



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Elizabeth Wanja Wachira (Deceased) (Succession Cause  
671 of 2011) [2022] KEHC 10691 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10691 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 671 OF 2011**

**M MUYA, J  
JUNE 30, 2022**

**N THE MATTER OF THE ESTATE OF ELIZABETH WANJA WACHIIRA (DECEASED)**

**BETWEEN**

**PETER MURIITHI WANJOHI ..... 1<sup>ST</sup> APPLICANT  
JOHN WACHIRA WANJOHI ..... 2<sup>ND</sup> APPLICANT  
CHARLES NJONJO WANJOHI ..... 3<sup>RD</sup> APPLICANT  
JOSEPH NGUTHIA WANJOHI ..... 4<sup>TH</sup> APPLICANT**

**AND**

**JOHN MWANGI WACHIRA ..... RESPONDENT**

**RULING**

1. The respondent misrepresented facts which led to the rightful beneficiary of the estate being disinherited.
2. The said grant was obtained fraudulently, by the making of a false statement or by the concealment from the court of something material to the case
3. That the sole beneficiary benefited from one property in the estate being LR NO Aguthi/Gatitu/xx which was held by the deceased in trust for the applicants herein.
4. The proceedings to obtain the grant were defective in substance and the process did not address pertinent issues.
5. The administrator swindled the estate.
6. The costs of the application be met by the respondent. subsequently, a notice of preliminary objection dated October 13, 2020 was filed in court on the following grounds:-



- (a) That the grant having been confirmed and the claim being premised on trust, the probate court has no jurisdiction to try and determine this matter
  - (b) The summons for revocation of grant as filed is misplaced.
7. In the Celebrated Court of Appeal case of "[\*The owners of Motor vessel Lilian "S"Vs Caltex Oil Kenya Ltd\*](#) 1989 KLR 1653\*it was held:- "Jurisdiction is everything, without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it has no jurisdiction"

### Respondents Case

- 8. It is the respondents contention that the applicants in the summons for revocation in their supporting affidavit (Para 4) have deponed that the land parcel Aguthi/Gatitu/xx was held by the deceased herein in trust.
- 9. Counsel for the respondents submits that this court has no jurisdiction to hear this claim which is based on trust.
- 10. Reliance is placed on the persuasive authority of Nakuru HC Succession Cause No 488/2001 [\*in the matter of Estate of the late Jonathan Kinyua Waititu\*](#). Where it was held:-

“ Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the [\*law of Succession Act\*](#) is limited, it does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the [\*law of Succession Act\*](#), and the relevant subsidiary legislative do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matter resolved ought to file a substantive suit to be determined by the Environment and Land Court. Consequently and for the reason above stated I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land on the alleged trust.”

- 11. Reliance is also placed in the persuasive case of Kerugoya HC Succession Cause No90/2013 [\*Elijah Gachoki and another v Stanley Mugo Kariuki and another\*](#).
- 12. Where it was observed:

“That the law of succession deals with testate and intestate administration of deceased persons and is not meant to deal with disputes related to land”...

### The Applicants, Case

- 13. It is submitted for the applicant that the respondent obtained the grant fraudulently without disclosing the fact that land parcel No Aguthi/Gatitu/xx was held by the deceased in trust for the applicants and as a result caused the transfer of the aforesaid land into his name as shown by the green card marked as exhibit “M-1”. Further that the suit property belonged to Wachira Gitiche who is the grandfather of the applicant and that it is this property which passed on to the deceased Elizabeth Wanja Wachira after the death of the grandfather Wachira Gitiche. Reliance is place on the case of [\*Karisa Madumbo Ranai v\*](#)



*Kavumbi Kitsao Chengo and 2 others* which was cited in the case of the *Estate of James Muiruri Kamau (deceased)* 2018 eKLR where S 26 of the *Registered Lands Act* Was followed and which provides that,

“There is no need to indicate in the register that one is a trustee but the principle of Trust can be inferred from the circumstances of the case. It was also held that a testator can only freely dispose of such property as belongs to them absolutely or property that they have absolute control over...”

14. On the issue whether the grant had been confirmed and that the claim was based on trust and therefore the probate court had no jurisdiction. It is contented that the same arose in the course of Succession proceedings, counsel relied in the case of *Aurenzia Gikira Njeru v Kimani Kabengi and 2 others* 2014 eKLR :-

“Where it was held that the element of trust was not registered in the land register and it therefore became a matter of evidence. The respondent who was relying on it, had the duty to prove that fact. He who pleads a fact must prove it.”

15. On the issue of propriety of the preliminary objection itself Counsel relies on the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* [1969] EA 696, where it was held:- “So far as I am aware, a preliminary objection, consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection, may dispose the suit.” It is counsel’s submission that different courts hold divergent views and as such this does not amount to a point of Law and therefore it amounts to a matter of discretion.

#### **Analysis and determination**

16. The summons for revocation of grant is dated June 30, 2020.

At paragraph 3, it is deponed thus:-

“That the sole beneficiary benefited from one property in the estate which property is Land Parcel No Aguthi/Gatitu/xx which was held by the deceased in trust for the applicants herein.”

17. Peter Muriithi Wanjohi on behalf of the 4 objectors in his affidavit in support of the annulment/ revocation of the grant at paragraph 4 depones:- “That the respondent upon acquisition of the grant used it to dispossess the applicants and other beneficiaries of Land Parcel No Aguthi/Gatitu/xx which was being held by the deceased in trust.
18. The main issue in this succession is whether there did exist a trust as known in law.
19. It is the objectors/applicants (in the objection proceedings) who have pleaded the issue of trust. They are the ones who are required to prove that fact which they have themselves pleaded.
20. The preamble to the *Law of Succession Act* provides thus:- An act of parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased person; and for purposes connected there with and incidental thereto.”
21. A clear reading of the above, outs issues of ownership of land and trusts from probate.
22. Article 162(2) of the *Constitution* establishes, courts with the status of the High Court to hear and determine disputes relating:-
- (a)...



(b) The environment and the use and occupation of, and title to land.”

23. I have duly perused and considered the numerous authorities cited for and against this preliminary objection. They are of persuasive value but not binding on this court. It is noted that they are not in agreement as to whether a probate court has jurisdiction on matters of declaration of trusts but on my part I am of the considered view that this court dealing with succession does not have jurisdiction to deal with the issues relating to declaration of a trust. I ought and should lay down my tools for lack of jurisdiction.

**Conclusion**

23. The preliminary objection has merit. The claim as regards the declaration of a trust ought to be filed as a separate suit before the Environment and Land Court.

**RULING DELIVERED DATED AND SIGNED AT NYERI THIS 30TH OF JUNE 2022.**

**HON. JUSTICE M. MUYA**

**JUDGE**

**In the presence of:**

**Miss Macharia: for the Applicant**

**Miss Magua : for the Respondent**

**Court Assistant: Kinyua**

