



REPUBLIC OF KENYA



In re Estate of Gitundu Kamau (Deceased) (Miscellaneous Succession Cause E034 of 2023) [2024] KEHC 3178 (KLR) (22 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS SUCCESSION CAUSE E034 OF 2023**

A MSHILA, J

MARCH 22, 2024

IN THE MATTER OF THE ESTATE OF GITUNDU KAMAU (DECEASED)

RULING

1. Before court is Summons dated 27th February, 2023 and brought under Section 45, 47 and 49 of the [Law of Succession Act](#) Cap 160 of the Laws of Kenya and Rule 7(1) 49, 64 and 73 of the [Probate and Administration Rules](#) and all the enabling provisions of the law. The Applicant sought for orders;-
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That this Honourable Court be pleased to issue a declaration that the Chief Magistrate's Court at Thika lacks requisite jurisdiction to entertain and hear a Succession Cause where the property is not registered in the name of the deceased.
 - e. That the Court Order issued by Thika Magistrate's Court in Thika Succession Cause No 238 of 1997 to Muhungura Gitundu on 31st day of July, 2019 and amended on 28th day of January, 2021 be reviewed and be set aside.
2. The application is based on the grounds that the Honourable Court erroneously declared the suit land number Ithanga Phase IV/83 as part of the deceased estate which property is not registered in the name of the deceased as such does not form part of the deceased estate and the title is still in the name of the Applicant. The Probate court was said to lack jurisdiction to deal with properties that are not registered in the name of the deceased.
3. Muhungura Gitundu swore the supporting affidavit. He deposed that a grant of letters of administration was issued and that later the family members applied for the sharing of Land title number Ithanga Phase IV/83 which does not form part of the deceased estate. He filed an objection and after the hearing the court ordered that the suit property be shared out amongst the family members. He deposed that a probate court should only deal with properties registered in the name of



the deceased. He stands to suffer irreparable loss if the orders sought are not granted as he lives on the suit property with his family since 1965 and that he has extensively developed the property

4. Daniel Kimuhu Mbugua filed his replying affidavit dated 27/09/2023. He deposed that the court did not err when it declared that the suit property forms part of the deceased's estate. The Applicant changed the deceased's property to his name without consulting the other beneficiaries. It was said that the suit property should not be used for the sole benefit of the Applicant. The Applicant included the property in his petition as he was aware that the property belonged to the deceased as such the change of name from the deceased to his name was a move meant to disinherit the other beneficiaries and that the Applicant does not stand to suffer any prejudice as he stands to benefit alongside other beneficiaries.
5. Muhungura Gitundu filed his supplementary affidavit dated 16th October, 2023, where he reiterated the averments in his supporting affidavit further noting that the suit land had already been subdivided despite his objection as such he stands to suffer loss if the orders sought are not granted.
6. The parties were directed to canvass the application by way of written submissions. Hereunder is summary of the rival submissions.

Applicant's Submissions

7. The Applicant submits that the application herein is merited as the lower court sitting as a probate court did not have jurisdiction to distribute property that was not registered in the name of the deceased. Reliance was placed in the case of *In the matter of the estate of Atibu Oronje Asioma* (2022) KEHC 11046 KLR.

Respondent's Submissions

8. The Respondent submits that the lower court had jurisdiction to handle this matter as the property had initially been registered in the name of the deceased in the ballot and was un-procedurally changed by the Applicant without the consent of the other beneficiaries. Reliance was placed in the case of *Bahola Mkalindi v Michael Seth Ksee & 2 others* (2012) eKLR. The Respondent submits that the orders sought should not be granted as the means used by the Applicant to acquire the property were illegal as such the lower court's decision should be upheld. Reliance was placed on among others the case of *Nyangwira v Stephen Mungai Njuguna & another* (2013) eKLR.

Issues for Determination

9. Having read the rival written submissions this court has framed only one issue for determination which is whether the miscellaneous application is properly before this court.

Analysis

10. The Applicant seeks to have the Court Order issued by Thika Magistrate's Court in Thika Succession Cause No 238 of 1997 to Muhungura Gitundu on 31st day of July, 2019 and amended on 28th day of January, 2021 it reviewed and or it be set aside.
11. It is apparent from the court record that the Applicant raised the issue that the subordinate probate court did not have jurisdiction to distribute property that was not registered in the name of the deceased; the probate subordinate court then made a determination on this issue which now the Applicant seeks to have the decision set aside and or reviewed.
12. Starting with the right to seek a review of an order; It is trite law that every suit shall be instituted in such manner as may be prescribed by the rules; any person considering himself aggrieved may apply for



a review of the decree or determination or judgment and that such an application shall only (emphasis mine) be made to the court which passed the decree or made the Order sought to be reviewed;

13. One of the grounds for review are discovery of new and important material that was not within the knowledge of the applicant even after exercising due diligence; another ground for review is that there is a mistake and error apparent on the face of the record; thirdly any other sufficient reason;
14. Therefore, an application for review on any of the set-out grounds shall only be to the court that made the order so that it can review its own decision not unless it is demonstrated that the judge is no longer in station; the court of first instance for the order sought for review ought to have been the probate court; thereafter if still dissatisfied the Applicant was at liberty to move this Honourable Court.
15. This court is satisfied that the application is not properly before this court as the Applicant has failed to demonstrate that he had first moved the probate court seeking to review or set aside the Court Order issued by Thika Magistrate's Court in Thika Succession Cause No 238 of 1997 to Muhungura Gitundu on 31st day of July, 2019 and amended on 28th day of January, 2021;
16. The Applicant ought to have filed the application before the court that made the order. In the alternate the Applicant ought to have moved this Honourable Court to set aside the perceived irregular judgment by way of an appeal and not by way of a miscellaneous application.

Findings and Determination

17. For the forgoing reasons this court finds that the application is not properly before this court; the application is hereby struck out with no order as to costs.

Orders accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 22ND MARCH, 2024.

A. MSHILA

JUDGE

In the presence of

Mourice – Court Assistant

Weyimi - h/b for Nyambura – for Respondent

Gachuhi – for Applicant

