



REPUBLIC OF KENYA



**Ngugi & 2 others v Kigwe & another (Succession Cause 256 of 1980)  
[2025] KEHC 682 (KLR) (Family) (31 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 682 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 256 OF 1980  
H NAMISI, J  
JANUARY 31, 2025**

**BETWEEN**

**VIOLET WACHUKA NGUGI ..... 1<sup>ST</sup> APPLICANT**

**CELINA WAMBUI KIGWE ..... 2<sup>ND</sup> APPLICANT**

**ROSEMARY MUMBI KIGWE (SUING AS AN ADMINISTRATOR OF THE  
ESTATE OF MARGARET WANJIKU KIGWE) ..... 3<sup>RD</sup> APPLICANT**

**AND**

**DAVID WAIGANJO KIGWE ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE MUHOHO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the Court is Summons dated 17 July 2024 seeking the following orders:
  - i. The Honourable Court be pleased to reinstate and reopen the succession cause herein;
  - ii. That the costs for the Application be provided for.
2. The Application is supported by the Affidavit of Violet Wachuka Ngugi And Celina Wambui Kigwe, a second Affidavit sworn by Rosemary Mumbi Kigwe and premised on the following grounds:
  - i. That the succession cause was closed on 3 February 2023 when the court delivered its Ruling on an application by one of the Beneficiaries, Grace Nyambura Kiarie (suing as an administrator of the Estate of Jacinta Njeri Kiarie (Deceased));



- ii. That the Applicants herein seek to have the case reopened to have the Respondents produce true and just accounts and distribution of the Estate of the Deceased as per the confirmed Grant;
  - iii. That the Applicants are desirous of having this cause reinstated and the Court file reopened to enable them to file the Application herein which has high chances of success
3. In their Supporting Affidavit, the 1st and 2nd Applicants, who are Beneficiaries of the Estate, indicate that at the time of confirmation of the Grant, they were aged 22 and 18 years, respectively and were completely unaware of their entitlement in the Estate. They aver that they have since lived under the misrepresentation of what is their entitlement in the estate until recently, when they learnt that they were entitled to 1/11 of the Estate as per the confirmed Grant.
  4. The 3<sup>rd</sup> Applicant's Affidavit reiterates the contents of the Affidavit by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants.
  5. In response thereto, the 1st Respondent filed Grounds of Opposition as follows:
    - i. The Applicants have no locus standi to file the present application.
    - ii. The Applicants are guilty of laches, unreasonable, unexplained and inexcusable inordinate delay having filed this application over 38 years since confirmation of the Grant herein.
    - iii. This Succession court became functus officio upon issuing orders confirming the Grant in 1986 and a Certificate of Confirmed Grant duly extracted. Subsequent disputes relating to transmission of the Estate to the rightful beneficiaries are within the ambit of Land Laws and the Environment and Land Court exclusively.
    - iv. The orders intended to be sought by the Applicant can only be granted by the Environment and Land Court which is vested with exclusive jurisdiction to hear disputes relating to title, occupation and use of land as is the case in this matter.
    - v. In the unlikely event that this application is allowed and this succession cause reopened, it shall be impracticable for this court to preside over the matter in a fair manner owing to the unreasonable, unexplained and inexcusable inordinate delay prejudicial to the 1st Respondent in terms of evidence favourable to the 1st Respondent becoming lost/degraded and or witnesses favourable to the 1st Respondent dying or losing their memories.
  6. The 2<sup>nd</sup> Respondent filed a Replying Affidavit, in which he raises a Preliminary Objection on the following grounds:
    - i. This honourable Court is functus officio;
    - ii. The Applicants herein have no locus standi;
    - iii. Contrary to Order 19 Rule 5 of the *Civil Procedure Rules*, the two Applicants have sworn one Affidavit in support of the Application;
    - iv. The Application is, therefore, incompetent and should be struck off
  7. Further, the 2<sup>nd</sup> Respondent avers that he is not an Administrator of the Estate and cannot be condemned to render true and just account of the Estate.
  8. Parties were directed to canvass the Application together with the Preliminary Objection by way of written submissions.



## Analysis and Determination

9. I first wish to dispose of the Preliminary Objection raised by the 2nd Respondent.
10. The Supreme Court in *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“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... 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 judicial discretion”.
11. In *Aviation & Allied Workers Union Kenya -vs- Kenya Airways Limited & 3 Others* [2015] eKLR, the Supreme Court stated as follows:

“A preliminary objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”
12. The 2<sup>nd</sup> Respondent has raised the issue of locus standi of the Applicants. Looking at the list of Beneficiaries names and recognised in the Petition for Grant of Letters of Administration as well as the confirmed Grant dated June 1986, the following are named:
  - a. George Gathecha Kigwe
  - b. Anna Njahira
  - c. Joseph Wathua Kigwe
  - d. Gabriel Muritu Kigwe
  - e. Salome Njeri
  - f. Pauline Muthoni
  - g. Joyce Wachuka
  - h. Pauline Gathecha Kigwe
  - i. Lucy Wanjiru
  - j. Margaret Wanjiku
  - k. David Waiganjo Kigwe
  - l. Jacinta Njeri
  - m. Virginia Wanjiku
  - n. Francis Kariuki Kigwe



- o. Bernadette Wachuka Kigwe
  - p. Christopher Kangethe Kigwe
  - q. Selina Wachuka
  - r. Maria Njahira
  - s. Rosemary Wanjiku
  - t. Cecilia Njeri
  - u. James Gathecha Kigwe
  - v. Patrick Kibathi Kigwe
  - w. Margaret Wachuka
  - x. Jane Waruiru
13. Quite obviously, the list does not contain the names Violet Wachuka Ngugi and Celina Wambui Kigwe. In the Supporting Affidavit dated 17 July 2024, the two have simply deponed that they are Beneficiaries of the Estate. If at all they are truly Beneficiaries, the discrepancy in the names is not explained. It is only in the submissions that the explanation is provided. It is trite law that submissions cannot take the place of evidence. In the case of *Nancy Wambui Gatheru v Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 Mwera J, expressed himself as follows:
- “Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgment. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”
14. In the case of *Robert Ngande Kathathi v Francis Kivuwa Kitonde* [2020] eKLR, Justice G V Odunga as then he was stated:
- “It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in *Erastus Wade Opande v Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007:
- “Submissions simply concretize and focus on each side’s case to win the court’s decision that way. Submissions are not evidence on which a case is decided.”
15. In the premise, pursuant to the Confirmed Grant and the evidence presented before this Court, I find that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants herein are not Beneficiaries of the Deceased.
16. The 3<sup>rd</sup> Applicant, Rosemary Mumbi Kigwe, avers that she is the daughter to Margaret Wanjiru Kigwe, a named Beneficiary of the Deceased herein. In her Affidavit in support of this Application, the 3<sup>rd</sup> Applicant states that she is the administrator of the Estate of her late mother. However, no evidence



of the same is provided in the Affidavit, to demonstrate that the 3<sup>rd</sup> Applicant is a validly appointed legal representative of her late mother.

17. In the case of *Otieno v Ougo* [1986-1989] EA 468, the Court stated that:

“An Administrator is not entitled to bring any action as administrator before he has taken out letters of Administration. If he does, the action is incompetent as of the date of its inception.”

18. In the premise, I, therefore, find that the Applicants have no locus standi in this matter and uphold the Preliminary Objection. The Application dated 17 July 2024 is hereby struck out.

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

**HELENE R. NAMISI**

**JUDGE**

Delivered on virtual platform in the presence of:

N/A.....for the Applicants

Ms. Moga h/b Lutta..... for the 1st Respondent

Mr. Githui .....for the 2nd Respondent

Libertine Achieng ..... Court Assistant

