In re Estate of Andrew Achoki Mogaka (Deceased) (Probate & Administration 35 of 2019) [2023] KEHC 25670 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25670 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

PROBATE & ADMINISTRATION 35 OF 2019

WA OKWANY, J

NOVEMBER 23, 2023

IN THE MATTER OF THE ESTATE OF ANDREW ACHOKI MOGAKA (DECEASED)

BETWEEN

ANASTASIA NDUNGE ACHOKI .... 1ST APPLICANT

TABITHA KEMUNTO ACHOKI .... 2ND APPLICANT

AND

PRISCILLA BOSIBORI ACHOKI .... 1ST RESPONDENT

JOB MECHA ACHOKI .... 2ND RESPONDENT

RULING

1. This court (differently constituted), confirmed the Grant of Letters of Administration in respect to the estate of the deceased herein, Andrew Achoki Mogaka. Following the said Confirmation of Grant, the 2nd and 4th Petitioners filed an application dated 6th October 2022 seeking, *inter alia*, orders to Revoke the said confirmed grant.
2. In a ruling delivered on 23rd March 2023, this court dismissed the said application for Revocation of Grant.
3. The ruling of 23rd March 2023 precipitated the filing of the two applications that are the subject of this ruling, namely;
    a. The Application dated 14th July 2023; and
    b. The Summons for Rectification of confirmed Grant dated 22nd March 2022 (sic).
4. I will consider the Application dated 14th July 2023 first as its determination will determine whether or not I should proceed and determine the Application for Rectification of Grant.

Application dated 14th July 2023

5. The 2nd & 4th Petitioners seek the following orders through the application dated 14th July 2023: -

   1. Spent

   2. That the Honourable Court be pleased to issue a temporary stay of execution of the Order dated 15th April 2021 pending hearing and determination of this Application.

   3. That the Honourable Court be pleased to issue a stay of execution of the Order dated 15th April 2021.

   4. That the orders dated 15th April 2021 be set aside, reviewed and/or varied and the application dated 24th March 2021 be fixed for hearing.

   5. That costs of this application be provided for.

6. The application is supported by the Affidavit of the 4th Petitioner, Tabitha Kemunto Achoki, and is premised on the grounds that: -

   1. The Honourable Lady Justice E. N. Maina delivered a ruling dated 15th April 2021 confirming the grant herein.

   2. The 2nd & 4th Petitioners/Applicants never were served with a hearing date nor did they consent to the confirmation of the grant.

   3. That the distribution of the grant is unconscionable and skewed in favour of the 1st and 2nd Petitioners/Respondents.

   4. That the orders dated 15th April 2021 be set aside, reviewed and/or varied and the application dated 24th March 2021 be fixed for hearing.

   5. The 2nd & 4th Petitioners/Applicants are apprehensive that execution is imminent.

7. The 1st and 3rd Petitioners opposed the application through the Replying Affidavit sworn by Job Mecha Achoki who avers that the application is misconceived and has been brought in bad faith with the sole intention of delaying the proper administration of the estate of the deceased.

8. He states that the application raises the same issues that were canvassed in the Applicant's Summons for Revocation of Grant dated 6th October 2021 which the court already considered and determined in the ruling rendered on 23rd March 2023.

9. He further states that the application is incompetent and fatally defective because the Applicants have invoked the provisions of the *Civil Procedure Rules* that do not apply to succession proceedings.

10. The deponent contends that the Affidavit in support of the application was not sworn by Anastacia Ndunge Achoki as shown in the handwriting expert's report attached to the Replying Affidavit as annexure "JMA-1". He further states that the distribution of the deceased's estate was conducted in an inclusive, fair and transparent manner in a process where all the beneficiaries, including the Applicants herein, were represented by an Advocate.

11. He further states that there has been an inordinate delay in filing the application as the orders sought to be set aside were issued at least two years ago.

12. The application was canvassed by way of written submissions which I have considered.

13. The main issues for determination are as follows: -

    a. Whether the application is res judicata.

    b. Whether the cited provisions of the *Civil Procedure Act* and Rules are applicable in Succession proceedings.

    c. Whether the application is merited.

Res judicata

14. 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”

15. 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...”

16. Under the res judicata doctrine, person may not commence more than one action in respect of the same or a substantially similar cause of action. In this regard, courts must endeavor to determine all matters in dispute in an action so as to avoid multiplicity of actions. In order to determine if an issue in a subsequent application is res judicata, the court will consider the de 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.

17. In the case of *Njangu v Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported), Kuloba J. 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....”

18. In the Court of Appeal case of *Siri Ram Kaura v M.J.E. Morgan*, CA 71/1960 (1961) EA 462 the then EACA stated that: -

> "The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...
>
> The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...
>
> The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.
>
> It is therefore not permissible for parties to evade the application of *Res Judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

19. In *Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* the court in an earlier Application ruled that the Application before it was *Res Judicata* as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined "thrice by the High Court and twice by the Court of Appeal", it could not be resuscitated by another Application.

The Court of Appeal further stated that:

> "That is to say, there must be an end to Applications of similar nature, that is to further, under principles of Res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of or Civil Procedure Act caters for."

20. The principle that emerges from the above cited cases is that a court's decision, unless set aside or quashed in a manner provided for by the law, must be respected. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court.

21. In the present case, the Respondents submitted that the issues raised in this application had already been canvased in the Applicant's Summons for Revocation of Grant dated 6th October 2021 which the court already considered and determined in the ruling delivered on 23rd March 2023.

22. I have considered the reasons that the Applicants advanced in seeking orders to set aside/review or vary the orders of 15th April 2021, I note that the orders that the Applicants seek to set aside/vary or review are the orders confirming the grant of Letters of Administration in respect to the estate of the deceased.

23. It was not disputed that the Applicants herein filed the application dated 6th October 2022 seeking to revoke the same grant. As I have already stated at the beginning of this ruling, the application for Revocation of the confirmed grant was dismissed vide a ruling delivered on 23rd March 2023. I note that the reasons advanced by the Applicant in the earlier application for revocation of the confirmed grant are the same reasons that the Applicants have been given in this application, namely; that they did not consent to the mode of distribution, that the distribution was unfair and that some purchasers had been excluded from the distribution.

24. My finding is that, having rendered itself on the application for Revocation of Grant, this court cannot once again be invited to deliberate on an application that seeks the same orders through an application that is differently worded. Allowing this application will be akin to this court sitting on an appeal against its own decision. I find that the application offends the res judicata doctrine.

25. My finding on the issue of res judicata would have been sufficient to determine the application dated 14th July 2023, but I am still minded to consider the issues of applicability of the provisions of the *Civil Procedure Act* and *Rules* to succession proceedings, and whether the application meets the threshold set for the granting of orders for review.

a. Whether the cited provisions of the Civil Procedure Act and Rules are applicable to Succession proceedings.

26. The Respondents argued that the provisions of order 42 rule 6 of the *Civil Procedure Rules* and section 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* do not apply to Succession proceedings by dint of rule 63 of the *Probate and Administration Rules*. The Respondents relied on the decision in *Kimani Wanyoike v Electoral Commission* Civil Appeal No. 213 of 1995 (UR) where the Court of Appeal ruled that: -

> " Where there is a law prescribed by either a constitution or an act of parliament governing a procedure for the redress of any particular grievance, that procedure should be strictly followed." (Underlining mine)

27. The Applicants argued that failure to invoke the correct provision of the law does not make an application defective. Rule 63 of the *Probate and Administration Rules* stipulates as follows: -

> " 63. Application of *Civil Procedure Rules* and *High Court (Practice and Procedure) Rules*
>
> (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely order 5, rule 2 to 34 and orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the

High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules."

28. The above rule outlines the provisions of the *Civil Procedure Rules* that are applicable to Succession proceedings and I note that order 42 (6) of the *Civil Procedure Rules* is not one of the provisions that are applicable to Succession cases.

Review

29. Order 45 Rule 1 of the *Civil Procedure Rules* stipulates as follows on review: -

"(1) Any person considering himself aggrieved: -

a. By a decree or order from which an appeal is allowed but from which no appeal has been preferred or

b. By a decree or order from which no appeal is hereby allowed, and from whom the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgement to the court which passed the decree or made the order without unreasonable delay."

30. The Respondents submitted that the application does not meet the threshold set under order 45 (1) of the *Civil Procedure Rules* for the granting of orders for review namely; the existence of new and important matter or evidence that, after due diligence, was not within their knowledge at the time of confirmation of grant; an apparent error on the face of the record.

31. The Applicants, on the other hand, argued that this court has powers to review its orders.

32. My finding is that even though the court can review its own orders, such review powers can only be exercised within the confines of the law governing orders for review. In this case, I note that the Applicant has not identified any error or mistake apparent on the face of the orders of 15th April 2021 and neither did they present any new evidence/material that was not in their knowledge at the time the said orders were issued. I therefore find that the prayer for review is not merited.

33. Having regard to my findings on the issue of res judicata, the applicability of the *Civil Procedure Rules* to succession proceedings, and the prayer for review, I find that the application dated 14th July 2023 is not merited and I therefore dismiss it with no orders as to costs.

Application dated 22nd March 2022

34. Through the application dated 22nd March 2022, the Petitioners seek orders for the Rectification of the Confirmed Grant. The application is brought under rule 43 (1) of the *Probate and Administration Rules* and is premised on the grounds that: -

    i. That the deceased was a partner in Manor House Farm in Trans Nzoia County in which farm he was entitled to a share of approximately 115.5 acres.

    ii. That after the survey of the said farm the deceased was allocated LR. 32829/5 measuring 45.911 hectares and LR. 32829/7 measuring approximately 0.0382 hectares.

    iii. That at the time of confirmation of this grant the petitioners did not have the correct survey details hence erroneously referring to LR. 32829/2 as the property of the deceased.

    iv. That the said 2 parcels aforesaid constitute all the deceased's land at Manor House measuring 46.239 hectares (114.256 acres) contrary to the previous estimate of 115.5acres.

    v. That Anastasia Ndunge Achoki shall have LR. 32829/7 measuring 0.3282.

    vi. That approximately 1.2 acres of the previous 115.5 acres has been allocated to Public Utilities hence the need to adjust the acreage previously allocated to the respective houses of the deceased.

    vii. The court by mistake omitted an old tractor – FIAT which was allocated to Anastasia Ndunge Achoki from the confirmed grant.

    viii. There is an error regarding motor vehicle KAS 825N which the beneficiaries now want transferred to Priscilla Bosibori Achoki.

35. The 2nd Petitioner opposed the application through her Replying Affidavit sworn on 25th May 2023 wherein she states that: -

> " 5. That by the time the grant was confirmed we had not agreed on the mode of distribution.
>
> 6. That when the matter came for the confirmation of the grant, Advocate Jeremiah Ongeri Samba misled the court that the parties had agreed on the mode of distribution and referred the court to the consent filed in court on the mode of distribution which consent was signed by only 7 people out of 13 people. (Annexed hereto and marked ANA 1 the copy of the consent.)
>
> 7. That the proceedings to obtain the confirmed grant were defective in substance.
>
> 8. That the confirmed grant to be rectified was obtained fraudulently by making false statement or by concealment from court of material facts.
>
> 9. That I am not aware that there was an ongoing survey of Manor House Farm nor I am aware that some acres have been allocated to any public utilities without any evidential support.
>
> 10. That I am aware of the tractor and Plot No. 32829/7 left behind by the deceased by we had not agreed on the mode of distribution."

36. The application was canvassed by way of written submissions alongside the application dated 14th July 2023 which I have already determined.

37. What emerges from the two applications is that even though the Petitioners herein were throughout the proceedings that led to the Confirmation of Grant represented by the same Advocate, not all of them agree with the mode of distribution. It is noteworthy that some of the parties herein are not satisfied with the mode of distribution and this has led to the numerous applications that have been filed following the confirmation of grant. It is alleged that the consent on the mode of distribution was signed by only seven (7) out of the thirteen (13) beneficiaries. Be that as it may and considering that the parties in this case are members of the same family, and without prejudice to the orders of 15th April 2021 confirming the grant and any other subsequent orders made in this matter, this court is of the view that it should refer this matter to Mediation before it can give its final verdict on the application for rectification of grant.

38. The matter will be mentioned on 5th March 2024 for the Mediation Report.

39. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 23RD DAY OF NOVEMBER 2023.

W. A. OKWANY

JUDGE