; she denied that she had

any succession where the children were given shares. She stated that she was married in 1998 and was not told that the land had been given by her father. She stated that the father-in-law, the late patriarch, had three houses. The first house has Mugo Gakinya and three others. The second house has Murandi Gakinya and other brothers and sisters. The third house has 9 children and was their house. The children are:

- a. Pauline Nyawira(Deceased).
- b. Mary Wairimu(Deceased)
- c. Teresa Wambui
- d. Catherine Nyambura
- e. Harrison Murangi(Deceased)
- f. Jane Wanjira
- g. Alice Wanjiru
- h. James Irungu
- i. John Gikandi

11. On re-examination, she stated that the three wives are for the late patriarch's house, not the deceased herein. He stated that the step-brothers occupy the other 2/3 of the other houses, namely Mugo Gakinya and Murandi Gakinya. The applicant's case was closed.

12. The first respondent, Catherine N. G. Gakinya, testified and stated that she is a public servant. She relied on her replying affidavit dated 27.02.2020 and a further affidavit sworn on 11.09.2020. During her testimony, she produced several

exhibits which, upon inquiry by the Court, had not been served upon the applicants. Consequently, the witness stepped down and was ordered to pay throw-away costs of Ksh. 10,000/= to enable service of the said documents. The applicants were granted leave to file responses to any documents that had not been previously served upon them.

13. There was no need for further documentation, and the applicant's case remained closed.

14. Catherine N G Gakinya continued with her testimony on the adjourned hearing. She produced two annexures as exhibits. She stated that she filed a succession cause on behalf of the brother. Most of the father's property was in Embu. The court indicated on the record that she was lying, as her ID card showed she was from Makakai in Embu Central. She stated that the said parcel of land belongs to her father, and the deceased herein was a trustee. The deceased herein went to Embu for business. She stated that the green card filed by the sister-in-law, the first applicant herein, was shown to her. The said document has a first entry on 15.03.1999. She stated that the father's name had been there. The sister-in-law obtained letters of chief from Naromoru, but the deceased herein did not live in Naromoru. The deceased was buried in Embu. She confirmed that Brian Gakinya Murangi and Gladys Muguru Murangi were her nephew and niece respectively. The two were children of the deceased herein. The first applicant,

Catherine Marigu Njeru, was the mother of Brian Gakinya Murangi and Gladys Muguru Murangi.

15. The witness was lying by evading a question, which she eventually answered. She stated that she did not inform the children of the deceased and Catherine Marigu Njeru. She stated that she had declared them the only beneficiaries because the property belonged to her father, the late patriarch. She stated that the property was appropriately distributed. She also did not declare that she was holding the property in trust.

16. She stated that she filed tribunal case number 37 of 2019. She declared herself a landlord. Prior to filing, she was not collecting rent from the premises. It was her mother who was collecting, though she had no document to show it. The respondent's case was closed.

Submissions

17. The respondent was the only one who filed submissions. These were the strangest submissions the court has come across in the last three decades it has been involved in matters law. The submissions not only amounted to concession but also raised new matters. They submitted that the Land Parcel Number Embu Municipality 112 belongs to, and lo and behold, to the deceased patriarch, Gakinya Gikandi. They sought that

the following parcels of land be shared equally between the children of the third house of Gakinya Gikandi:

- a. land parcel number Nyeri/Weru 3491.
- b. land parcel number Nyeri/Wazara/1423
- c. land parcel number Nyeri/Wazara/1427
- d. EABL shares numbers 00170250.

18. They included in that sharing, the children of the deceased herein, but excluded the sister-in-law, Catherine Marigu Njeru. They also submitted that a judgment of a competent court, that is, the tribunal, is binding on the court. They also stated that the applicants were unable to explain how the deceased acquired the land.

Analysis

19. This is not a criminal trial. It is a civil hearing where the court has to find for one part or another on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 as follows:

In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish

his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.

20. This was further enunciated in the case of **Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR)**, where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller -vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both

parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

21. On this sole important issue, the law is that he who alleges must prove. The term burden of proof draws from the Latin Phrase *Onus Probandi* , and when we talk of burden, we sometimes talk of onus. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to **Phipson on the Law of Evidence**, the term 'burden of proof' has two distinct meanings:

1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the

matter that you failed to persuade on is not critical to the whole matter so you can still win.

2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

22. The burden of proof is set out in sections 107- 109 of the Evidence Act as follows:

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by

any law that the proof of that fact shall lie on any particular person.

23. There is no duty to prove an admitted fact. In evidence, the respondent conceded that the first applicant is a sister-in-law. She is the mother of the second applicant, Brian Gakinya Murangi, and another child, Gladys Muguru Murangi. It is therefore irrelevant whether the applicant is a wife. The respondents were under a duty to disclose at least the children. Secondly, they also admitted that the estate of the late patriarch, for whom they purported to claim, has several other beneficiaries. At the point where evidence was brought that the deceased herein had 8 siblings, not 2, the respondents should have known that their goose was not only cooked, but also eaten and released to the sanitation section of Embu water and sanitation. That is to say, even if the deceased did not have a spouse, there are still children, all of whom were not disclosed. even the children of the patriarch were not disclosed.

24. So, whether they were dealing with the estate of the late patriarch or the estate of the deceased, they did not disclose all dependents in either estate. *Ipsa facto*, they obtained the grant fraudulently by first failing to disclose their own siblings, if it is true that they were seeking a grant on behalf of the patriarch's estate. To make matters worse, they fraudulently

filed a suit in the business premises tribunal as landlords when they had never been landlords. This was a nullity, and there is no need to say much. In the case of **Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others** [1998] eKLR, the court stated as follows:

Mr. Gautama again averred that no one, especially third parties, can be guilty of disobeying an order which is null and void. With this submission, I agree. There cannot be as far as third parties are concerned, interference with due administration of justice when the ex-parte order made is without any legal basis and is of no legal effect, and; as regards the parties to this suit, it cannot be said that there was disobedience of an order which was in the first place null and void.

25. The question of nullity was addressed in the locus classicus case of **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**, Lord Denning, delivering the opinion of the Privy Council at page 1172 (1) said;

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And

every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

26. The tribunal had no jurisdiction to deal with the estate of the deceased herein. Any such proceedings are a nullity and do not bind this court. Having changed their stand that they are claiming as trustees of the estate of the late patriarch, then they are in the wrong court. The respondent ought to have moved to a different forum against the rightful heirs of the estate of the deceased herein. The uncontroverted evidence is that the deceased herein had three beneficiaries, that is,

- a. Brian Gakinya Murangi.
- b. Gladys Muguru Murangi.
- c. Catherine Marigu Njeru.

27. In terms of the degrees of consanguinity, the respondents do not rank either in the first or second degree of consanguinity. The three beneficiaries rank in priority, that is, Catherine Marigu Njeru, Brian Gakinya Murangi , and Gladys Muguru Murangi. There are no other beneficiaries to the estate of the late deceased herein. This court must remember that it is not handling the estate of the late patriarch.

28. The respondents took issue with the difficulty for the applicants to know how the suit was acquired. That is

irrelevant to the succession court. Article 162 (2) (b) provides for the court to determine the use and occupation of, and title to, land. The only relevant statute in this case is the Law of Succession Act, which is said to be an act of Parliament to amend, define, and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto. It does not deal with the acquisition of land.

29. Under section 2(1) of the Succession Act, the act is said to be of universal application:

Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

30. Even if the deceased left no wife or children, section 29 of the Succession Act was to be used. It provides as follows:

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon

the kindred of the intestate in the following order of priority—

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

31. It was not disputed that the deceased was survived by a wife and two children, who were the rightful beneficiaries of his estate. Nevertheless, the applicants did not place before the Court any lawful or factual basis for excluding the sisters and half-sisters of the deceased from the succession proceedings, if their interests related to the patriarch. This omission further underscored the irregular manner in which the grant was obtained and administered.

32. In accordance with the Law of Succession Act, the sisters of the deceased did not qualify as beneficiaries of his estate. It is further evident that the interests of the respondents were adverse to those of the estate of the deceased, and they ought not to have been appointed as administrators. In the circumstances, the summons for revocation of grant is merited and is hereby allowed.
33. Given that the identity of the beneficiaries is not in dispute, the Court shall proceed to confirm the grant in favour of the three beneficiaries as proposed by them. However, the Court declines to sanction the creation of a trust in respect of the estate.
34. Further, it came out that the representatives had transferred to themselves the sole property of the estate. The effect of revoking the grant is that they had no basis for obtaining it in the first place. Therefore, the registration of the Respondents pursuant to the confirmed grant in respect of 1/3 share of Land Parcel Number Embu Municipality 112, is set aside. Consequently, the land registrar, Embu County, shall immediately delete the entries relating to the deceased's interest in 1/3 share of Land Parcel Number Embu Municipality 112. The said parcel shall revert to the estate of the deceased herein.

35. Given that the Respondents used the proceedings to evict the rightful heirs, the court directs that the heirs be restored to the 1/3 share of Land Parcel Number Embu Municipality 112, as the Respondents were intermeddling therein. The applicants are entitled to a refund of all expenses incurred in defending this suit, including monies paid in respect of the fraudulently filed case, being BPRT case number 37 of 2019.

36. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited** [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

37. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that costs follow the event: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be,

whether or not the circumstances merit an award of costs to the Applicant.

38. The applicants were compelled to incur considerable costs in prosecuting the present application in order to establish matters that were otherwise apparent on the record. In the circumstances, they are entitled to an award of costs. Although the parties are related, the respondents' conduct towards the applicants was such that the Court finds no basis for shielding them under the guise of preserving family harmony. Moreover, the respondents are not beneficiaries of the estate of the deceased herein. Accordingly, the Court awards the applicants costs of Ksh. 105,000/=.

39. Further, as there is no other property disclosed as forming part of the estate of the deceased, this file shall be transferred to the Embu High Court. The Court declines to entertain or make any orders in respect of properties registered in the name of the deceased patriarch, Gakinya Gikandi, as the same do not form part of the estate before this Court.

Determination.

40. In the end, the court makes the following orders:

- a. The grant of letters of administration granted to Catherine N G Gakinya and Teresa Wangui Gakinya and

confirmed on are hereby revoked for being fraudulently obtained.

- b. The respondents are busy bodies to the estate of the deceased. Consequently, they must render a true and just account and file in court an inventory of rent recovered, including costs and all expenses incurred in the fraudulently filed case, being BPRT case number 37 of 2019. The amounts found due should be paid to the Applicants within 4 months from today; failing which, the Applicants are free to proceed with recovery.
- c. The registration of the Respondents as owners of Catherine N G Gakinya and Teresa Wangui Gakinya, 1/3 share of Land Parcel Number Embu Municipality 112 was fraudulent and is therefore set aside.
- d. The land registrar, Embu County, shall immediately delete the entries relating to the transfer of the deceased's interest in 1/3 share of Land Parcel Number Embu Municipality 112. The said parcel shall revert to the estate of the deceased herein for transmission as herein after indicated.
- e. The Respondents shall deliver to the court the original title in respect of 1/3 share of Land Parcel Number Embu

- Municipality 112, if in their possession, for onward transfer to the Embu County.
- f. Consequently, upon the foregoing, a fresh grant is issued to the applicants, Catherine Marigu Njeru and Brian Gakinya Murangi.
 - g. The grant is accordingly confirmed on the basis that the two children of the deceased shall each be entitled, in equal shares, to the one-third (1/3) interest in Land Parcel Number Embu Municipality/112 that was held by the deceased, to be owned by them absolutely. The first applicant shall have a life interest in the said portion.
 - h. The respondents shall remove themselves from the suit premises by 1/2/2026, failing which they shall be forcefully evicted.
 - i. The estate of the late deceased herein is at liberty to sue for mesne profits.
 - j. Costs of Ksh. 105,000/= to the Applicants.
 - k. Further, as there is no other property disclosed as forming part of the estate of the deceased, this file shall be transferred to the Embu High Court, *suo moto*.

1. The Court declines to entertain or make any orders in respect of properties registered in the name of the deceased patriarch, Gakinya Gikandi, as the same do not form part of the estate before this Court.

DELIVERED, DATED and SIGNED at NYERI on this 19th day of January, 2026. Ruling delivered physically in open court.

KIZITO MAGARE

JUDGE

In the Presence of: -

Ms. Maina for the Respondent

No Appearance for the Applicant

Court Assistant - Michael