



**In re the Estate of the Late M'Rwito Manga alias Chabari Manga (Deceased)  
(Succession Cause 4 of 1994) [2024] KEHC 9679 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9679 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 4 OF 1994**

**LW GITARI, J**

**JULY 30, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE  
M'RWITO MANGA ALIAS CHABARI MANGA (DECEASED)**

**BETWEEN**

**PHILIS KAJUJU M'RWITO ..... PETITIONER**

**AND**

**JEDIEL MUTHURI ..... OBJECTOR**

**RULING**

1. The matter pending before this court is the summons dated 6/6/2023 filed by Peterson Kobia who is one of the administrators. The applicants seeks an order that the certificate of the confirmation of grant dated 27/7/2005 be amended and a fresh certificate be issued as follows:
  1. LR No. Abogeta/Upper Chure/424 be distributed in equal shares of 3.85 Acres to the children of the deceased as follow:-

Nchugune Beatrice  
Jane Kaburu NkanataPenina Gacheri MutegiAlice Mugure NkanataPettersson Kobia  
NkanataHumphrey Koome M'NkanataJohn GichungeSalome Karimi Munyua

Harriet Nkuene:  
Jadiel Muchiri MutueranduHellen Kananu MutueranduSilas Muriungi  
MutueranduMugambi MutueranduMary Nkatha MutueranduCatherine Muriko  
MutueranduJulius Kiambi MutueranduAngatia Mungatia Mutuerandu
2. The above are the children of the two daughters of the deceased and they have agreed on the mode of the distribution of the estate of the deceased. The summons is based on the facts that the two daughters of the deceased who were the beneficiaires are now deceased and two of the children were not children of the deceased and were not entitled to the estate, it has become necessary that the certificate



of the confirmation of grant be amended as prayed. The application is supported by the affidavit of Petterson Kobia on 6/6/2023. An affidavit of protest was filed by Patrick Mutai M'Rwito, Cecilia Gaiti M'Rwito, Jediel Muthuri Chabari, Kenneth Kirimi Chabari and David Mutwiri M'Ringera who contend that they are children of the deceased but this court found that they are not children of the deceased. They assert that they have lived on land Parcel No. Abogeta/U-Chure/424 all their lives and that is the only place they call home where they have built homes and developed the land extensively. They are contending that they have occupied the land adversely for thirty years. That they have since filed Meru ELC No.E013/2022 (OS) claiming adverse possession of 5.8 acres out of the said land parcel. They contend that the OS has high chances of success and have urged the court to stay the distribution of 5.8 acres out of Land Parcel No. Abogeta/U-Chure/424 pending the hearing and determination of the OS in the ELC Court.

3. To this protest, the applicant filed a Supplementary Affidavit and contends that the protestors are not children of the deceased and have no capacity to file the affidavit of protest to the mode of distribution of her estate. That this court has made a determination that they are not entitled to the estate of the deceased. The applicant contends that they are the only ones entitled to the estate as the surviving grandchildren of the deceased. The applicant further contends that the claim by the protestors was determined by this court which held that they were licencees on the estate of the deceased. Further that the ELC Judge in the said OCS refused to grant an injunction to the protestors and held that they have not established a prima facie case with a probability of success. That the protestors can not turn round and state that they have a case with overwhelming chances of success. That the protestors are illegally occupying the estate of the deceased and the applicant is seeking an order evicting them in the ELC Court.
4. The summons was canvassed by way of written submissions. For the applicant it is submitted that on 6/6/2011 this court rendered its decision and held that Charity Njiru the protestor's mother was never married to the deceased M'Rwito Manga alias Chabari Manga deceased and were therefore not entitled to the estate herein. The court further held that they were on the land without the consent of the deceased and they did not qualify as beneficiaries of the estate. They submit that there is no appeal pending as the protestors filed a notice of appeal in the Court of Appeal which appeal was never filed and the notice was marked as withdrawn. It is further submitted that attempts by the protestor to obtain an injunction from ELC was thwarted when the court found that they have no prima facie case. These applicants have submitted that the certificate of confirmation of grant was issued but the administrator and the beneficiaries have passed away. On the merits the applicant relies on Rule 49 and 63 of the Probate and Administration Rules. That the certificate of the confirmation of grant in the present form is incapable of being executed by the administrator as the beneficiaries do not exist and no transfer can be effected in their favour. That Section 74 gives the court inherent powers to make orders as may be necessary for the ends of justice. On the protest the applicant relies on Rule 40(6) of the *Probate and Administration Rules* and submits that their claims in the estate have been determined and have no right to file a protest. That the OS in the ELC has no chances of success.
5. For the respondent it is submitted that the court has no jurisdiction to deal with ownership issues of 5-8 acres out of Land Parcel No.Abogeta/U-Chure/424 which the protestors are occupying and has urged the court to stay the execution of the grant. The protestors cite *in the Estate of M'Murianki M'Mugwika (Deceased)* 2019 eKLR which cited *In Re Estate of Alice Mumbua Mutua (Deceased)* where it was stated:

“The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally



distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets."

6. The protestors have also relied on the case of *in Re Estate of Samuel Kathieri (deceased)* 2019 eKLR where it was stated:-

"Where there is dispute as to what constitutes the net estate of the deceased available for distribution arising from contest as to deceased's title and ownership, then the distribution of the said asset is hived off and confirmation of grant of the undisputed assets may be granted to allow beneficiaries beneficial interest over the said part of the estate. If the contested asset(s) is/are the only ones available for distribution as in the instant case, then the confirmation proceedings grind to a halt pending outcome of the ownership and title of the said properties by Environment and Land Court."

7. Similarly, *in the Estate of Richard Karanja Javan* [2014] eKLR, Musyoka J had this to say at page 2;

"It is not in dispute that the deceased was the registered proprietor of the property in question. His registration as such was not disputed until after his death. The registration in question was under the Registered Land Act Cap 300 Laws of Kenya (now repealed). It was a first registration by dint of section 143 of the Registered Land Act, the said registration cannot be faulted. There is Judicial authority on this in *Obiero –vs Opiyo & Others* (1972) E.A.227 where it was held that a first registration is indefeasible even if fraud is proved. There is therefore no merit in the applicant's case. Even if she had a case that there existed a trust in her mother's favour, the same ought to be established in a suit before the Environment and Land Court."

8. The protestor also relies on Rule 41 (3) of the *Probate and Administration Rules* which provides:-

"(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant."

10. They also rely on Section 47 of the *Law of Succession Act* and Article 47(3) of *the Constitution* and Section 4 *Fair Administration Actions Act*.

11. The protestors urge the court to stay the application dated 6/6/2023.

12. I have considered the application. The issues which arise for determination are:

1. Whether the protest has merits.
2. Whether the court should allow the rectification of the certificate of confirmation of grant.

### **Whether the protest has merits:**

13. From the averments in the affidavit of protest, the protestors state that they are claiming part of the estate of the deceased through adverse possession. The matter pending before this court is a succession



cause. The jurisdiction of this court is given under Section 2 of the [Law of Succession Act](#) provides that the Act constitutes the Laws of Kenya in respect of and shall have universal application to all cases of intestate and testamentary succession to Estates of deceased persons dying after the commencement of this Act and to the administration of estates of those person. This section ecos the preamble to the Act and further that for purposes therewith connected and incidental thereto. Section 47 of the Act states “that High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and makes such orders therein as may be expedient.”

14. Thus it is the High Court that has unfettered discretion to deal with disputes under the Act and those incidental thereto. The High Court has pronounce itself and stated that the protestors are not children of the deceased and are therefore not entitled to the estate of the deceased. It is not denied that after this court rendered that decision, the protestors filed a Notice of Appeal to the Court of Appeal which they did not persue and the appeal was marked as withdrawn. Thus, this court has pronounced itself on the claim of the protestors to the estate of the deceased. Two matters arise:-

1. Judgment
2. *Res judicata*

15. In Law, a judgment is a decision of a court regarding the rights and liabilities of parties in a legal action or proceeding. As such where a court gives Judgment in a matter involving the same parties, that judgment becomes the final determination of the issues in dispute and more so where there was no appeal. A party cannot challenge that Judgment in the same court other than as may be provided under the law. This brings in the doctrine of *functus officio*. This is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision. The Court of Appeal expounded this doctrine in the case of [Telkom Kenya Limited v John Ochanda \(suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited\)](#) (2014) eKLR. It further stated: “The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal *in re-St. Nazaire Co.*(1879), Ch.D.88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the Appellate division. The rule applied only after the formal Judgment had been drawn up, issued and entered and was subject to two exceptions.....”

16. The Supreme Court of Kenya on the other hand in [Raila Odinga & 2 Others v Independent Electoral and boundaries commission & 3 Others](#) 2013 eKLR cited with approval an except from an article by Daniel Madan Pretorius entitled. The origins of the *Functus Officio* Doctrine with special reference to its application in Administrative Law (2005) 122 SAL J 833 which states:-

“The *functus Officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine a person who is vested with adjudicative or decision making powers may, as a general rule exercise those powers only once in relation to the same matter.... The (Principle) is that once such a decision has been given, it is (subject to any right of appeal be superior body or functionary) final and conclusive such as a decision cannot be reviewed or varied by the decision maker.”

17. Although the court may retain jurisdiction in the matter to correct minor errors like clerical or arithmetical mistakes, see Section 99 of the [Civil Procedure Act](#), the doctrine of *functus officio* bars the court from revisiting the matter on a merit based engagement once a final judgment has been entered. I find that this court, having held that the protestor are not entitled to estate herein, it is *functus officio* and lacks jurisdiction to entertain and claim of right whatsoever over the estate from the protestors. This court is ‘*Funcus officio*’



## Res judicata:

18. This is a doctrine which provides that a person may not commence more than one action in respect of the same or substantially similar cause of action. The court should guard against allowing parties to litigate over the same subject by filing the same subject matter while disguising it as a new matter. In *Njangu and Another v Wambugu and Another* Nairobi H.C CC 2340/1991. It was stated:-

“If parties are allowed to go on litigating for ever over the same issue with the same opponent before courts of competent jurisdiction merely because he give his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of ‘resjudicata’

19. *The Blacks’ Law Dictionary* 10th Edition defines ‘resjudicata’ as;

“An issue that has been definitely settle by Judicial decision---- the three essentials are:

1. An earlier decision on the issue
2. A final judgment on the merits and
3. The involvement of same parties....”

20. Considering that this court settled the issue that the protestors are not beneficiaries entitled to the estate of the deceased with finality the issue is res judicata. The protestors are barred from coming to this court wearing anew cloak to disguise themselves as to who they really are. This court must nib that in the bud because if that is not done they can go on and on. The issues raised in the protest are ‘res judicata’.

## Whether the protest has merits:

21. A protest is in the nature of an objection to the proposed confirmation of grant. Rule 40(6) of the *Probate and Administration Rules* provides:-

“Any person wishing to object to the proposed confirmation of a grant shall file in the cause.-  
in duplicate at the principal registry an affidavit of protest in form 10 against such confirmation stating the grounds of his objection.”

22. The protestors are stating that since they have filed Meru ELC No.E013/2022 (OS) claiming adverse possession of 5-8 acres out of Abogeta/U-Chure/424 the portion should be set aside to await the determination of that OS. The protestors are relying on Rule 41(3) of the *Probate and Administration Rules*. This rule provides as follows:-

“Where a question arises as to the identity share of any person claiming to be beneficiary interested in or any condition or qualification attach to such share or estate which cannot at that stage be conveniently determined the court may prior to confirming the grant, but subject to the provision of Section 82 of the Act, by order, appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI Rule -1- Civil Procedure Rules and may thereupon, subject to proviso to Section 71 (2) of the Act proceed to confirm the grant. (Emphasis mine.)”



23. This court has determined that the protestors have no beneficial interest in the estate of the deceased. In *Re-Estate of Richard Karanja Jaran (Deceased) (2014) eKLR*. The court held that the title of the deceased which was a first registration and was not challenged during his lifetime, the registration could not be faulted. Section 26(1) of the [Land Registration Act](#) provides that the title of a person registered as proprietor is indefeasible. It is not denied that the ELC Court in No.E013 of 2022 (OS) has expressed itself that the protestors have not shown that they have a prima facie case with chances of success. An injunction is granted on the strength of a prima facie case which has chances of success. Conversely a determination that a party has no prima facie means that this claim will not see the right of the day. A party cannot rely on such a determination to claim he has chances of success. Rule 41(3) of the [Probate & Administration Rules](#) (*supra*) is discretionary.
24. It is trite law that the discretion of the court must be exercised judicially. The claim by the protestors was determined with finality in this court and the ELC Judge in E013/2022 (OS) has at a very stage held that the protestors are not likely to succeed. The exercise of judicial discretion must therefore tilt in favour of the applicant. There is no prove of any interest, beneficial or otherwise to warrant this court to set aside any portion of the deceased's estate to await the outcome of the case in ELC Court. I have not seen any relevance to Section 4 of the [Fair Administration Actions Act](#) to this proceedings. For these reasons I come to the conclusion that the protest has no merits.

#### **Rectification of Grant:**

25. Section 74 of the [Law of Succession Act](#) provides as follows:-
- “Errors in names and descriptions or in setting out the time and place of deceased's death or the purpose in a limited grant may be rectified by the court and the grant of representation whether before or after confirmation may be altered or amended accordingly.”
26. The marginal notes state that, ‘Errors may be rectified by the court. The applicant is in effect seeking amendment of the certificate of confirmation of the grant. Section 47 of the [Law of Succession Act](#) (*supra*) gives this court jurisdiction to entertain any application and pronounce such orders as may be expedient. This is buttressed under Rule 73 of the [Probate & Administration Rules](#) which states that ‘saving of inherent powers of court’
- “Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
27. The applicant has stated that all the beneficiaries mentioned in the certificate of confirmation of grant are dead and the certificate is incapable of being executed in the present form. A grant of Letters of Administration was issued to the applicant after the court appointed him as the administrator. For him to complete the administration and distribution of the estate, the grant ought to be amended. I therefore find that the application for amendment of the grant has merits. The applicant also seeks an order that the restriction placed on the land be removed to enable the administrator to distribute the estate. The protestor's claim for adverse possession which is clearly an afterthought after the court held that they are not beneficiaries is a none starter having as it has no chances of success.
28. There is absolutely no good reason why the restriction should remain on the title. The deceased remains the absolute proprietor and the estate should go to his rightful beneficiaries who have been declared by this court. This is an old succession cause which is now thirty years old and have seen the beneficiaries



pass away one after the other without enjoying their share of the estate. It is trite law that litigation must come to an end.

**Conclusion:**

29. For the reasons stated I find that:-

1. The protest has no merits and is dismissed.
2. The summons dated 6/6/2023 is allowed-
  - a. The certificate of confirmation of grant shall be amended and rectified as prayed.
  - b. The restriction placed on Land Parcel No.Abogeta/Upper-Chure/424 shall be removed forthwith to facilitate the distribution of the estate to the beneficiaries.
  - c. Costs to the applicants.

**DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF JULY 2024.**

**L.W. GITARI**

**JUDGE**

