



REPUBLIC OF KENYA



In re Estate of Kogi Mwaura Wallace (Deceased) (Succession Cause 61 of 2018) [2023] KEHC 1557 (KLR) (Family) (24 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1557 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 61 OF 2018
MA ODERO, J
FEBRUARY 24, 2023**

BETWEEN

JOSEPH WANYIRI KOGI APPLICANT

AND

MWAURA KOGI ALIAS MWAURA WAMBUI 1ST RESPONDENT

KARANJA KOGI ALIAS KARANJA WAMBUI 2ND RESPONDENT

MWANGI KOGI ALIAS MWANGI WAMBUI 3RD RESPONDENT

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated June 28, 2022 filed by the Respondents. The Applicant Joseph Wanyiri Kogi representing the estate of the late Kogi Mwaura Wallace opposed the Preliminary Objection through his response dated July 13, 2022.

Background

2. This matter involves the estate of the late Kogi Mwaura Wallace (hereinafter ‘the Deceased’) who died intestate on December 28, 2021.
3. Following the demise of the Deceased the Applicant Joseph Wanyiri Kogi sought and obtained Grant of letters of Administration Ad Litem which were issued by the Court on May 17, 2022. Armed with the Grant Ad Litem the Applicant filed a Notice of Motion dated June 3, 2022 seeking the following orders:-
 - i. Spent.
 - ii. Spent



- iii. That the Honourable Court be pleased to issue restraining orders restraining the Respondents and/or any persons acting on their behalf and/or third parties and/or their employees and/or their agents and/or their works and/or assignees from trespassing, from entering, from visiting, from dealing and/or interfering with the deceased family property that the deceased and his family currently lives, from visiting Kogi Mwaura Wallace grave and occupies known as Land Parcel Gatamaiyu/Kumachenge/415 and/or in other manner from interfering and or having any dealings with the deceased family and from having any dealing with the deceased property Land parcel Gatamaiyu/Kamuchege/415 pending the hearing and determination of the DNA testing in compliance with the court judgement read on December 2, 2021, in this matter.
 - iv. That the costs of the application be in the cause”
4. The application which was premised upon Order 51 Rule 1 of the *Civil Procedure Rules*, Section 45 of the *Law of Succession Act* cap 160, Laws of Kenya the inherent jurisdiction of the court and all other enabling provisions Law was supported by the Affidavit of even date sworn by the Applicant.
 5. Before the application could be heard the Respondents Mwaura Kogi alias Mwaura Wambui Karanja Kogi alias Karanja Wambui and Mwangi Kogi alias Mwangi Wambui filed the notice of Preliminary Objection dated June 28, 2022 in which they objected to the Application and prayed that the same be struck out on the following grounds:-
 - i. That the application herein is fatally defective having been filed by one Joseph Wanyiri Kogi who is not a party to this suit.
 - ii. That this honourable court is functus officio in so far as the determination of the issue of the ownership of Land Parcel No Gatamaiyu/Kamuchege/415 is concerned as the said land was subject of litigation in Nairobi Succession Cause No 3002 “A” of 2003 in which cause, after over 30 years of litigation; the court found that the deceased had no interest in the land; proprietary, beneficial or otherwise and subsequently directed the Land Registrar, Kiambu District Land registry to forthwith lift the cause lodged by the deceased, applicant herein to enable the Respondents and other beneficiaries in the said cause and will enjoy the fruits of the judgement.
 - iii. That the purported Applicant is merely Forum Shopping as similar orders in respect of the same subject land have previously been sought vide other suits to wit; Nairobi Court of Appeal Civil Application No 178 of 2018 (UR 146/2018), which has since been dismissed; Githunguri Chief Magistrate’s Court ELC No 18 of 2019 that is yet to be prosecuted and now this instant application, all aimed at defeating the judgement delivered on May 4, 2018 by the Hon Justice W. Musyoka in Nairobi Succession Cause No 3002 “A” OF 2003.
 - iv. That the Respondents were bequeathed and are legal/lawful owners of only 3 acres of the said Land parcel No Gatamaiyu/Kamuchege/415 which land is about 10.5 acres and the other beneficiaries are not parties to this suit, by which reason the purported Applicant herein has unclean hands; keen on concealing material information and misguiding the Honourable Court.
 - v. That the Application herein is utterly misguided as it is based on a misapprehension of the applicable law and facts as the purported Applicant and/or deceased father have/had no locus standi to make an application such as this in respect of Land Parcel No Gatamaiyu as they lack interest therein; proprietary, beneficial or otherwise and have demonstrated none.



- vi. That the Deceased failed to demonstrate any estate and/or property that he may have had during the pendency of this suit whose effect would have been to clearly demonstrate as the Respondents had pleaded that indeed this suit was instituted in an attempt to defeat the Judgment in Nairobi Succession Cause No 3002 “A” of 2003 and the purported Applicant cannot seek to introduce such material and engage this Honourable Court in monkey business after Judgement herein has been rendered.
 - vii. That litigation must come to end and the ends of justice indeed, be met. The purported Applicant is seeking to re-open for litigation issues already determined by this honourable *vide* Nairobi Succession Cause No 3002 “A” of 2003.
 - viii. That the said Notice of Motion dated June 3, 2022 is hopeless, an abuse of the court process, and a waste of judicial time, and ought to be dismissed with costs to the Respondents.
6. The matter was canvassed by way of written submissions. The Applicants filed the written submission dated September 30, 2022 and September 2, 2022 whilst the Respondents relied upon their written submissions dated September 15, 2022.

Analysis And Determination

7. I have carefully considered this notice of Preliminary Objection, the Response filed by the Applicant as well as the written submissions filed by both parties. The only question for determination is whether the Preliminary Objection has merit and ought to be allowed.
8. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd [1969] EA* where the court stated 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 the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”
9. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others [2015] eKLR*, the Supreme Court of Kenya 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.”
10. Therefore in order for a preliminary objection to succeed the following tests must be satisfied.
- (i) The Preliminary Objection should raise a pure point of law.
 - (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
 - (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.



- (iv) A valid Preliminary Objection ought if successful dispose of the entire suit.”..... [Own emphasis]
11. In their Preliminary Objection the Respondents raised eight (8) grounds. A perusal of said grounds clearly reveal that several do not raise pure points of law which would if determined dispose of the suit. Grounds (iii) and (iv) raise issues of fact which would require parties to adduce evidence and cannot be said to raise pure points of law.
 12. Similarly grounds (vi) and (vii) and (viii) in my view raise matters of fact which would call for evidence to be adduced. The same are not pure points of law and do not qualify as genuine preliminary objections.
 13. The only two issues which in my view qualify as pure points of law as the question of locus standi and the argument that the Application dated June 3, 2022 is ‘*res judicata*’.
 14. On the question of locus standi the Respondents submit that the Applicant has no locus standi in this matter as he is not a party to the instant suit.
 15. The term ‘locus standi’ is a Latin term which literally means ‘a place of standing’. It refers to the capacity of a party to file suit or to act in a particular matter. Any action taken without requisite locus standi is null and void.
 16. It is quite correct that the initial parties to the suit were the Respondents and one Kogi Mwaura Wallace (now Deceased). The said Kogi Mwaura passed away on December 28, 2021. A copy of the Death Certificate appears as Annexure JWK ‘3’ to the supporting Affidavit dated June 3, 2022.
 17. Following the demise of the original Applicant the current Applicant Joseph Wanyiri Kogi applied for Grant of Letters of Administration Ad Litem in Nairobi Succession Cause No E574 of 2022 Matter of the Estate of Wallace Kogi Mwaura (Deceased). Letters of Administration Ad Litem were duly issued to the Applicant on May 17, 2022. A copy of said Grant is annexed to the Supporting Affidavit of the Applicant (Annexure JWK ‘1’). The Limited grant provides that the Grant was issued “only for purposes of filing suit”. Therefore that Grant Ad Litem authorized the Applicant to act for the estate of the Deceased in this suit.
 18. Through the limited Grant issued to himself the Applicant is permitted to ‘step into the shoes’ so to speak of the Deceased in any suit or action involving the Deceased as the legal representative of the Estate of the Deceased.
 19. Section 54 of the [Law of Succession Act](#) provides that:-

“A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule.”
 20. The Fifth Schedule (14) provides as follows:-

“Where it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”



21. In *Re the Estate of Helena Wangechi Njoroge (Deceased) 2015 eKLR* it was stated in regard to letters of Administration ‘ad litem’ that:-

“It was limited to the purpose of filing suit to preserve the three assets of the estate. It is what is called a grant of letters of administration ad litem. The suit envisage to be filed on the strength of a grant ad litem is not a probate or succession case, or an interlocutory application within a probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or defend the estate against third parties.”... [own emphasis]

22. I therefore find that the Applicant is indeed a party to the suit as he is the legal representative of the Deceased. As such, the Applicant is qualified to represent the estate of the Deceased in this matter and I find he is possessed of requisite ‘locus standi’.

23. The other ground raised by the Respondents in their preliminary objection which this court needs to consider is the argument that this court is ‘functus officio’ in this matter.

24. In Black’s Law Dictionary, 10th Edition, page 787 defines functus officio thus:

“[having performed or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

25. The principle of functus officio provides that once a court makes a decision after a hearing, it no longer has authority to re-examine the matter and, cannot reopen the case. In other words, the authority of the court that has made such a decision has come to an end. This principle limits the authority of the court to take up such a case once it has pronounced the final order. The principle exists to prevent parties relitigating a matter in the same forum.

26. In *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) 2014* the Court of Appeal stated that: -

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon”

27. The court however went on to state that:-

“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgement has been entered and a decree thereon issued.....” [emphasis]

28. In their Preliminary Objection the Respondents contend that the issue of ownership of LR No Gatamaiyu/Kamuchege/415 was already determined in Nairobi Succession Cause No 3002 “A” of 2003 after thirty (30) years of litigation over that issue. That vide the judgment delivered by Hon Justice William Musyoka on May 4, 2018 the court found that the Deceased had interest in that parcel of land.

29. I have taken the liberty to peruse the judgement in Succession Cause No 3002 A of 2003. In that judgment the court only dealt with the question of the validity of the Will lodged in court on October



21, 2003 which written will the Deceased had sought to revoke on grounds that the Grant was obtained fraudulently.

30. Although the Deceased (Wallace Kogi Mwaura) argued that LR No Gatamaiyu/Kamuchege/415 did not belong solely to his late mother, the court did not make any pronouncement on the question of ownership of the said property. The court only decided the dispute over the question of validity of the Will. No pronouncement was made by the court regarding the ownership of LR No Gatamaiyu/Kamuchege/415
31. Based on the foregoing I find that this court is not 'functus officio' as alleged by the Respondents, and this application is therefore not 'res judicata'.
32. The upshot is that I find no merit in the Notice of Preliminary Objection dated June 28, 2022. The same is dismissed in its entirety. This being a family matter each party will bear its costs.

DATED IN NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

MAUREEN A ODERO

JUDGE

