



REPUBLIC OF KENYA



In re Estate of Priscilla Nyambura Kirina (Deceased) (Succession Cause 1320 of 2017) [2022] KEHC 2997 (KLR) (Family) (22 April 2022) (Ruling)

Neutral citation: [2022] KEHC 2997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 1320 OF 2017

MA ODERO, J

APRIL 22, 2022

BETWEEN

JOSEPHINE WANJA MWARANGU APPLICANT

AND

CAROLINE WANJIKU NJUGUNA 1ST RESPONDENT

JAMES LOUIS NJOGU 2ND RESPONDENT

RULING

1. Before this Court for determination is the summons dated 6th August 2021 by which the Applicant/Creditor Josephine Wanja Mwarangu seeks the following that:-
 - “1. To be recognized and enjoined as a bona fide creditor to the estate of the deceased.
 2. That this honourable court orders that the estate of the deceased pays the applicant the sum of Kenya Shillings Two Million, Six Hundred Thousand (Kshs 2,600,000) being the sum owed to her creditor with interest.
 3. Costs of the application.
2. The summons which was premised upon section 86 of the *Law of Succession Act*, Rules 49 and 59 (1) (5) of the *Probate & Administration Rules* was supported by the Affidavit of even date sworn by the Applicants.
3. The Respondents Caroline Wanjiku Njuguna and James Louis Njogu who are the Administrators of the estate of the Deceased opposed the application through their Replying Affidavit dated 27th October 2021.



4. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated 2nd December 2021 whilst the Respondents relied upon their written submissions dated 14th December 2021.

Background

5. The Succession Cause relates to the estate of Priscilla Nyambura Karina, who died intestate on 26th January 2015. Following the demise of the Deceased Grant of letters of Administration Intestate were issued to Caroline Wanjiku Njuguna and James Louis Njogu (the Respondents' herein).
6. The Administrators then filed the summons dated 3rd December 2015 seeking confirmation of the Grant issued to them. The Applicant herein filed a Protest dated 20th February 2020. That Protest was heard by Hon Lady Justice Ali-Aroni, who dismissed the same vide her Ruling dated 10th June 2021.
7. The Applicant then filed the present application seeking to be recognized and enjoined to this Succession Cause as a bona fide creditor to the estate of the Deceased. As stated earlier the application was opposed by the Administrators of the estate.

Analysis and Determination

8. I have carefully considered the summons filed by the Applicant, the Replying Affidavit filed by the Respondent as well as the written submissions filed by both parties.
9. The Applicants case is that during the lifetime of the Deceased she advanced to the Deceased on diverse dates various amounts totaling Kshs 2,600,000 as follows:-



No.	Date	Money advanced by Josephine Wanja Mwarangu to Priscilla Nyambura Kirina
1.	18 th of August	Kenya Shillings Three Hundred Thousand (Kshs 300,000)
2.	2 nd of September 2014	Kenya Shillings Six Hundred Thousand (Kshs 600,000)
3.	12 th of September 2014	Kenya Shillings Two Hundred Thousand (Kshs 200,000)
4.	28 th of September 2014	Kenya Shillings Six Hundred and Fifty Thousand (Kshs 650,000)
5.	17 th of October 2014	Kenya Shillings Two Hundred Thousand (Kshs 200,000)
6.	17 th of December 2014	Kenya Shillings One Hundred and Fifty Thousand (Kshs 150,000)
7	22 nd of January 2015	Kenya Shillings Five Hundred Thousand (Kshs 500,000)
Total		Kenya Shillings Two Million Four Hundred and Fifty Thousand (Kshs 2,600,000)

10. The Applicant has annexed to her summons copies of several agreements allegedly signed by the Deceased acknowledging receipt of the amounts in question (Annexures 'JWM1' – 'JWM-8'). The Applicant now seeks to have this debt to herself settled prior to confirmation of the Grant.
11. In opposing the summons the Respondents contend that the same is Res Judicata as the issues raised therein were heard and determined by Hon Lady Justice Ali-Aroni vide her Ruling of 10th June 2021.
12. The doctrine of res judicata is set out under 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”.



13. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR; the Court of Appeal stated as follows:-

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice”. (own emphasis)

14. Therefore party seeking to rely on the doctrine of res judicata to bar a suit from being heard must prove each of the following elements:

- a) The suit or issue was directly and substantially in issue in the former suit;
- b) The former suit was between the same parties or between the same parties under whom they or any of them claim;
- c) The parties were litigating under the same title in the former suit; and
- d) 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.

15. I have carefully perused the Protest dated 20th February 2020 as well as the Ruling delivered on 10th June 2021. The Applicant filed the Protest not in her personal capacity but in her capacity as a Director of Strumech Engineering & Construction Co. Ltd, whom she claimed had entered into a sale Agreement with the Deceased for the purchase of the property known as L.R. No Dagoretti/Kangemi Township/451.

16. In paragraph 4 and 5 of the Ruling Dated 10th June 2021 Hon Lady Justice Ali-Aroni observed as follows:-

“4. It is not in dispute that on the 24th of November 2014 the deceased entered into a sale agreement with Strumech Engineering & Construction Limited for the purchase of the land in question for the sum of Kshs 16,000,000/- and a deposit of 10% being Kshs 1,600,000/- was paid to the Deceased.

5. The Objector is a director of Strumech Engineering & Construction Limited and it is her case that she paid a 10% deposit and advance further sums to the Deceased and/or her agents; in total she made an advance payment of Kshs 5,000,000/- and as such she ought to be allowed by the estate to complete the transaction with the terms and conditions in the sale agreement.”

17. On the other hand in the present application the applicant is suing in her personal capacity for loans which she allegedly advanced to the Deceased during her lifetime. Therefore the amount of Kshs 1,600,000 referred to in the Respondents Replying Affidavit refers to the amount paid as a 10% deposit of the purchase price for the land in Dagoretti and does not refer to payment made for the personal loans allegedly advanced to the Deceased.



18. It is manifest therefore that the sum of Kshs 2,600,000 referred to in the present application is totally distinct and separate from the Kshs 1,6000,000 referred to in the Ruling of 10th June 2021. As such, I find that the issues raised in this present application have not been previously heard and determined by a court of competent jurisdiction and therefore the matter is not Res Judicata.
19. It is trite that the duties of a probate court is to identify the estate of a Deceased, identify the lawful beneficiaries of the estate and facilitate the distribution of the estate to those lawful beneficiaries. *In Re Estate of Alice Mumbua Mutua (Deceased)* 2017 eKLR Hon Justice Musyoka stated as follows:-
- “The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.
20. The Applicant claims that she loaned to the Deceased a total amount of Kshs 2,600,000. It is not the duty of the Probate Court to determine the veracity of this claim. The Applicant by her summons dated 6th August 2021 is seeking to enforce the alleged loan Agreements. This amount to a civil claim. The proper forum for enforcement of this claim is by way of a suit filed in the court with proper jurisdiction to handle such claims.
21. In the circumstances the Applicant ought to file a suit against the Administrators of the estate to recover the amount (if any) due to her. This court lacks jurisdiction to entertain the Applicants claim. According I dismiss in its entirety the summons dated 6th August 2021. Each party to meet its own costs.

DATED IN NAIROBI THIS 22ND DAY OF APRIL 2022.

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MAUREEN A. ODERO

JUDGE

