

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE NO. 051 OF 2006

IN THE MATTER OF THE ESTATE OF THE LATE BENSON MBATIAH
MUYA - (DECEASED)

THROUGH

CHARLES WANYOIKE MBATIAH
RESPONDENT

VERSUS

JOHNSON KAHIRA MBATIAH 1ST
APPLICANT

ELLY KURIA MBATIAH 2ND
APPLICANT

Coram: Before Justice R. Nyakundi
M/s Ngigi Mbugua Advocates
M/s JM Kimani & Co. Advocates
M/s Wambua Kigamwa & Co. Advocates

RULING

1. This Suit was filed in this Court way back on 27th March 2006. The Proceedings proceeded in earnest and on 31/3/2009 a Certificate of Confirmation of Grant with the following details was issued to the Administrator one Serah Wanjiku Mbathia with the following details on transmission of the intestate estate signed by Hon. Lady Justice P.M. Mwilu (as she then was);

<i>NAME</i>	<i>DESCRIPTION OF PROPERSTY</i>	<i>SHARE OF HEIRS</i>
<i>JOHNSON K. MBATIA & ELLY KURIA MBATIA</i>	<i>UASIN GISHU/KIMUMU/2373</i>	<i>EQUAL SHARES</i>
<i>CHARLES W. MBATIA</i>	<i>UASIN GISHU/KIMUMU/2374</i>	<i>WHOLE SHARE</i>
<i>ELLY KURIA MBATIA</i>	<i>UASIN GISHU/KIMUMU/2375</i>	<i>WHOLE SHARE</i>
<i>ELLY KURIA MBATIA</i>	<i>UASIN GISHU/KIMUMU/2376</i>	<i>WHOLE SHARE</i>
<i>JOHNSON K. MBATIA</i>	<i>UASIN GISHU/KIMUMU/2380</i>	<i>WHOLE SHARE</i>

MIKE ROTICH	UASIN GISHU/KIMUMU/2381	WHOLE SHARE
MIKE ROTICH	UASIN GISHU/KIMUMU/2382	WHOLE SHARE

2. This Estate remained undistributed although a Certificate of Confirmation of Grant had been issued to the Administrators. What followed were series of interlocutory Applications. First Charles Wanyoike Mbatiah filed Summons date 19/8/2015 against Johnson Kahira Mbatiah, Elly Kuria Mbatiah and Elizabeth Jepchumba Tunoi seeking the following orders;

a) The respondents be restrained from carrying on any dealings in respect of the assets of the deceased including; Land parcels known as UASINGISHU/KIMUMU/2375, 2376, 2380, 2383, 2384, 2385 and 2386 pending the determination of the summons herein.

b) The interested party be restrained from carrying out any dealings in respect of the land parcel UASIN GISHU/KIMUMU/ 2373 pending the determination of the summons herein.

c) The land registrar enters an inhibition on the registers of the parcels known as UASIN GISHU/KIMUMU/2375, 2376,2380,2383,2384,2385and 2386 pending the determination of the summons herein.

d) That any transfers, conveyances or transmissions of the parcels known as UASIN GISHU/KIMUMU/2375, 2376, 2380, 2383, 2384, 2385 and 2386 be cancelled and the respective registers be restored to the names of the late BENSON MBATIAH MU YA.

e) In the alternative, the respondents account to the estate of the deceased and its beneficiaries the proceeds arising from the sale of the parcel known as UASIN GISHU/KIMUMU/ 2373 and deposit the proceeds thereof into the court or an interest earning bank pending the determination of the summons.

f) The grant of letters of administration made to SERAH WANJIKU MBATIA on 16th August 2006 and confirmed on 13th February 2009 be revoked and annulled by reason of her death on 21st March 2013

3. Besides that, the Interested Party filed an Application dated 27th October 2016 seeking the following orders;

a) *The court issues an order that the amount payable as monthly rent in the premises known as UASIN GISHU/KIMUMU/2373 be deposited in court.*

b) *The purchase price of kshs. 8,000,000/- be deposited in court pending the hearing and determination of the application*

c) *In the alternative the court, be pleased to issue an order that the amount payable as monthly rent in the property known as UASINGISHU/KIMUMU/2373 be deposited in a joint account of the advocates for both the respondent and the interested party*

4. The Court considered the two Applications and ruled as follows;

WHETHER THE RESPONDENTS SHOULD BE RESTRAINED FROM CARRYING OUT ANY DEALINGS IN THE PARCELS KNOWN AS UASINGISHU/KIMUMU/2375, 2376, 2380, 2383, 2384, 2385 AND 2386.

The administratrix of the estate of the deceased died on 21st March 2013 and no personal representative has been appointed since then. It follows that dealing in the suit properties would then amount to intermeddling. The court need restrain the respondents from further dealing in the named parcels of land until another administrator is appointed.

The court therefore grants the orders restraining the respondents from dealing in the suit lands.

WHETHER THE REGISTER SHOULD BE RESTORED TO HAVE THE TITLES IN THE NAME OF THE DECEASED

The applicant has not shown that any of the titles save for 2373 have been transferred or any conveyances conducted on the same. However, given that there has been proof that the initial grant was issued fraudulently and that the grant issued to Serah Mbatiah was revoked by operation of law upon her demise, the court orders that the other titles save for 2373 be restored to the name of the deceased

WHETHER THE RESPONDENTS SHOULD DEPOSIT THE PROCEEDS OF THE SALE AND RENT FOR UASIN GISHU/KIMUMU 2373 INTO THE COURT OR INTO A JOINT INTEREST EARNING ACCOUNT

The interested party has proven that she is a bonafide purchaser for value without notice of defect in the title. As the proprietor of the land

she is entitled to collect rent as the property belongs to her. As for the purchase price, it is clear that the respondents obtained the same fraudulently as the grant that distributed the suit property was fraudulent. The purchase price should be deposited in a joint interest earning account. The respondents should give an account of the rent collected and the same be paid to the interested party. Orders were issued on 11th May 2009 to the effect that there were no dealings allowed in respect of the properties of the estate. The interested party conducted due diligence before entering the agreement on 25th may 2015 and was not made aware of the orders.

I do order that the purchase price be deposited into a joint interest earning account. The rent collected be computed and remitted to the interested party as she has a valid title and is entitled to the same.

WHETHER THE INTERESTED PARTY SHOULD BE RESTRAINED FROM UTILISING UASIN GISHU/KIMUMU/2373

The interested party has proven that she was a bonafide purchaser for value without notice of defect in the title. The threshold for one to be considered a bonafide purchaser were set down in **Katende v. Haridar & Company Limited (2008) 2 E.A.173**. It developed the following strictures to be satisfied before a conclusion can be drawn that the purchaser is innocent and acquired the property for value and without notice: -

"..... it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defense against claim of any prior equitable owner."

The interested party has established the threshold to be considered a bonafide purchaser and therefore there should be no injunctive orders issued against her. The such orders sought against her are unmerited and are hereby denied.

WHETHER THE GRANT OF LETTERS OF ADMINISTRATION ISSUED TO SERAH WANJUKU MBATIAH SHOULD BE REVOKED

*Serah Wanjiku Mbatiah is deceased. By operation of law the grant issued is revoked as per **Section 76(e) of the Law of Succession Act.***

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(e) that the Grant has become useless and inoperative through subsequent circumstances.

By operation of the law the prayer is already in place. The grant stands revoked.

5. The Applicants did not stop there on 6th February 2020 Elizabeth J. Tunoi filed a Notice of Motion seeking the following orders;
 - a) *That leave be granted to the company of Mwaka & Company Advocates to come on record on behalf of the applicants*
 - b) *That stay of execution of the ruling and orders of Hon. Justice S.M Githinji on the 7th day of November 2019, and more specifically the notice to show cause for the 10th day of February 2020 be issued pending the hearing and determination of this application.*
 - c) *That the court be pleased to grant leave to the applicants to appeal out of time against the ruling and the orders of Hon S. M Githinji of 7th day of November 2019*
 - d) *The applicants be granted leave to file and serve the court of appeal and/or file of fixing and service of the notice of appeal be extended*
 - e) *That the said leave do operate as stay of all proceedings in the matter herein.*
 - f) *That costs of this application be provided for*

6. Following this Application, the Court pronounced itself as follows;

“Having weighed the foregoing, I find that the applicant has not given a plausible and satisfactory explanation for the delay and thus the leave to file the notice of appeal lacks merit.

In the premises, the application fails in its entirety and is hereby dismissed with costs.”

7. The beneficiaries, interested parties to this estate have never been tired to file interlocutory applications without focusing on the distribution of the estate. That is how on 13/9/2021 the following observations were made by the Deputy Registrar;

On 16th August 2021 Miss Kogo for the 1st Respondent and Mr. Kimani for the 2nd Respondent notified the Court that they had agreed to deposit a title deed in Court. Mr. Mogambi objected to this and sought warrants of arrest against both Judgment debtors. The Court was told that the Petitioner had approached one of the Respondent and they had agreed on the same. I found it fit to have the Petitioners and the Respondent attend Court so that I could determine whether or not some negotiations were going on.

2. On 13th September 2021 I heard all the parties and it became apparent that the parties were actually not negotiating. Mr. Kimani Advocate submitted on the provisions of Order 22 rule 34 of the Civil Procedure Rules. I do bear in mind that the orders that are for compliance was delivered in the year 2019. I must bear in mind that the Ruling herein by Hon. Justice S.M Githinji directing that the purchase price of Uasin Gishu/Kimumu 2373 be deposited into court or a joint interest earning Account was delivered way back on 7th November 2019.

The same was fixed for notice to show cause on 11/3/2021 and warrants had issued against the Judgment debtors on 31th May 2021. The only proposal received is that the Judgment debtors are willing to deposit title deeds of some property into Court. Is this tenable?

In Centre for Peace and Democracy versus Non-Governmental Organizations Co-ordination Board (2019) eKLR The Court Appeal ruled that a Deputy Registrar serves at the direction of the Court that

she serves and that in matters of execution the powers are limited to giving effect to orders stemming from the Ruling of the Hon. Judges.

In the absence of a consent by the parties or review of the orders by his Lordship, I am afraid that deposit of title deeds proposed by the Judgment debtors is not allowed. However, considering the amounts involved herein I do grant the judgment debtors 60 days from today's date to comply with the orders of his Lordship.

8. Interestingly, one cannot avoid to take judicial notice of an abuse of the Court process by the parties in the form of seeking justice. In this respect, the story of peace meal litigation tells a sad story if the next ruling of the court is anything to go by that on 7/11/2019 an Application was filed on which the court considered on 17/11/2023 in which on analysis of the entire evidence it pronounced itself as follows;
30. *On the same subject of depositing the purchase price therefore, the Applicant has already been found to have been guilty of unreasonable delay to approach Court for Review. In his Ruling, Githinji J found that the delay of 3 months was unreasonable. In the present Application, that delay of 3 months has since escalated to over 2 years. If 3 months was already found in this very matter and subject to have been inordinate, how can this Court now contradict that earlier finding and declare a delay of over 2 years to be reasonable?*
31. *The Applicant has not at all addressed or given any reasons for the delay in filing the Application for review. In the absence of any explanation, I find that the delay is gross and unreasonable.*
32. *The 2nd Respondent has also correctly submitted that, in any event, the prayer that the Applicant be allowed, in substitution, to deposit a title deed instead of the amount of Kshs8,000,000/-, had already been litigated upon before the Deputy Registrar. I agree with this Submission since the record shows that indeed, the same prayer was placed before the Deputy Registrar when the Notice to show cause came before her. The Deputy Registrar delivered a reasoned Ruling on 24/09/2021 whereof she declined the prayer and granted the Applicant a period of 60 days to deposit the funds as ordered by Githinji J.*
33. *The said directions by the Deputy Registrar not having been challenged, and this Court not having been moved to set aside the*

same, the directions remain a valid and lawful order upon which this Court has no reason to interfere.

Final orders

34. In the premises, the Notice of Motion dated 16/11/2021 filed by the Applicant, the said Elly Kuria Mbatiah is hereby dismissed with costs to the 2nd Respondent, the said Charles Wanyoike Mbatiah.

9. In this trajectory of litigating for the purposes of delaying distribution of the estate another Application was filed before this court in terms of Section 47, 93(1) & (2) of the Succession Act, Rules 49, 63 and 73 of the Probate and Administration Rules, Section 80 of the Civil Procedure Act, Rule 44 of the Civil Procedure Rules, Section 120 of the Evidence Act and Articles 35, 47, 48, 50(1) & 159(2) (c) of the Constitution of Kenya seeking the following orders;

b. That the court be pleased to review its orders made vide its ruling delivered on 7th November, 2019 requiring the Applicants to deposit into an interest earning account the sum of Kshs. 8,000,000/= being proceeds of sale of title No. UASIN GISHU/KIMUMU/2373 to one Elizabeth Jepchumba Tunoi.

c. That the court do inquire and find that there is an error apparent on the face of the record since it ordered that all dealings over the following assets of the late Benson Mbatiah Muya be preserved i.e. L.R. UASIN GISHU/KIMUMU/2375, 2376, 2380, 2384, 2385 and 2386 and revert to the names of the deceased, which order was made at the instance of the Respondent Charles Wanyoike Mbatiah but was never: - (i) extracted nor, (ii) lodged or registered with the Land Registrar Uasin Gishu where their respective registers are domiciled.

d. That the orders made on 7.11.2019 were made in error since there was no administrator or personal representative appointed by the court upon the demise of the grant holder on 21.3.2023. The Respondent had not sought to be appointed an administrator and the court never appointed either the applicants to be such an administrator.

e. That the 2nd Applicant as aggrieved party had a duty to court and the law to ensure that all orders, decrees and edicts of the court over the estate he sought to protect were extracted and registered in the respective land registry, he failed to do so and is busy selectively

seeking enforcement in a manner prejudicial to the applicant and other beneficiaries.

f. That the Respondent by deed and representation has varied the certificate of confirmation of grant of letters of administration made on 16.3.2009 by agreeing to settlement made on 5.4.2013 before counsel and drawn benefits from the arrangement by appropriating parcels of land known as L.R. UASIN GISHU/KIMUMU/2374 to his own use and continues to reside in L.R. UASIN GISHU/KIMUMU/2375 while at the same time requiring the applicants to deposit the proceeds of sale of L.R. No. UASIN GISHU/KIMUMU/2375 while at the same time requiring the Applicants to deposit the proceeds of sale of L.R. No. UASIN GISHU/KIMUMU/2373, against the court orders that directed that the other title save 2373 be restored in the name of the deceased.

g. That in view of the apparent error on the face of the record, the court be pleased to appoint an administrator or administrators in terms of Section 66 of the Law of Succession Act who shall exercise the powers of a personal representative donated by Section 82 & 83 of the Succession Act.

h. That pending the appointment of a personal Representative to the estate of the deceased, the court be pleased to suspend the execution of its orders requiring the applicants to deposit Kshs. 8,000,000/= into an interest earning account in the names of counsels for the parties.

i. That by dint of the previous ruling of 20.8.2015 the Deputy Registrar of the court ordered stay of all conveyance including of parcel No. UASIN GISHU/KIMUMU/2373, which order was extracted but not registered by the Respondent with the Lands Registry, which allowed the interested party to search, lodge and register her transfer over the same. The title was subsequently upheld by the court in its ruling of 7.11.2019 as bonafide and legitimate.

j. In the alternative and without prejudice to the foregoing the court do find that the entire estate of the deceased has devolved to the heirs in terms of their agreement made on 5th April, 2013 before counsel and mark the cause as closed.

10. At the tail end of this Application the Court held a strong view couched in the following language. That;

29. In appreciating the principles in the above case, as now settled even in our jurisdiction, the doctrine of *res judicata* in a wider sense acts as a bar against proceedings which are re-litigated over and over again to attain the threshold of an abuse of process. It has often startling on my part to encounter Succession proceedings in the various courts in which litigation on the same issues disguised as new cause of action. In looking at the instant application, largely I must admit that there is no new cause of action open to the applicants to defend and they should be estopped, for all purposes and intent to file multiplicity of applications on the grounds that there is a remedy capable of being granted by this court.

30. This was the position articulated by the court in **The Kenya Commercial Bank Limited v Muiru Coffee Estate Limited & another (2016) eKLR** that:

“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.”

31. I need say no more. The remaining duty is to dismiss the application dated 8th July, 2024 with costs.

32. It is so ordered

11. Following this Ruling, the proceedings became a still birth and court directions on appointment of administrators pursuant to Section 66 of the Law of Succession Act seems to have fallen in sinking sand. The Law of Succession is very clear that in intestate estate the administrators must be appointed by the court to act in personam to administer the estate on behalf of the estate on behalf of the deceased. There are no two ways about it, it is only one way. This Court in providing leadership has held many pre-trial conferences geared in complying with the provisions of Section 66 of the Act as read with Rule 73 (1) of the Probate and Administration Rules. Time has come for this Court to invoke the inherent jurisdiction to act according to law and justice particularly to prevent abuse of process so that there is management, transparency and accountability of the

adjudication process. The notion that the beneficiaries to the estate have their way is not recognized in law. While considering the inordinate and inexcusable delay by the beneficiaries not to prosecute the petition, this court cannot sit back and allow its processes to be abused.

12. In this respect, the following orders shall abide that through the Sub-County Commissioner Moiben Sub-County summons requiring attendance of all the beneficiaries of the estate of the Late Benson Mbatia Muya to show cause why this estate should not be referred to the regional office of the Public Trustee to do all what it takes under the law to prepare the inventory of all the assets survived of the Deceased, identify the beneficiaries and prepare a scheme of distribution.

13. For those reasons, the door of legal mercy is soon closing down for the beneficiaries to this estate unless and until they present themselves to this court on 11/2/2026 to mitigate their indolence, laxity and a don't-care attitude in securing their inheritance rights as per the law established. In order to comply with the Constitutional imperatives as espoused in Article 50 of the Constitution and the protocols of the Succession Act the Summons Requiring Attendance shall be processed, extracted by the Deputy Registrar of the High Court for service upon each beneficiary by the Process Server of the Court through the Sub-county Commissioner Moiben Sub-county. In default of any beneficiary not attending the status conference on appointment of administrator he shall be liable to forfeit Ksh 20,000/=to the State for disobedience of a Court Order punishable as contempt on the face of the record. Come one come all for your attendance is indispensable.

14. Orders accordingly.

**GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 20TH
DAY OF JANUARY, 2026**

.....
R. NYAKUNDI
JUDGE