



**In re Estate of Kimani Kago (Deceased) (Miscellaneous Succession Application  
E109 of 2022) [2023] KEHC 106 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 106 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS SUCCESSION APPLICATION E109 OF 2022  
RB NGETICH, J  
JANUARY 19, 2023  
IN THE MATTER OF THE ESTATE OF KIMANI KAGO ALIAS  
GODWIN KIMANI KAGO (DECEASED)**

**BETWEEN**

**KEZIA NJERI KAMAU ..... 1<sup>ST</sup> APPLICANT**

**EUNICE WANGUI KIMANI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOSEPH KAGO KIMANI ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL MBURU KIMANI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicants filed a summons application dated 13<sup>th</sup> June 2022, seeking revocation or annulment of the grant dated 28<sup>th</sup> January 2022 and prohibition of distribution of monies arising from the compensation of Gatamaiyu/Kamuchege/132, on the ground of concealment of material facts.
2. In response, the Respondent filed a preliminary objection dated 23<sup>rd</sup> June 2022. The preliminary objection is premised on the ground that this suit is res judicata, is incurable defective and ought to be dismissed with costs to the Respondents.
3. In further response to the application, Daniel Mburu Kimani filed a Replying affidavit sworn on 28<sup>th</sup> July 2022. He disposes that there was no concealment of material facts. He denied the averments that the signatures were forged and the applicants were well aware of the court proceedings in the trial court and denied that the value of the property is over Kshs. 30 million and stated that there is a pending application for the revocation of a grant by the applicants in the trial court which is pending determination.



4. In response to the Preliminary objection, Keziah Njeri Kamau filed a Replying Affidavit sworn on 25<sup>th</sup> August 2022. She deposed that the objection by the Respondent is unfounded and the preliminary objection raises no iota of water on the jurisdiction of the court. She also deposes the matter under consideration before the trial court is well beyond the pecuniary jurisdiction. That the parcel Gatamaiyu/Kamuchege/132 consists of 11 acres with each acre's approximate value is Kshs. 6,868,978/=; and the issue of res judicata cannot hold.
5. On 20<sup>th</sup> July 2022 directions were issued for the Preliminary Objection and application to proceed by way of written submissions and both parties complied.

### **Applicant's Submissions**

6. Ms. Nguru counsel for the applicant filed submissions on 18<sup>th</sup> October 2022. She submitted that the grant obtained in the trial court was obtained fraudulently through the forging of signatures of the Applicants by the Respondent and there is no need to call an expert witness to testify about the authenticity of the signatures since the applicants can tell the signatures appended on the application for confirmation of grant are a forgery.
7. Counsel submitted that the Respondents are relying on technicalities to avoid liability for their lack of compliance with the Provision of Section 76 of the Law of Succession Act.
8. Counsel further submitted that the applicants have established there was non-disclosure of material facts when obtaining the grant. That jurisdiction is key and the fact that the trial court lacked the jurisdiction to issue an order for confirmation of grant does not validate the proceedings of the lower court but requires the proper forum to be approached to address the issues.

### **Respondent's Submissions**

9. Counsel for the Respondents filed submissions on 22<sup>nd</sup> September 2022. She submitted that the applicants have filed a similar application seeking revocation of the grant in the trial court and the application is pending a hearing and determination.
10. She further submitted that the National Land Commission is ready and willing to compensate the affected families and the estate has already been distributed in Kiambu Succession Cause No. E667 of 2022.
11. Counsel submitted that orders being sought under this cause cannot be issued under a Miscellaneous Application. That the Law of Succession Act section 76 provides for summons for revocation of a grant and added that protracted litigation will not solve the problem the family is faced with as they stand to lose both land and compensation.
12. In conclusion, counsel submitted that no valuation report has been attached to ascertain the value of the property and the National Land Commission has taken into consideration the part to be occupied by the dam.

### **Analysis and Determination**

- a The guiding principles in determining a preliminary objection have been discussed in the case of *Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors* [1969] EA 696. At page 700 cited



by the court of appeal in the case of *Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR where it was stated that: ...

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.

Sir Charles Newbold P. added as follows at page 701:

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.”

13. What I wish to consider is whether issues raised in the application dated 13<sup>th</sup> June 2022 are res judicata. Section 7 of the *Civil Procedure Act* provides for the doctrine of res-judicata as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

14. In the instant case, the Respondent argued that the issue of revocation of the grant has been raised in the trial court by the applicants in a similar application which is pending determination.
15. In the current application, the applicant seeks revocation of the grant on the basis of concealment of material facts and forgery of signatures. The applicants also contend the trial court lacks jurisdiction to entertain the matter in the trial court.
16. The undisputed legal position is that jurisdiction is everything and without jurisdiction, the court must down its tools as was held in the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR where the court stated as follows: -

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. The applicants argue that the property in question is worth 30 Million which is above the pecuniary jurisdiction of the trial court. However, no valuation report has been filed to assist the court in determining the value of the property. This court cannot therefore conclude that the trial court is not seized with pecuniary jurisdiction.
18. In respect to the issue of res judicata, it is well settled principle that the matter in issue should be similar, between the same parties, and having been determined by a court of competent jurisdiction. The application by the applicant in the lower court for the revocation of the grant has not been determined. In my view, the applicant has failed to demonstrate that this matter is res judicata.



19. Article 159 of *the Constitution* of Kenya provides for expeditious disposal of suits, with the courts according to all parties a fair hearing.
20. From the foregoing I see no merit in the preliminary objection raised and dismiss accordingly.

**Final Orders**

1. Preliminary objection is hereby dismissed.
2. Directions on hearing of application for annulment /revocation of Grant issued on 28<sup>th</sup> January 2022 to be taken.
3. Costs in the cause.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 19<sup>TH</sup> DAY OF JANUARY, 2023**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Martin – Court Assistant

Mr. Macharia holding brief for Ms. Nguru for Applicants

Ms. Kamunyu for Respondent

