In re Estate of Magangi Obuki (Deceased) (Succession Cause 41 of 2016) [2023] KEHC 26933 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26933 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

SUCCESSION CAUSE 41 OF 2016

RPV WENDOH, J

DECEMBER 18, 2023

IN THE MATTER OF THE ESTATE OF MAGANGI OBUKI (DECEASED)

BETWEEN

PATRICK ARASA MAGANGI ..... APPLICANT

AND

JOHNES GATI O'BOKE ..... RESPONDENT

RULING

1. The Preliminary Objection (the objection) dated 9/6/2023 was filed by Patrick Arasa Magangi (the applicant). It is premised on the following grounds:-

    a. This court dealt with this matter substantively and judgment was delivered on 16/12/2020.

    b. This court is functus officio in this matter.

2. On 5/7/2023, this court directed that the Objection be canvassed by way of written submissions. On 12/10/2023, only the applicant had complied and filed submissions. Mr. Mwita, Counsel for Johnes Gati O'boke (the respondent) stated that his submissions were misplaced and asked for 14 days to place them on the court file. They were not yet on the file at the time this court retired to write this ruling.

3. The applicant submitted that this court heard and determined this matter by a judgement delivered on 16/12/2020; that pursuant to the orders issued in the said judgement, the applicant applied for letters of administration and the cause was gazetted afresh; that grant of letters were issued and confirmed on 29/7/2020 and 27/10/2022 respectively; that the respondent filed another succession cause before the Chief Magistrate's Court in Migori and was issued with letters of administration which were later confirmed; that the respondent is before this court seeking for the removal of the caveat in order to transfer the estate to himself.

4. It was further submitted that this matter is res judicata and the respondent has contravened the provisions of Section 7 of the Civil Procedure Rules; that if this court is to entertain this suit, it will be trying this case afresh and overriding the decree obtained earlier. The applicant relied on the Court of Appeal findings in *Daniel Kirui & Another v Monicah W. Macahrai & Another* (2007) eKLR and *Pop - In (Kenya) Limited & 3 Others v Habib Bank AG Zurich* (1990) eKLR where in both cases, the courts expounded on the principles of *res judicata*. The applicant prayed that the respondent's application dated 5/12/2022 be struck out, the grant of letters of administration issued, confirmed and obtained vide Migori CM Succession Cause No. 41 of 2021 be revoked and/or annulled for being res judicata, the respondent's orders obtained vide Migori CM Succession Cause No. 9 of 2022 during the pendency of this matter be set aside and/or annulled and the respondent do pay costs of the two applications.

5. I have considered the objection and the submissions of the applicant. The only question for determination is whether this matter is res judicata.

6. A preliminary objection is one which raises a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which when argued, may dispose of the suit. In *Mukisa Biscuit Manufacturing Company v West End Distributors Limited* (1969) EA it was held as follows:-

> " So far as I am aware, 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 on 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."

7. Therefore, where there are contested facts, a preliminary objection cannot be sustained. In the instant case, the objection is premised on the fact that this court is functus officio having pronounced itself on the issues in controversy vide a judgement dated 16/12/2020.

8. The doctrine of *res judicata* is codified in Section 7 of the *Civil Procedure Act* 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."

9. 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."

10. The doctrine of res judicata emphasizes the fact that the court will not re-litigate on the same issues which were previously settled either by the trial or appellate court. 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.

11. A court becomes functus officio once it renders its decision which is final and conclusive. The doctrine of *functus officio* was considered by the Court of Appeal in *Telkom Kenya limited v John Ochanda*

(suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) (2014) eKLR, where the court held 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."

12. The Supreme Court of Kenya in the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others*(2013) eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*" (2005) 122 SALJ 832 which reads: -

> " The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

13. The exception to the doctrine of functus officio is provided under Section 99 of the *Civil Procedure Act* which allows the court to correct arithmetic errors in judgements, decrees or orders under the accidental slip rule. The doctrine of functus officio bars a court from revisiting a matter determined on merit once final judgement has been entered and a decree issued.

14. It is not disputed that this court delivered its judgement on 16/12/2020. It is a matter of fact. In its judgement, this court revoked the grant of letters of administration issued to the respondent on 25/11/2005 and confirmed on 8/9/2006 and ordered that the objector (now the applicant) together with all the other beneficiaries do apply for fresh grant of letters of administration. In compliance with the said order, the applicant applied for grant of letters administration which were issued on 29/7/2022 and later confirmed on 27/10/2022.

15. It has emerged that the respondent filed parallel succession proceedings at the Chief Magistrate's Court in Migori. The succession application is annexed as "JGO 9" in the respondent's application before this court dated 5/12/2022. The application for letters of administration were filed on 14/1/2022. The certificate of confirmation of grant was then issued on 13/10/2022. The respondent deposed in his supporting affidavit that he chose to file parallel proceedings in the lower court after the applicant failed to apply for grant of letters of administration within 60 days as ordered by this court in its judgement.

16. What is significant is that before filing for letters of administration in the lower court, the respondent had first started with filing citation proceedings against the applicant. The citation application is dated 28/6/2021. The respondent decided to file the citation proceedings after this court started hearing the parties on the summons for revocation application dated 9/6/2016. The objector's (now the applicant's) case was heard between 3/12/2018 to 16/9/2019. When the court was ready to proceed with the hearing of the respondent's case, at the behest of his Counsel, the matter was adjourned to 21/5/2020, then again adjourned to 27/7/2020. Counsel for the respondent did not appear in court and directions were issued that the summons proceed by way of submissions. All through the hearing, Counsel for the respondent was present and even cross examined the witnesses.

17. It is quite appalling that the respondent through his same Counsel chose to proceed to file citation proceedings in the year 2021 after this court had heard all the parties and even confirmed written submissions. The respondent's Counsel openly disregarded this court's authority. The respondent's

Counsel blatantly lied to the lower court by purporting to file citation proceedings, even after being aware of this court's judgement.

18. This court affirmed that the respondent was not a son to the deceased herein. There is no logical explanation why the respondent is still insistent on inheriting as a beneficiary of the decesed's estate. It is even startling that the respondent is now claiming in his application that his deceased father was a creditor in the estate of the deceased and that is why he is filing an application to remove the caveat placed on the suit land. This allegation was never raised at the hearing of this succession cause and no evidence was led on the same.

19. Counsel for the respondent is an officer of this court. He is expected to be a defender of the rule of law. The actions of Counsel to file parallel succession proceedings before the subordinate court after he has participated in the proceedings before this court is in total disregard of the principles of judicial precedent. This amounts to an abuse of the court process.

20. In *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others* (2009) eKLR, the Court of Appeal held that: -

> " The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -
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> i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
>
> ii Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
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> iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.
>
> iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness."

21. Moreover, with the knowledge that the process of obtaining letters of administration was tainted with illegality, the respondent has the audacity to purportedly seek this court's favourable orders using the illegal confirmed grant. Not only are the actions of Counsel for the respondent an abuse of the court process but also an affront to the rule of law.

22. It therefore goes without saying that the respondent's application dated 5/12/2022 is incompetent and bad in law. It is best suited to be dismissed. It is not even necessary to hear parties on it since it is premised on an illegality. If at all the respondent is of the view that he had an interest to protect on behalf of his deceased father in the estate of the deceased herein, he had the opportunity to do so during the hearing of the application for revocation of the grant but he did not offer any evidence on the same. The respondent has also not responded to this objection.

23. This court agrees with the applicant that it is functus officio this matter having pronounced itself on the issues in controversy. Any party aggrieved by its decision has a right to appeal.

24. On the prayer to set aside, annul and/or revoke the grant in Migori Succession Cause No. 91 of 2022, section 23 of *Magistrates' Court Act* No. 26 of 2015 provides:-

> " The *Law of Succession Act* is amended, by repealing section 48(1) and substituting therefore the following new subsection –
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> 1. Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7 (1) of the *Magistrates' Courts Act*, 2015.' (emphasis added)."

25. The law is settled on the jurisdiction of the Magistrate's court in determining disputes concerning revocation of grants. The Magistrate's court was accorded the jurisdiction to hear and determine applications under the *Law of Succession Act* provided they are within the required pecuniary limit. The suit property of the estate of the deceased person was estimated to be Kshs. 1,000,000/= which is within the jurisdiction of the Senior Principal Magistrates' Court. The applicant is at liberty to file an application for revocation of the grant before the Magistrate's Court. Flowing from the observations made by this court, the honourable thing to do is not to contest the application.

26. In the end, the objection is hereby allowed with costs. Counsel for the respondent will personally bear the costs. This ruling together with the judgement of this court dated 16/12/2020 be forwarded and brought to the attention of the court where the application for revocation of the grant will be filed by Counsel for the applicant.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 18TH DAY OF DECEMBER, 2023.

R. WENDOH

JUDGE