



**In re Estate of Peter Njoroge Karanja (Deceased) (Succession Cause
296 of 1989) [2023] KEHC 21213 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 296 OF 1989
SM MOHOCHI, J
JULY 27, 2023**

IN THE MATTER OF THE ESTATE OF PETER NJOROGE KARANJA(DECEASED)

BETWEEN

PETER NJOROGE MAINA 1ST BENEFICIARY

SAMWEL NDIRANGU MAINA 2ND BENEFICIARY

AND

JOYCE MUTHONI NJOROGE RESPONDENT

AND

MOHAMMED K NJOROGE ADMINISTRATOR

RULING

Introduction

1. The deceased herein the Late Peter Njoroge Karanja passed on the August 28, 1977, almost two months short of, forty-six (46) years to the date and his succession is not concluded and it is the desire of the court that the Ruling herein shall bring to conclusion the succession of the deceased.
2. The Deceased left behind two houses, the Applicants are beneficiaries from the 2nd House, the Respondent is mother to the Applicants and wife of the Deceased and the Administrator is the 1st born son of the Deceased from the 1st House.
3. This Grant of probate of Letters of Administration intestate was made on the March 19, 1990 and confirmed on October 8, 1990 at this juncture the only asset in the estate of the deceased was listed as Title No G1thunguri/Githangari/T620.



4. The Asset forming subject of the ruling is Nakuru LR No 9195 that was subsequently included in a rectification of the grant allowed in December 1990 and a rectified certificate of confirmation was issued to the Administrator on the April 16, 1991.
5. That on the March 4, 2005 the Respondent herein then an Applicant seeking to be included as a co-administrator entered consent with the Respondent the Administrator and interstate party herein, to which he has to surrender the title and a fresh mode of distribution was thus adopted incorporating 5 children of the Respondent herein that were born long after the demise of the deceased person.
6. The Certificate of Confirmation of Grant dated 4/3/2005 was as a result of a Consent that was recorded by three beneficiaries only being Mary Wangari Njoroge, Joyce Muthoni Njoroge and Mohamed Karanja Njoroge and it introduced a mode of distribution of the estate of the deceased which was different from the one in the initial Certificate of Confirmation dated 8/10/1990.
7. Before this Court is a Summons for revocation, dated May 12, 2022, expressed to be brought under Section 49 and 76 of the Law of Succession Act cap 160 Laws of Kenya and Rules 44, 49 and 73 of the Probate and Administration Rules.) seeking the following reliefs;
 - i. That the application herein be certified as urgent and service of the same be dispensed with in the 1st instance.....spent
 - ii. That pending the hearing and determination of this application inter partes, there be a stay of execution of the Certificate of Confirmation of grant dated 4/3/2005.....spent
 - iii. That pending hearing and determination of the Summons for Revocation of Grant herein there be stay of execution of the Certificate of Confirmation of the Grant dated 4/3/2005....spent
 - iv. That the Grant of Letters of Administration confirmed in favor of Mohammed Karanja Njoroge, on the 4/3/2005 be revoked.
 - v. That a fresh Certificate of Grant to Issue as follows-LR No9195;
 - Mohammed Karanja Njoroge-115 Acres
 - Peter Ndungu Njoroge -95 Acres.
 - Karanja Njoroge (Whereabouts Unknown)-70 Acres.
 - Joyce Muthoni Njoroge To Hold in Trust. -70 Acres
 - Peter Njoroge Maina (To Hold In Trust Of The Children Of Henry Maina Njoroge).
 - Samuel Ndirangu Njoroge. -60 Acres.
8. The Application is supported by the affidavits of Peter Njoroge Maina And Samuel Ndirangu Njoroge and based on the following grounds that;
 - i. That the Certificate of Confirmation of Grant issued on the 16/4/1991 was revoked without the participation of all the children of the deceased including Henry Maina Nioroge.
 - ii. That a fresh Certificate of Confirmation of Grant issued on the 4/3/2005 provided for 7 persons who were not dependents of nor beneficiaries of the estate of Peter Njoroge Karanja as they were his children.



- iii. That the 7 persons were born by Joyce Muthoni Njoroge 2nd wife of the deceased, after his demise on 28/3/1977 and they cannot inherit his estate.
 - iv. That the proceedings to obtain the Grant were defective in substance.
 - v. That the Grant was obtained fraudulently by the making of a false statement and the concealment from the Court of something material to the case.
 - vi. That the Grant was obtained by means of an untrue allegation of a fact essential point of law to justify the Grant.
9. The Application was opposed by the Respondent vide a replying affidavit sworn on the 01/9/2022 whose contents were incorporated in submissions that;
- i. The issue is res judicata and an attempt to obtain review of a ruling thru the back door;
 - ii. The Applicant seeks to set aside a consent order entered into over eighteen (18) years ago which is impermissible in law for being time barred by dint of Section 4(4) of the *Limitation of Actions Act*, Cap 22; and
 - iii. The estate of the deceased has since been distributed in accordance with the impugned Certificate of Confirmation of Grant
10. Directions were issued to hear and determine the Application by way of written submissions.
11. The overall import of the application, is that the Application seeks revocation of grant and reinstatement of a grant revoked by consent in April 2005.
12. The instant application regurgitates the failed similar application for Revocation that was dismissed and a ruling was delivered dated April 9, 2022.
13. The 1st and 2nd Applicants' vide a Summons dated May 6, 2022 sought for several prayers in regard to the Certificate of Confirmation of Grant dated March 4, 2005.
14. The Applicant's rely on the two Supporting affidavits sworn on the May 6, 2022 and on a supplementary affidavit sworn on the September 9, 2022 and on the May 10, 2022.

Applicants case

15. The Applicants' submit that Respondent and the Administrator have not denied that the additional beneficiaries were not children of the deceased as was alleged at the confirmation of grant.
16. That, the fresh Certificate of Confirmation placed their entitlement under their mother the Respondent to hold in trust despite them being adults at the time of recording the consent.
17. That, the consent went ahead to include 7 persons said to be children of the deceased with the Respondent but who were born after the deceased's demise. The 7 are John Mwangi, Peter Gatheru, Teresia Njoki, Peninah Waithira, Cecilia Wanjiru, Mary Wambui and Mary Wangechi.
18. That, the 7 are to inherit part of the 190 acres of land held in trust by the Respondent.
19. That, the Respondent in her replying has not denied this obvious fact that the 7 were born after the deceased's demise. The Administrator in the Petition filed on the November 29, 1989, 12 years after the deceased's death did not list the 7 as beneficiaries in the P & A 5 Form and only 6 children namely Nduta Njoroge, Karanja Nioroge, Ndirangu Njoroge, Maina Njoroge, Nyawira Njoroge and



Nyaguthii Nioroge were listed as the children of the 2nd House. The Applicants concede that one Wangari Njoroge was omitted from the list as the deceased had 7 children with the Respondent.

20. Reliance is placed on the Court of Appeal decision of *Rose Nafula Wanyama v Nusra Nasambu Chibanga & Ano* (2020) eKLR, the Court held as follows:-

“ 21. A child born after nine months from the date of death of a spouse cannot be regarded as a dependant or beneficiary of the estate of the deceased. A posthumous child born after the death of a husband cannot inherit from the estate of the deceased unless such a child was in utero when the husband died. The child must be born within ten (10) lunar months after the husband's death to be entitled to an inheritance. (See also *Amen v Astrue*, 822 NW 2d 419 Nebraska)

22. In *Re Estate of M'mboroki s/o Maraja* (deceased), (2009) eKLR it was stated: - "That exclusion is in my opinion in order for a child born posthumously to a widow not less than nine months upon the death of the husband cannot be regarded as having survived the deceased and is therefore not entitled to inherit the net intestate estate." (See also *In re Estate of the Late Wandimu Munyi* (Deceased) eKLR - Keruguya Succession Cause No 23 of 2013).

23. From the evidence on record we find that the learned judge erred in finding that the 2nd Respondent was Son of the deceased. The 2nd Respondent was born long after the deceased had died. It follows that the 2nd Respondent could not have been a dependant of the deceased, the fact that the 2nd Respondent lived on the suit property in his younger days does not make him the son of the deceased. one does not become a son by living on a property, as to whether the 2nd Respondent can be a beneficiary of the estate of the deceased, we find that as at the deceased's death in 1962, the 2nd Respondent was not alive and cannot be a beneficiary of the estate of the deceased. “

21. That, the Grant was therefore, obtained fraudulently by the making of a false statement that the 7 were dependents and deceased children and through Concealment of the correct facts. The said 7 stand to inherit, a huge chunk of the deceased property from the 190 acres totaling to 88 acres and they shall deprive bonafide beneficiaries from the 2nd house of their rightful inheritance. Had all the beneficiaries been involved at the time of recording the consent, the Court would have been informed of the correct position and proceeded to omit the 7 from the list of beneficiaries.

22. That, the grant was thus confirmed in the absence of bonafide beneficiaries and without their consent including the Applicants herein.

23. That, It is not in dispute that the deceased 7 children with the Respondent are all adults. There is a need for determination of the trust as proposed by Hon. Lady Justice T. Matheka in paragraph 19 of the Ruling delivered on the April 9, 2020.

24. That, If the Court shall not be persuaded to revert to the distribution in the old Grant of April 9, 1995 then we pray for the trust in the 190 acres to be lifted now that the 7 children are of age and for each child to be allocated his/ her share and last but not least Section 4 (4) of the *Limitation of Actions Act* is not applicable in Succession matters especially on matters revocation of Grant.

25. According to the Applicants the deceased's estate should be shared out as per the Certificate of Confirmation Of Grant dated April 16, 1991 and the Respondent can retain 70 acres of Karanja



Njoroge who disappeared in 1996 and his whereabouts remains unknown to date, The 2nd Applicant contends that he is entitled to 60 acres absolutely and the trust Created ought to be dissolved as he was of age and that the share of the deceased brother Henry Maina Njoroge of 60 acres should be transferred to his son Peter Njoroge Maina the surviving Son.

Respondent's Case

26. That, the said application is belated coming as it does after 17 years since issuance of the Certificate of Confirmation of Grant on March 4, 2005.
27. That, the application is attacked for being time barred by dint of Section 4(4) of the Limitation of Actions Act, Cap 22, Laws of Kenya having been brought after 12 years since the impugned grant was issued.

Section 4(4) of the said Act provides as follows: -

“An action may not be brought upon a judgement after the end of twelve years from the date on which the judgement was delivered or where the judgement or a subsequent order directs payment of money or delivery of any property to be at a certain date or at recurring periods, the date of the default in making the payment or delivery in question and no arrears of interest in respect of a judgement debt may be recovered after the expiration of six years from the date on which the interest became due”.

28. That, the impugned Certificate of Confirmation of Grant was issued pursuant to a consent order recorded by the parties herein on March 4, 2005 (see annexure JMNI) and a period of 17 years had elapsed before the instant application was filed by the Applicants.
29. That to make matters worse, this is the second application by the 2 Applicants seeking to revoke the impugned grant with the first application dated March 20, 2014 having been filed on April 8, 2014 attached to the replying affidavit).
30. That, the said application was dismissed in a well-reasoned ruling delivered by Honorable Lady Justice Mumbua Matheka on April 9, 2020 (see the ruling marked JMN 3). No appeal was preferred against the said ruling and it is therefore despicable for the Applicants to seek a review thereof through the backdoor. This amounts to an outright abuse of court process which should not be countenanced.
31. That, in view of the said ruling, the instant application is Res Judicata and an abuse of court process, It follows that this Court has no jurisdiction to entertain the matter as doing so, will amount to sitting on appeal against its own decision.
32. That, the estate of the deceased has since been distributed in accordance with the impugned Certificate of Confirmation of Grant as evidenced by the documents marked JMN 4 attached to the replying affidavit.
33. The Respondent submit that the question of dissolution of trust cannot be adjudicated upon by the honorable court in the instant proceedings as the same ought to be litigated in a different suit for that purpose. In any event, litigation must come to an end and the Applicants cannot keep on filing new applications in a matter which started 34 years ago.
34. That, the court has the inherent power under Rule 73 of the Probate and administration Rules, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I am convinced that the co-administrator Njoroge Gatheru (Deceased) and/his successors have



frustrated the completion of the instant succession. I have perused the entire probate noting that there is no continuing trust.

Issues and Disposition

35. The Court is of the considered view that the following Issues are important in determination;
 - i. Whether the Application and issues therein is res judicata.
 - ii. Whether the Motion is time barred and offends the Limitation of Action's Act.
 - iii. Where the Grant was obtained by fraudulent consent should be revoked.
 - iv. Whether a previously revoked grant can be reinstated following subsequent revocation of a grant?
 - v. What Remedies' are available to the Applicant.
36. Whereas no formal Notice of Preliminary Objection was raised, the court considers the first two grounds in response, to amount to Preliminary Objection on matters of law that goes to the heart of the jurisdiction of the court.
37. The Court is of the considered opinion that if the Application is res judicata then it shall down its tools without any need to deliberate on the other issues.
38. The substantive law on *Res Judicata* is found in Section 7 of the [Civil Procedure Act](#) cap 21 which provides that:

“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”
39. The [Black's law Dictionary](#) 10th Edition defines “res judicata” as;

“An issue that has been definitely settled 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, or parties in privity with the original parties...”
40. A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.
41. In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;
 - i. what issues were really determined in the previous Application;
 - ii. whether they are the same in the subsequent Application and were covered by the Decision.
 - iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.



42. Kuloba J Rtd (as he then was), in the case of Njangu v Wambugu and another Nairobi HCCC No2340 of 1991 (unreported), held that:
- ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’
43. The Court has considered the Ruling of this Court and finds that the Summons dated March 20, 2014 was identical to the instant one with minor variance as to the respondent who in this instant was the mother holding in trust the Applicant’s share and the administrator was interestingly enjoined as an interested party. The Subsequent Application asserts that seven of the beneficiaries are not beneficiaries in law an issue that was dealt with by the Court in the Ruling dated April 9, 2022.
44. A grant is made and confirmed to the Administrator(s) or Executors who are subject to the Court until conclusion, the onus of demonstrating fraud as a basis of revocation should always be directed at the Administrator and where a 3rd party is accused as such then a causal link must be made out to the Administrator who legally moves the court on behalf of the estate.
45. The Court is persuaded that the Applicant, did move the court for revocation of grant on the same grounds and basis contravening the “*Res Judicata*” rule. The Court shall thus not consider the other issues emerging.
46. That owing to the foregoing and based on Ruling of this court dated April 9, 2022, the court affirms the same and is convinced to disallow the application for offending the “*Res Judicata*” rule.
47. The court thus lack jurisdiction to sit in review in a matter considered by this very court and thus makes the following orders;
- i. That the Summons for Revocation of Grant, dated May 12, 2022 is hereby struck out.
 - ii. Each Party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF JULY, 2023.

MOHOCHI S.M

JUDGE

Quorum

1. Waichungo Martin & Co. Advocates - For the 1st & 2nd Beneficiaries/Applicants.
2. Gakuhi Chege & Associates Advocates – For the Respondent

