



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 793 OF 1985

IN THE MATTER OF THE ESTATE OF JOHN KING'ANG'I THIONG'O

GRACE NJERI KING'ANG'I.....APPLICANT

VERSUS

DEDAN THIONG'O.....1ST RESPONDENT

WALTER GITAU JOHN.....2ND RESPONDENT

LIZZIE NJOROGE.....3RD RESPONDENT

RULING

1. The applicant Grace Njeri King'ang'i was aggrieved by the judgment dated 10th May 2016 by this court. She appealed to the Court of Appeal. The ruling was in respect of her application dated 3rd May 2015 in which she sought the revocation of the grant that had been issued to the respondents Dedan Thiong'o John, Walter Gitau John and Lizie Njoroge on 3rd December 1987, confirmed on 20th September 1988 and rectified on 13th February 1995. In an application dated 17th January 2017 the applicant sought that the respondents, their servants and agents be restrained from interfering with her use of the quarry on the disputed land (LR No. Dagoretti/Uthiru/222) pending the hearing and determination of the appeal. The application was on 12th February 2019 dismissed with costs.

2. The history of this dispute is that the deceased John King'ang'i Thiong'o died intestate on 31st January 1975. He left three sons (Dedan Thiong'o John, Walter Gitau John and the late husband of Lizie Njoroge). There are the respondents. He was also survived by daughters, who included the applicant. The other daughters were Rachel Wambui King'ang'i, Priscilla Tiebo, and Monica Muthoni. The deceased's estate comprised Dagoretti/Uthiru/222 and Dagoretti/ Uthiru/T.30. In the distribution of the estate, the sons benefitted more than the daughters. The daughters were given 0.4Ha of Dagoretti/ Uthiru/222 which was sold and they equally benefitted from the proceeds. The applicant shared in proceeds. Her application for revocation alleged that she had not been informed of the petition leading to the grant, she had not been involved in the distribution and that she had, and had consequently been disinherited. The court found that, although she had not been named in the petition or her consent sought and had not participated in the proceedings leading to the confirmation of the grant, the distribution had benefitted her. She had participated in the sale of the 0.4Ha of Dagoretti/Uthiru/222 on 1st November 2006 and had shared in the proceeds of Kshs.2,500,000/=. The other daughters of the deceased had joined in the opposition to the application for revocation.

3. In the instant application dated 10th November 2021, the applicant seeks the stay of the judgment dated 10th May 2016, decree and orders thereof. It was her contention that the appeal filed (**Civil Appeal No. 439 of 2019**) against the judgment above would be rendered nugatory if stay is not granted. The appeal was based on her exclusion of her as a daughter in the succession process, the omission of consents and citations on all surviving children of the deceased and the violation of her constitutional rights to property and inheritance. It was also clear that the application was prompted by the notice to show cause dated 11th August 2021 in which there was execution for costs in the sum of Kshs.201,067/=.

4. The application was opposed by the 1st and 3rd respondents who filed grounds of opposition to say that the applicant had filed a similar application dated 17th January 2017 which had been heard and dismissed with costs; that the application was therefore *res judicata*; that the application dated 17th January 2017 having been dismissed with costs, the applicant had no basis to secure stay; and that the applicant had not shown that if stay is now granted she will not recover the costs from the respondents.

5. In the application dated 17th January 2017 the applicant deponed that she had filed the appeal which had good chances of success; that the respondents had stopped her from extracting stones in her quarry on Dagoretti/Uthiru/222; and that she wanted that stoppage injuncted until the appeal had been heard and determined. This was substantially an application for stay of execution pending the hearing and determination of the appeal. This was because of the distribution of the estate had given Dagoretti/Uthiru/222 to new owners who wanted her out of the quarry. The court proceeded on the basis that the applicant had sought stay of execution. It heard the application and dismissed it.

6. **Section 7 of the Civil Procedure Act** 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.”

7. I agree with the respondents that the present application is, in material terms, similar to the application dated 17th January 2017 that was between the same parties over the same subject matter, and was heard on merits and dismissed with costs. The application dated 10th November 2021 is therefore *res judicata* (**IEBC –v- Maina Kiai & 5 Others [2017]eKLR**).

8. Let it be reiterated that the applicants’ application for revocation was dismissed with costs. It was a negative order that was not capable of execution, and hence could not be stayed or injuncted.

9. On the question of the notice to show cause on the issue of costs, there was no plea that if the costs are paid and the appeal ultimately succeeds, the respondents would not be able to refund them (**Caneland Ltd & 2 Others –v- Delphis Bank Ltd, Civil Application No. Nai 344 of 1988**).

10. In all, therefore, I find no merit in the application which I dismiss with costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 19TH DAY OF JANUARY, 2022.

A.O. MUCHELULE

JUDGE