



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**SUCCESSION CAUSE NO. 507 OF 2015**

**IN THE MATTER OF THE ESTATE OF MUNGIRIA M'RUNGUCHI (DECEASED)**

**DOMISIANO NJERU MUNGIRIA ..... PETITIONER**

**-VERSUS-**

**PETERSON KENNETH MUGO ..... 1<sup>ST</sup> PROTESTOR**

**ALEXANDER KIRUNJA MIRITI ..... 2<sup>ND</sup> PROTESTOR**

**ROBERT MURIITHI CHRISPO ..... 3<sup>RD</sup> PROTESTOR**

**JOHN NJAGI MIRITI ..... 4<sup>TH</sup> PROTESTOR**

**JUSTUS MBAE MIRITI ..... 5<sup>TH</sup> PROTESTOR**

**FERDINARD MBABU MIRITI ..... 6<sup>TH</sup> PROTESTOR**

**LINET KARIMI MIRITI ..... 7<sup>TH</sup> PROTESTOR**

**SILAS GITONGA MIRITI ..... 8<sup>TH</sup> PROTESTOR**

**JAMES MUGO MIRITI ..... 9<sup>TH</sup> PROTESTOR**

**CIRIANKA TIRINDI ..... 10<sup>TH</sup> PROTESTOR**

**R U L I N G**

1. This cause relates to the estate of the Mungiria M'Runguchi alias Mungiria M'Ruguchi (deceased) who died intestate on 20<sup>th</sup> March 1962. The sole asset disclosed as forming the deceased estate is half of the land parcel known as L.R. No. Muthambi/Gatua/1924 (the suit land) which is registered in the joint names of Mungiria M'Runguchi alias Mungiria (the deceased herein) and Murugi King'ang'a (also deceased).

2. Before this court is the summons dated 25<sup>th</sup> May 2021 and filed on 4<sup>th</sup> June 2021. The same seeks for orders of stay of proceedings in this succession cause pending the hearing and determination of **Chuka ELC No. E004 of 2021 (O.S.)**.

3. The application is expressed to have been brought pursuant to **Section 47** of the **Law of Succession Act (the "Act")** and **Rules 41(3), 49, and 73** of the **Probate and Administration Rules (the "Rules")**. It is premised on the grounds on the face of it and the supporting affidavit sworn on 4<sup>th</sup> June 2021 by the 1<sup>st</sup> Protestor herein on behalf of all the Protestors. The Protestors claim to be entitled to the entire suit land by didn't of the principle of adverse possession and as such, no part of the suit land is available for distribution in these proceedings.

4. The application is opposed by the Replying Affidavit sworn on 7<sup>th</sup> June 2021 by the Petitioner. It is the Petitioner's contention that the present application is *Res Judicata* as a similar application was dismissed by R. K. Limo (J) on 11<sup>th</sup> February 2019. The Petitioner further contends that the protestors do not have an arguable case on adverse possession and that such a claim is only aimed at delaying the proceedings before this court. It was thus his prayer that the application be dismissed with costs.

5. The Protestors accordingly responded vide a further affidavit sworn on 21<sup>st</sup> June 2021 by the 1<sup>st</sup> Protestors, again on behalf of all the Protestors. They conceded that they had filed an earlier application seeking the stay of these proceedings but contended that the present application was brought under different circumstances as there was no suit pending before the Environment and Land Court (hereinafter referred to as “ELC”). They further contended that the earlier application was never heard and determined on merit and as such, the principle of *res judicata* is not applicable.

6. The application was canvassed by way of written submissions. The Protestors filed their written submissions on 21<sup>st</sup> June 2021 while the Petitioner filed his written submissions on 15<sup>th</sup> December 2021. Below is a summary of the rival submissions made by the parties.

#### **Protestors’ Submissions**

7. It is the Protestors’ submission that the court properly seized of the jurisdiction to hear and determine their claim of ownership of the suit land by virtue of the doctrine of adverse possession is the ELC.

8. On the issue of the Protestors not having the *locus standi* to institute the instant application, it is the Protestors’ submission that their continued occupation of the suit land makes them intricately interested in the estate hence giving them the necessity to institute the same.

9. On the issue of the application being *res judicata*, the Protestors pointed that the earlier application was dismissed for want of prosecution and was not therefore determined on merit. They thus submitted that the principle of *res judicata* should not be applied in dismissing the instant application.

10. The Protestors thus urged this court to stay these proceedings to allow for the determination of the issue on whether they are entitled to ownership of the suit property by way of adverse possession.

#### **Petitioner’s Submissions**

11. On his part, the Petitioner referred to the earlier application that the protestors filed, and which dismissed on 11<sup>th</sup> February 2019 for want of prosecution. He submitted that failure by the Protestors to review or appeal against the orders arising from the earlier application is an indication that the instant application was only filed as a delaying tactic and hence, the same should be dismissed as it is an abuse of the court process.

#### **Issues for Determination**

12. Having considered the application, the affidavits in support and opposing the same and the respective submissions of the parties, it is my view that the main issues for determination by this court are:

- a. ‘*Locus Standi*’
- b. Whether the application dated 25<sup>th</sup> May 2021 is *res judicata*;
- c. Whether the application dated 25<sup>th</sup> May 2021 should be allowed.

#### **Analysis**

##### **Locus Standi**

It is important in this matter for the court to determine whether the applicants have ‘*Locus Standi*’. The term ‘*Locus Standi*’ connotes the right of a party to bring an action. It seeks to determine whether a party has properly brought an action or is properly before the court. There are many decisions on the subject from the court and to quote the decision in the case of Michael Osudwa Sakwa –v- Chief Justice and President Supreme Court of Kenya & Another.[2016] eKLR which referred to the matter of Ms Priscilla Nyokabi Kanyua –v- Attorney General & I.E.B.C, Nairobi H.C CP NO. 1/2010 stated that:-

**“ In Kenya the court has emphatically stated that what gives *Locus Standi* is a minimal personal interest an such interest gives a person standing even though it is quite clear that it would not be more affected than any other member of the population.”**

Such interest must be vested legal interest giving the party a right to enforce the claim by way of a lawsuit. It follows that for a party to have a *locus standi* he must have a vested interest in the subject matter before court. ‘*Locus Standi*’ is point of law that touches on the jurisdiction of the court. In the Law Society of Kenya –v- Commissioner of Land & Others, Nakuru H.CCC No.464/2000 the court stated that, “*Locus Standi*” signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in Court of Law.”

The dispute herein is a succession matter. The applicants joined this suit vide an application dated 9/10/2018. Their prayer was that;

**“There be stay of proceedings in this cause pending the hearing and determination of an intended suit at Chuka Environment and Land Court,”**

Ground four (4) in support of the application state that they wished to pursue the claim through the doctrine of adverse possession. My view is that the applicants had no vested legal interest in the estate of the deceased save for the claim of adverse possession which had not been established in a court of law. It is clear from the application the one stop shop for their claim was the Environment and Land Court.

13. The test for determining the application of the doctrine of *res-judicata* in any given case is spelt out under **Section 7** of the **Civil Procedure Act**. In **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

"(a) The suit or issue was directly and substantially in issue in 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."

14. In the case of **Attorney General & Another ET vs (2012) eKLR** it was held that;

*"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi -v- NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit". In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: 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 in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....".*

**Section 7 of the Civil Procedure Act** provides:

"(1) Where a decree is for the payment of money the court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant, if he is within the precincts of the court.

(2) Save as otherwise provided by subrule (1) or by any other enactment or rule, every application for the execution of a decree shall be in writing, signed by the applicant or his advocate or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars—

- (a) the number of the suit;
- (b) the names of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;
- (e) whether any, and, if any, what payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree;
- (f) whether any, and if any, what previous applications have been made for the execution of the decree, the dates of such applications, and their results;
- (g) the amount with interest, if any, due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;
- (h) the amount of the costs, if any, awarded;
- (i) the name of the person against whom execution of the decree is sought;
- (j) the mode in which the assistance of the court is required, whether—
  - (i) by the delivery of any property specifically decreed;
  - (ii) by the attachment and sale, or by the sale without attachment, of any property;
  - (iii) by the arrest and detention in prison of any person;
  - (iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief granted may require.  
(3) The court to which an application is made under subrule (2) may require the applicant to produce a certified copy of the decree.”

15. In this case, the Protesters filed a summons application dated and filed on 9<sup>th</sup> October 2018 (hereinafter the “earlier application”) seeking stay of proceedings in this cause pending the hearing and determination of an intended suit at the Chuka ELC. In the said earlier application, the Protestors contended that they were opposed to the mode of distribution of the estate of the deceased as proposed by the Petitioner in his summons application dated 3<sup>rd</sup> October 2018 for confirmation of grant.

16. The Judge handling the matter directed that the earlier application be canvassed by way of *viva voce* evidence and the same was fixed for hearing on 11<sup>th</sup> February 2019. When the matter came up for hearing on the said 11<sup>th</sup> February 2019, the counsel for the Applicant was not present in court and sought for an adjournment through the counsel for the Protestors who indicated that the Petitioner’s counsel was held up in Meru. Finding that the reason given was not good enough, the court rejected the Petitioner’s application for an adjournment and proceeded to dismiss the earlier application for want of prosecution.

17. The question that begs an answer is whether dismissal of a matter for want of prosecution can be relied on to conclude that the matter is *res judicata*. The court of appeal has addressed this issue in the case cited by the petition, that is *Njue Ngai-v- Ephantus Njiru & Another C.A. 29/2015 [2016] eKLR.*

“Another issue may arise as to whether a dismissal of a suit for non attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of *Peter Ngome vs Plantex Company Limited [1983] eKLR.* stating:

“Rule 4(1) does not say “judgment shall be entered for the defendant or against the plaintiff.” It uses the word “dismissed.” The Civil Procedure Act does not define the word “judgment”. According to *Jowitt’s Dictionary of English Law 2nd ed p 1025:*

“Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several.”

*Mulla’s Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order; “Judgment - in England, the word judgment is generally used in the same sense as decree in this code.”*

*In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8.”*

What the court is saying is that an order dismissing a matter for want of prosecution and the party fails to apply for the suit to be reinstated, forms the judgment in that suit. It becomes the final determination of the issues between the disputing parties. There is no dispute that on 11/2/2019 Justice Limo dismissed similar application by the applicants. They filed this application when the order dismissing the application is still in force and is a valid order. The Rule under which the application was dismissed requires that a party moves the court to set aside the order dismissing the application but not to file a fresh application in the same suit. This is meant to discourage multiplicity of suit and abuse of court process.

I find that the application is *res judicata*. It is my view that in a claim for adverse possession by a party, where the claim is successful, the applicant acquires the land by the judgment and decree of the court. A party cannot in my considered view claim adverse possession and at the same time claim beneficial interest in the estate of the deceased (Owner of the Land). As I have observed earlier, a claim for adverse possession arises from possession, occupation and use of the land of another in a manner adverse to the owner of the land. A beneficial interest on the other hand arises from a claim of dependency and is governed by the **Law of Succession Act**. The end result if successful is to acquire land. A party claiming the right to own the land under the two regimes demonstrates that he does not have a direct claim and can only be viewed as a testing the waters which fails to demonstrate a *prima facie* case with chances of being successful.

I find that the application is not properly before this court as it is *res judicata* and for want of merits.

18. The application is expressed to be brought under the provisions of **Rules 41(3), 49 and 73** of the Probate and Administration Rules (the Rules). **Rule 41(3)** of the **Rules** provide as follows:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil”

19. The Protestors are relying on the principle of adverse possession to support their claim on the suit land. It is their contention that they have been in occupation of the whole suit land for a period provided by statute, that is 12 years. As noted herein before, the claim of the suit land by the protestors against the estate of the deceased is pending in **Chuka ELC Case No. E004 of 2021 (O.S.)**.

20. The concept of adverse possession is not covered by our succession laws. Adverse possession is about occupation and use of property, and by virtue of **Articles 162(2) and 165(5)** of the **Constitution 2010**, the High Court has no jurisdiction to determine any disputes that centre on occupation and use of land. The court clothed with the requisite jurisdiction is the ELC. It is the said ELC that can declare that by dint of adverse possession, a party is entitled to a property against the owner of that property.

21. The merits of the claim is more appropriately addressed in the Environment and Land Court as the jurisdiction of the High Court as a probate court is limited to *ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate*.

**Section 2(1) of the Law of Succession Act** provides:

***“ (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”***

This court’s jurisdiction is to determine the estate of the deceased, that is, the free property of the deceased person, the dependants and distribution of the estate to the lawful dependants. The applicants are not dependants and are not claiming dependency. I find that the applicants lack “*Locus Standi*” in this succession cause.

**CONCLUSION:**

It is my view that no orders can be granted to a party who has no ‘*locus stand*’ in the matter. The applicants have since filed a suit in the ELC Court at Chuka. The applicant’s application to stay the proceedings was dismissed. They have no claim pending before this court and therefore lack capacity to stay the proceedings herein. I find that the application lacks merits and is dismissed.

**Dated, signed and delivered at Chuka this 17<sup>th</sup> day of February 2022.**

**L.W. GITARI**

**JUDGE**

**17/2/2022**

Mr. Murithi for protestors

Mr. Nyaga for Petitioners

Ruling has has been read out in open court

**L.W. GITARI**

**JUDGE**

**17/2/2022**