



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

SUCCESSION CAUSE NO. 24 of 2018

(Formerly Kisii High Court Succession Cause No. 13 of 1997)

IN THE MATTER OF THE ESTATE OF NYAMANGA OPIYO (DECEASED)

AND

IN THE MATTER OF REVOCATION OF GRANT OF LETTERS OF ADMINISTRATION

AND

IN THE MATTER OF SECTION 76 OF THE LAW OF SUCCESSION ACT CAP 160

BETWEEN

ANTHONY OCHIENG OKAL.....PETITIONER

-VERSUS-

ROSE OUMA ODHIAMBO

ROSEMARY OCHIENG OWOUR.....OBJECTORS/RESPONDENTS

AND

PHILIP ODERO MAKABONGO.....INTERESTED PARTY/APPLICANT

RULING

By a Notice of Motion Application dated 7/10/2020, filed in court on 12/10/2021, the applicant sought the following orders:-

- a) That the court do strike out the objectors' application for revocation of grant dated 28/11/2012 having abated;**
- b) That in the alternative, the objectors' application for revocation of grant dated 28/11/2012, the same be dismissed for want of prosecution.;**
- c) Costs be in the cause.**

The application is based on the grounds appearing on the face thereof and the supporting affidavit of Philip Odero Makabongo. The applicant briefly deponed:-

- a) That he purchased the suit property being Land Reference No. KAMAGAMBO/KANYAJUOK/1640 from Anthony Ochieng Okal (Deceased) for Kshs. 280,000/= after he lawfully succeeded the late Nyamanga Opiyo (Deceased) and thereafter obtained title to the suit property on 26/9/2003.**
- b) That he took possession of the land and lived thereon uninterrupted until the year 2009 when he received summons from**

the defunct District Lands Tribunal filed by one Joseph Nyamanga to answer the complaint of obtaining land from the deceased illegally.

c) That Joseph Nyamanga was advised by the tribunal to move to the High Court since it lacked jurisdiction, and thereafter he filed a Misc. Application Number 249 of 2012 which was dismissed in 2017 for want of prosecution.

d) However, on 5/11/2012, Joseph Nyamanga introduced Rose Auma Odhiambo and Rosemary Achieng Owour, the objectors herein, as the only beneficiaries to the estate of the deceased to his exclusion.

e) The objectors sought to revoke the grant issued to Anthony Ochieng Okal in Kisii Succession Cause No. 13 of 1997 in which the court directed that it be heard while maintaining status quo.

f) That notwithstanding, Joseph Nyamanga instituted this suit where the issues in dispute, the parties and cause of action are the same and hence is res judicata.

g) The subject matter of the application for revocation has already been decided in the defunct District Land Tribunal and Kisii High Court in Misc 249 of 2012.

h) Further to the above, the application for revocation is yet to be heard but it is noteworthy that the objectors have failed to substitute the deceased petitioner since the year 2005.

i) The objectors' claim has abated by operation of law having failed to substitute the petitioner more than a year after his death.

The applicant is represented by the firm of S. M. Sagwe Advocates

The application was opposed. The objectors filed a replying affidavit dated 21/10/2020 sworn by the 1st objector on behalf of the 2nd objector. The objector deposed:-

i. That the subject matter touched on the estate of Nyamanga Opiyo (deceased) who was the registered owner in the original parcel of land known as L.R. No. KAMAGAMBO/KANYAJUOK/572 which has since been subdivided culminating in the creation of inter alia the suit property herein;

ii. That after the death of the deceased the petitioner (also deceased) lodged succession proceedings to the exclusion of the true beneficiaries of the said estate and proceeded to unlawfully sell and transfer the suit property in favour of the applicant without notice to the objectors;

iii. That the objectors lodged summons for revocation of grant which came up for hearing on various dates culminating on 5/11/2020;

iv. That at the time of filing this application, the summons for revocation of grant had a date which is within the knowledge of the applicant; the subject matter has not been dormant for a period of more than 12 months or otherwise;

v. That the provisions invoked by the applicant do not apply here;

vi. That the law of abatement does not apply to succession proceedings;

vii. That the issues raised by the applicant on the sale agreement, the letters of administration, the true identities of the beneficiaries of the estate of the deceased and any issue touching on the estate of the deceased can only be addressed at the hearing of the said summons and not otherwise;

viii. That the application is devoid of merit and should be dismissed,

The objectors are represented by the firm of Oguttu Mboya Advocates.

Both parties filed submissions which I have duly considered. The applicant submitted that the application for revocation has never been heard or determined due to the failure of the objectors to substitute the petitioner since his death on 11/10/2015; that pursuant to Order 17 rule 2 and Order 24 Rule 3 of the Civil Procedure Rules, the objectors have never taken any action for 7 years, hence the court should dismiss the objection both for the reason of want of prosecution and abatement as provided for in the aforementioned provisions. The applicant further submitted on the validity of the transfer and not urged that it cannot be the subject of revocation as he is protected under Sections 93 (1) and (2) of the Succession Act because he bought and obtained title to KAMAGAMBO/KANYAJUOK/1640 from the petitioner and his interest is indefeasible. On the issue of re judicata, the applicant submitted that similar issues were determined in District Land Tribunal No. 20/11 and later in Kisii High Court Misc. No. 249 of 2012.

The objectors submitted on two issues. They contended that Order 24 Rule (3) of the Civil Procedure Rules does not apply in this instance; that Rule 63 of the Probate and Administration Rules does not list Order 24 Civil Procedure Rules as one of the provisions which can apply to the Law of Succession Act. The objectors relied on the decisions of **RE: Estate of Omar Abdalla Taib (2017) eKLR** and **RE: Estate of Mukita Muvingo (2019) eKLR**. On the issue of dismissal of the application for revocation for want of prosecution, the objectors submitted

that the matter has been actively in court and it has not been docile for a period of more than 12 months. The objectors relied on the case of **RE: Estate of the Late M'Mungania M'Mwongera (2019) eKLR**, where the court observed that courts should be slow to strike out succession causes unless in very clear cases because of the nature of the cases that affect rights of beneficiaries of a deceased person. The objectors prayed that the application be dismissed.

The main issues to be determined by this court are:-

- i. Whether the Objectors' application for revocation of grant dated 28/11/2012 has abated.**
- ii. Whether the Objectors' application for revocation of grant dated 28/11/2012, should be dismissed for want of prosecution.**
- iii. Whether the Objection is res judicata.**

It is not in dispute that the petitioner is now deceased. However, none of the parties have produced a death certificate to confirm this fact but in the court proceedings of 27/6/2019 before Mrima J, Ms. Onchwangi counsel for the objectors informed the court that the petitioner is now deceased and is yet to be substituted. The deceased petitioner's Counsel in his submissions of 15/7/2021, confirmed that the petitioner is deceased and they have written to his wife to attend court for substitution but she has declined.

I have duly considered the application. The applicant invoked the process of Order 17 Rule 2 and Order 24 Rule (3) of the Civil Procedure Rules.

These are however, Succession proceedings which are governed by the Law of Succession Act and the Regulations made thereunder. **Rule 63 of the Probate and Administration Rules** Cap 160 provides as follows:-

“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 Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (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.”

Rule 63 specifically provides for what provisions of the Civil Procedure Act will apply to succession matters.

It is clear from the above provision that **Orders 17 and 24 of the Civil Procedure Rules** do not apply in succession proceedings. Thus, as it was held in **RE: Estate of Omar Abdalla Taib (supra)**, the concept of abatement does not apply in succession proceedings. It goes without saying that the application for revocation cannot also be dismissed for abatement and since the petitioner is deceased, it cannot be dismissed for want of prosecution.

The cure for substitution of deceased persons in succession proceedings is found in Paragraph 14 of the 5th Schedule of Cap 160 which states:-

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.” (emphasis)

What then happens if a representative of the deceased person is unable or unwilling to act on behalf of the deceased? In the **Matter of the Estate of Gilbert Kibiti Rinchuni (Deceased) (2013) eKLR** the court held that:-

“In this case there is no evidence that the respondent has sought and obtained letters of administration. She is wife of the deceased and most likely entitled to administration of the deceased's estate and she is most likely unable and/or unwilling act. There is equally a pending suit which has not been disputed. The fifth schedule under Rule 14 clearly states that letters of administration may be granted to the nominee of a party in the suit, limited for the purpose of representing the deceased in a suit and until a final decree shall be made therein and carried into complete execution.”

Similarly, before this court, there is no evidence that there is a pending application for grant of letters of administration ad litem to substitute the deceased petitioner. Counsel merely states that the wife of the deceased has refused to come to court and there is no doubt that they are guilty of laches. In light of the provisions of Paragraph 14 of the 5th Schedule, Cap 160, the court has the powers to issue the letters of administration ad litem to the personal representative of the deceased whether or not they are willing to act.

I am duly guided by **Rule 67 of the Probate and Administration Rules** which provides;

“Where any period is fixed or granted by these rules or by an order of the court for doing any act or thing the court upon request or on its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired.”

From the above provision, enlargement of time in succession proceedings is not limited. The court on its own motion can enlarge time for purposes of the furtherance of justice to all parties involved. There being no step taken in filing of letters of administration ad litem to

substitute the petitioner, the petitioner's Counsel is allowed to do so within 30 days of this ruling.

On the issue of res judicata, there is no substantive prayer in the applicant's application, that the present objection is res judicata. The applicant mentioned it in his submissions. Submissions however, do not constitute evidence. It is trite law that parties are bound by their pleadings. The court cannot amend pleadings on behalf of litigants and decide on matters not specifically pleaded by a litigant. See the Court of Appeal decision in **Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR**. Therefore, the issue of res judicata cannot be considered at this stage.

In the end, I make the following orders:-

- i. The application dated 7/10/2020 be and is hereby dismissed.**
- ii. Counsel for the Petitioner is hereby directed to, within thirty (30) days of this ruling, file an application for letters of administration ad litem to substitute the petitioner.**
- iii. Mention on 23rd May, 2022 to confirm compliance.**
- iv. Costs shall be in the cause.**

DATED, SIGNED AND DELIVERED AT MIGORI THIS 30TH DAY OF MARCH, 2022.

R. WENDOH

JUDGE

Ruling delivered in the presence of

Mr. Kisugwa holding brief Mr. Ogwe for the Interested Party

Mr. Odero holding Ms. Ochwal for the Objector/Respondent

No appearance for the Petitioner

Nyauke Court Assistant