



In re Estate of Elisha Okea Ogola (Deceased) (Succession Cause 95 of 2015) [2023] KEHC 19476 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 19476 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE 95 OF 2015**

RPV WENDOH, J

MAY 25, 2023

IN THE MATTER OF: ELISHA OKEA OGOLA (DECEASED)

AND

IN THE MATTER OF: THE LAW OF SUCCESSION ACT CAP 160, LAWS OF KENYA

BETWEEN

FLORENCE MURUNGA OKEA 1ST PETITIONER

ALOICE OBUNGA OKEA (DECEASED) 2ND PETITIONER

AND

WILLIAM OUKO OGOLA 1ST OBJECTOR

GEORGE LOCH MBOYA OGOLA 2ND OBJECTOR

RULING

1. The 1st petitioner/respondent filed a preliminary objection dated 8/4/2022 against the summons dated 22/11/2021 on the following grounds:-
 1. The issues raised in the summons are *res judicata* as there was a similar Notice of Motion dated 19/4/2018 lodged and/or filed by the 1st objector/applicant seeking *inter alia*, similar orders, which was heard and dismissed vide Ruling rendered on the 4/4/2019. Consequently, the application herein is therefore barred by the provisions of Section 7 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya.
 2. This court is devoid and/or bereft of jurisdiction to hear and determine the instant application as doing so would amount to the court sitting on an appeal over its own decision.
 3. At any rate, the objectors/applications herein lack and/or are devoid of the requisite *locus standi* to commence, mount and/or maintain the instant application over and in respect of



the estate of the deceased herein a position that was pronounced by this court in terms of the ruling of the court rendered on the 4/3/2020.

4. On the other hand, the summons dated 22/11/2021, has been overtaken by events as the suit properties forming part of the estate of the deceased no longer exist and/or in the names of the third parties who have not been enjoined in the instant application, thus a miscarriage of justice will be committed in their absence.
 5. Consequently, the summons does not disclose any reasonable cause of action.
 6. In the premises, the instant application amount to and/or constitute an abuse of the due process of the court.
 7. Besides, the objectors/applicants are non-suited.
2. The notice of preliminary objection was canvassed by way of written submissions. The objectors/applicants opposed the objection vide submissions dated 8/2/2023. The objectors gave a brief background of the succession cause.
 3. On whether the application is *res judicata*, the objectors submitted that in the present application, the objectors seek preservation of the two suit properties which constitute the estate of Daniel Ogola Sigera from being alienated or dealt with and an order that they compromise the estate of the Patriarch as opposed to the estate of the deceased. They challenged the registration of the properties as part of the estate of the Elisha Okea Ogola. The objectors submitted that in the notice of motion dated 19/4/2018, the objectors appeared on their own behalf and were deemed as strangers to the estate of the deceased but they were appointed as the administrators of the estate of Daniel Ogola Sigera; that they now appear before this court to challenge the inclusion of properties that form part of the said estate as part of the estate of the deceased herein. The objectors contended that their capacity has changed and they now have *locus standi*.
 3. Further, it was submitted that the issue of whether the two properties namely LR No. Suna East Wasweta/1/513 and Migori Market Plot No. 24 comprised the estate of Daniel Ogola Sigera which was in the previous application has not been settled; that the court noted that the issue could only be determined under Migori Succession No. 14 of 1994 which fact has been admitted in the 1st petitioner's submissions; that in the present application, the objectors have been issued with a confirmed grant in respect of the estate of the Patriarch Daniel Ogola Sigera confirming that LR No. Suna East Wasweta 1/513 and Migori Market Plot No. 24 form part of the estate of Daniel Ogola Sigera thus the present application is necessary to determine in which estate the two properties belong to. The objectors submitted that the aforementioned properties are currently part of two distinct estates where the mother estate is yet to be fully administered; that the previous application is still alive and hence the present application cannot be said to be *res judicata*.
 4. Whether the objectors have *locus standi*, it was submitted that they are representatives of the estate of Daniel Ogola Sigera which includes LR No. Suna East Wasweta 1/513 and Migori Market Plot No. 24; that they therefore have a stake as beneficiaries and administrators on the basis of the Certificate of Confirmation of Grant dated 16/9/2021.
 5. On whether the application has been overtaken by events, it was submitted that the properties in which they have an interest in, have not been passed on to third parties; that in the event they have, the same was passed irregularly and does not amount to passage of title in law; that the suit properties form part of the unadministered estate of the Patriarch and the properties can only pass through succession.



6. The objectors referred to the provisions of Section 93 of the Law of Succession Act and the various decisions in Jane Gachoki Gathecha v Priscilla Nyawira Gitungu & Another (2008) eKLR, Re: Estate of Christopher Jude Alela (Deceased) (2009) eKLR; Musa Nyaribari Gekone & 2 Others v Peter Miyyinda & Another (2015) eKLR where the application of Section 93 of the Law of Succession Act was discussed. In conclusion, the objectors submitted that the 1st petitioner obtained letters of administration by concealment of material facts that LR No. Suna East Wasweta 1/513 and Migori Market Plot No. 24 belong to the estate of the deceased herein but they are the unadministered estate of Daniel Ogola Sigera. The objectors urged this court to dismiss the preliminary objection dated 8/4/2022 with costs.
7. The 1st petitioner filed her submissions on 19/12/2022. On whether the application is *res judicata* in light of the rulings of 4/4/2019 and 4/3/2020 vide Kisii HCC Misc. Cause No. 173 of 2005 it was submitted that the objectors lodged an application dated 19/4/2018 seeking the properties Suna East Wasweta 1/513 and Migori Market Plot No. 24 be removed from the instant estate as they did not form part of the properties which belonged to the estate of the deceased herein; that the notice of motion was heard and determined and it was dismissed with costs vide a ruling dated 2/4/2019; that the prayers being sought herein are the same as the ones sought by the 1st objector in the application dated 19/4/2018 albeit couched in different terms. It was further submitted that the 2nd objector lodged the application dated 17/11/2016 seeking that the order for the Grant issued to the petitioners be revoked which was dealt with in a Ruling dated 4/3/2020.
8. The 1st petitioner submitted that the ruling of 4/3/2020 addressed the issue of the dependents and held that the objectors were not dependants neither were they children of the deceased; that the estate of the deceased Daniel Ogola Sigera whom the objectors have purported to bring the instant application were not dependants as tackled by the court. It was submitted that the issues of the properties as it was held, could not be litigated in the instant probate proceedings but the court that issued the grant; that therefore this court is *functus officio* and cannot re-litigate on that issue and this application is disguised as an appeal; that the two properties which comprise the estate of Daniel Ogola Sigera have been dealt with in the ruling of 4/4/2019 and 4/3/2020 thus offends the doctrine of *res judicata*.
9. In support of the doctrines of *res judicata* and *functus officio*, the 1st petitioner relied on the findings in John Florence Maritime Limited & Another v Cabinet Secretary For Transport & Infrastructure & 3 Others (2015) eKLR; Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another (2014) eKLR; Madara Evans Okanga Dondo v Housing Finance Company of Kenya (2005) eKLR; George Kinuu Mainigi & 4 Others v Nthimbiri Farmers Co - operative Society (2014) eKLR and John Gilbert Ouma v Kenya Ferry Services (2021) eKLR.
10. On whether the application is an abuse of the court process and the objectors lack *locus standi*, it was submitted that the ruling of 4/3/2020 held that the objectors had no interest in the estate of the deceased herein; that the objectors have now lodged the instant summons as administrators in the estate of Daniel Ogola Sigera; that the said deceased was the father of the deceased in the instant probate cause and the objectors are lodging an appeal against the ruling of the court made on 4/3/2020 by lodging fresh summons. The 1st petitioner stated that the court made a pronouncement that any issue pertaining to the estate of the deceased herein can be considered in Migori Principal Magistrate's Court Succession No. 14 of 1994. The 1st petitioner urged the court to be persuaded by the decisions of the court in Gitau Kamau v Ndugu Kamau & Another (2017) eKLR and Alice Kerubo Nyambati v Ochoki Mogaka & Another Kisii HCC No. 263 of 2009 (unreported) on what constitutes abuse of the court process.
11. On whether the objectors have failed to enjoin third parties, it was submitted that at the time when the application dated 19/4/2018 was lodged, Suna East/Wasweta 1/513 had already been sub - divided



- into 6 portions and transferred to various third parties; that it was thus necessary to enjoin all the third parties who had a stake in the outcome of the instant application.
12. The 1st Petitioner further submitted that failure to enjoin parties who are to be affected, the court is bereft of jurisdiction as it was held in the case of *Peter Kinyua Kimemia & 3 Others v Embakasi North Constituency Development Fund Account Manager & 2 Others* (2021) eKLR and *National Gender & Equality Commission (NGEC) v Independent Electoral & Boundaries Commission (IEBC) & 3 Others* (2018) eKLR. In conclusion, the 1st Petitioner urged the court to find that the application lodged is an appeal against the two rulings and thus the same is frivolous and ought to be dismissed with costs.
12. This court has carefully read and considered the preliminary objection and the position taken by each party in their respective submissions. The issues for determination are:-
- a. Whether the instant application is *res judicata*.
 - b. Whether the Objectors have *locus standi* to bring this application.
13. I have taken time to consider the background of the succession cause before this court. The instant cause relates to the Estate of Elisha Okea Ogola. A certificate of confirmation of grant was issued to Florence Murunga Okea and Aloyce Obunga Okea on 7/4/2016.
14. The preliminary objection by the 1st petitioner is grounded on two facts:-
- a. The application dated 22/11/2021 is *res judicata* by dint of the ruling dated and delivered on 4/4/2019.
 - b. The objectors lack *locus standi* to bring claims in the estate of the deceased herein as it was held in the ruling of 4/3/2020.
15. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969)EA the court defined what constitutes a preliminary objection 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 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.”
16. A preliminary objection therefore can dispose of the suit since it challenges the jurisdiction of the court seized with the matter in the first instance. If the court finds that it does not have jurisdiction to hear and determine the dispute, it will have no option but to down its tools.
17. On the first ground of *res judicata*, Section 7 of the *Civil Procedure Act* gives the guiding principles on what constitutes *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.”



18. The Court of Appeal explained the above doctrine in the case of The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, (2017) eKLR that:-

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue with the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

Further the rule or doctrine of *res judicata* serves the salutary (*sic*) aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

19. In *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 Others* (2014) eKLR, the court held:-

“To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”

20. The doctrine of *res judicata* is meant to lock out parties from the judicial system from re-litigating on the same issues which were previously settled either by the trial or appellate court. Emphasis is laid on the subject matter, the parties and earlier on litigated and the final decision on merits was delivered. Even if the same parties appeared before any court and the issues were framed differently over the same subject matter, the court can read through the renewed matter and note that the outcome would not be any different.

21. The objectors filed a notice of motion dated 22/11/2021. The motion is still pending before this court. They seek the following orders:-

- a. That the court conserve and preserve the portions of the estate Suna East/Wasweta 1/513 and/or Migori Market Plot No. 24 from being disposed of, distributed, transferred, charged and/or alienated.
- b. That the court makes an order that the Suna East/Wasweta 1/513 and Migori Market Plot No. 24 comprised the estate of Daniel Ogola Sigera as at the time of his demise and the petitioner was entitled to an equal share like all other beneficiaries of the estate of Daniel Ogola Sigera on behalf of her husband Elisha Okea Ogola.



- c. That the certificate of confirmation of grant dated 7/4/2016 be amended and/or rectified in the two properties to read that the petitioner was entitled to 5 acres out of Suna East/Wasweta 1/513 and an equal share of Migori Market Plot No. 24.
22. In the application dated 19/4/2018, the applicant, William Ouko Ogola (the 2nd objector herein) sought the following orders:-
- a. That the grant of letters of administration issued to Florence Murunga Okea and Aloyce Obunga Okea and confirmed on 7/4/2016 be altered by removing/ deleting from the schedule of properties thereof.
- a. Plot No. 24 Migori Town.
- b. LR No. Suna East/Wasweta I/513
- b. That the court do find that the above-mentioned properties do not form part of the estate of the deceased Elisha Okea Ogola.
23. Mrima J considered the arguments of the parties in the application dated 19/4/2018 and rendered a ruling dated 4/4/2019. The common denominator is that the deceased herein Elisha Okea Ogola administered the estate of Daniel Ogola Sigera alias Loch Ogola in Migori Principal Magistrate's Court Succession Cause No. 14 of 1994. The grant was confirmed on 14/3/1995. The same has not been challenged and/or set aside. The aforesaid confirmed grant issued to Elisha Okea Ogola (deceased) who was the petitioner then, the following properties wholly devolved to him that is:-
- a. Suna East/Wasweta 1/513.
- b. Suna West/Wiga/777.
- c. Plot No. 73 Migori Market.
- d. Plot No. 24 Migori Market.
24. Therefore, as matters stand, the two suit properties which are in contention, Suna East/Wasweta 1/513 and Migori Market Plot No. 24 wholly devolved to the deceased herein.
25. The Court of Appeal sitting in Kisumu, in Kisumu Civil Appeal No. 199 of 2001 discussed extensively, the ownership of Migori Market Plot No. 24. The Appellate court found that Migori Market Plot No. 24 should remain the property of Daniel Ogola Sigera alias Loch Mboya and comprise part of his estate. This ruling was delivered on 8/5/2009 long after the succession proceedings in the estate of Daniel Ogola Sigera were completed and the property Migori Market Plot No. 24 was already wholly devolved to Elisha Okea Ogola the deceased herein.
26. Concerning the two suit properties still in contention, Mrima J in his ruling of 4/4/2019 at paragraph held as follows:-
- “A closer look at the dispute in this Cause has to do with how Migori Principal Magistrate's Court Succession Cause No. 14 of 1994 was administered. I say so because the Applicant, Job and George vehemently believe that the estate of Daniel Ogola Sigera alias Loch Ogola who was their father still remain unadministered and that the two properties in issue ought to revert back to the estate. However, the correct position is that the estate was duly dealt with in law and if the Applicant, Job and George are intent on challenging that



administration then such proceedings ought to be taken in the right matter and not in this Cause.”

27. What the objectors are now seeking to challenge is the inclusion of the properties Suna East/Wasweta 1/513 and Migori Market Plot No. 24 as part of the properties which belonged to the estate of the deceased herein. The arguments that they were entitled to the share of the suit properties by virtue of being beneficiaries of the estate of Daniel Ogola Sigera cannot be argued before this forum. The suit properties already devolved to the deceased herein and after they were transferred in his name, they remained, unless challenged or otherwise, to be the properties of the Elisha Okea Ogola until his demise.
28. The objectors and the deceased herein are step - brothers. If the objectors are of the view that they deserve a share of the suit properties, which they contend lawfully belonged to their deceased father Daniel Ogola Sigera, the proper procedure was to move the appropriate court which issued and confirmed the grant of the said estate in the name of Elisha Okea Ogola (now deceased) and have it revoked, set aside and/or annulled grant as per the provisions of Section 76 of the [Law of Succession Act](#). The objectors were in a better position challenging the succession procedure which their deceased father undertook in the estate of their father when it came to their knowledge that succession proceedings were ongoing or had already taken place. The central issue still remains the properties Suna East/Wasweta 1/513 and Migori Market Plot No. 24 which has been dealt with upto the Court of Appeal. The suit parcel of land wholly devolved to the deceased herein and as I have stated hereinbefore, it remains be the property of Elisha Okea Ogola until challenged.
29. From the foregone, I agree with the submissions of the 1st petitioner that the issues which the objectors are raising in their application dated 22/11/2021 are *res judicata* by virtue of the ruling dated 4/4/2019. This court must also add that the decisions by the Court of Appeal in Kisumu Civil Appeal No. 199 of 2001 rested the issue of the ownership of Migori Market Plot No. 24 and the decision of the High Court in Kisii Misc. Probate & Administration Cause No. 173 of 2005 already gave the objectors guidance on the forum to express their grievances in the event they seek to challenge the grant that was issued to the deceased herein.
30. On the issue of *locus standi*, the [Black's Law Dictionary](#), 10th Edition defines the term *locus standi* to mean

“ as the right to bring an action or to be heard in a given forum.”
31. The 1st petitioner contended that the objectors lack *locus standi* to mount the application because position was dealt with in the ruling of 4/3/2020. The objectors are of the view they have *locus standi* by virtue of being representatives of the estate of Daniel Ogola Sigera whose estate comprised of Suna East/Wasweta 1/513 and Migori Market Plot No. 24 which were listed as part of the estate of the deceased herein.
32. As this court has observed above, the properties in contention wholly devolved to Elisha Okea Ogola (deceased) by dint of the certificate of confirmation of grant dated 14/3/1995. It is not possible that the properties would still remain to be the properties of the estate of Daniel Ogola Sigera whilst they already devolved to Elisha Okea Ogola and upon his demise, they remained to be subject of succession of his estate. The objectors cannot now purport to make claims in the estate of a different deceased persons. It is not legally and procedurally possible for estates of two deceased persons to be litigated in one cause. The objectors may have *locus standi* as beneficiaries in the estate of Daniel Ogola Sigera but they cannot use their rights to make claims in the estate of Elisha Okea Ogola. These two estates are distinct.



33. In Kisii HC Miscellaneous Succession Cause No. 173 of 2005 the court held as follows:-
- “I have noted that at the confirmation it was not indicated that the respondent was going to be registered as trustee of other beneficiaries in relation to the properties above.”
34. If the deceased was holding the properties in trust for other beneficiaries in the estate of Daniel Ogola Sigera, they would have a claim against the estate of the deceased herein.
35. In further interrogating the *locus standi* of the objectors, Mrima J in his ruling of 14/3/2020, observed that the objectors testified that they were not children neither were they being maintained by the deceased prior to his demise and therefore they cannot be beneficially entitled to inherit from the estate of the deceased as per Section 29 of the *Law of Succession Act*.
36. This court holds the same position and finds that the objectors have not established that they have the requisite *locus standi* to bring any claims in the estate of the deceased herein. Their claims, if any, lie in the estate of Daniel Ogola Sigera.
37. The upshot, therefore, is that the Notice of Preliminary Objection dated 8/4/2022 is merited and the same is upheld. The Objectors/Applicants to bear costs of the objection.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 25TH DAY OF MAY, 2023

R. WENDO

JUDGE

Ruling delivered in the presence of;

Ms. Ochwal for the 1st Petitioner/Respondent.

Mr. Odero holding brief Mr. Abisai for the Objectors/Applicants.

Emma/ Felix Court Assistant

