



REPUBLIC OF KENYA



**In re Estate of Mbaya Mbariri (Deceased) (Succession Cause
2095 of 1994) [2022] KEHC 408 (KLR) (Family) (1 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 408 (KLR)

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

SUCCESSION CAUSE 2095 OF 1994

MA ODERO, J

APRIL 1, 2022

IN THE MATTER OF THE ESTATE OF MBAYA MBARIRI (DECEASED)

BETWEEN

**MARIAMU KAGONDU NJAGI 1ST APPLICANT
GRACE WARUI MURIUKI 2ND APPLICANT
CHARITY RUGURU KARIUKI 3RD APPLICANT
SUSAN WANJOKA MUCIRA 4TH APPLICANT
PETER MWAI MBAYA 5TH APPLICANT
DAVID MURIITHI GATIMU 6TH APPLICANT
JOSEPHAT SIMON KARINGA NJAGI 7TH APPLICANT**

AND

**SIMON GITARI 1ST RESPONDENT
GICHOBI NJAGI 2ND RESPONDENT**

RULING

1. Before this Court for determination is the Notice of Preliminary objection dated 9th November 2021 by which Simon Gitari And Gichobi Njagi (hereinafter referred to as ‘the Respondents’) seeking to have the summons dated 10th January 2021 filed by the Applicants struck out.
2. The Applicants opposed the Preliminary Objection through their reply dated 1st December 2021 sworn by Mariamu Kagondu Njagi (the 1st Applicants). The matter was canvassed by way of written



submissions. Both the Respondents and the Applicants filed written submissions dated 17th December 2021.

Background

3. This Succession Cause relates to the estate of the late Mbaya Mabariri who died intestate on 25th February 1986. The Deceased was survived by two (2) Houses. Following the demise of the Deceased a dispute arose between his beneficiaries in respect of the property known as LR No Kabare/njuki/34 (hereinafter the 'suit land') which was the family home. The original protagonists (now both Deceased) in this dispute were Jane Mbaya Mbariri (the mother of the Applicants) and Njagi Mburugu who was the father to the Respondents)
4. The dispute over the suit land ended up in court vide Kerugoya Succession Cause No. 37 of 1999 heard in the Magistrates Court. The Kerugoya Resident Magistrate's Court with the consent of the parties referred the dispute to arbitration. The Arbitrators who were community elders determined that eight (8) acres of LR No. Kabare/Njuku/34 be awarded to Jane Mbaya Mbariri (representing the 1st House) whilst six (6) acres of the suit land was awarded Njagi Mburugu (representing the 2nd House).
5. Being dissatisfied with this award Jane Mbaya contested the same. By a Ruling dated 6th August 1993 the learned Resident magistrate dismissed her objection.
6. Following the demise of Jane Mbaya Mbariri the 5th Applicant Ann Wambura who was her daughter then filed the present Succession Cause in the High Court in Nairobi in which she petitioned for and obtained letters of Administration Intestate dated 21st March 1995. A certificate of confirmed Grant was later issued on 6th December 1996.
7. The 2nd Respondent Njagi Mburugu filed a summons dated 7th October 1998 seeking Revocation of the Grant issued to the 5th Applicant alleging that the Grant was obtained fraudulently by misleading the High Court. The 2nd Respondent claimed that this Succession Cause was filed covertly in an obvious attempt to defeat the orders made by the Resident Magistrates Court and that the involvement and/or consent of the Respondents were not sought and/or obtained before the Grant was issued to the 5th Applicant.
8. The summons for Revocation was heard by Hon Lady Justice Rawal (retired) who in a Ruling dated 15th October 2008 allowed the summons and revoked the Grant issued to the 5th Respondent. The Hon Judge vide an order dated 14th May 2019 upheld the decision made by the Arbitrators and directed that the suit land be subdivided into two parts of eight (8) acre and six (6) acres and distributed to the 1st and 2nd Houses respectively.
9. The matter did not end there. The 5th Applicant filed an appeal against the Ruling of Hon Justice Rawal being Appeal No. 71 of 2009 which Appeal was dismissed on 6th December 2017.
10. Thereafter the Respondents filed an application seeking orders to have the Hon Deputy Registrar sign the relevant transfer document in order to give effect to the orders of the court. Instead the 5th Applicant filed an application dated 17th May 2019 seeking stay of execution of the courts orders of 14th May 2019, and seeking a review and/or setting aside of the orders made by Hon Justice Rawal on 15th October 2008. This application was dismissed by Hon Lady Justice Ali-Aroni vide a Ruling delivered on 27th February 2020.
11. Still not satisfied the seven (7) Applicants herein filed the summons dated 10th January 2021 seeking to have the letters of administration and confirmed Grant issued by the court in regard to the estate of the Deceased revoked. In response to the summons filed by the Applicants the Respondents filed this



Notice of Preliminary Objection. The Notice of Preliminary Objection was premised on the following grounds:-

1. That the Application offends the principle of Finality since the suit was heard and determined on its merits and ruling delivered by Rtd. Honourable Lady Justice Kalpana Rawal on 15th October 2008.
 2. That on 27th February 2020 Honourable Lady Justice Ali-Aroni dismissed the Applicants application seeking review and/or set aside the courts orders issued by Rtd. Honourable Lady Justice Kalpana Rawal seeking the same orders sought by this application.
 3. That the issues that the Applicants have raised in their application are barred by res judicata as they had been adjudicated upon and a ruling entered.
 4. That this court is now functus officio the matter having been adjudicated upon by the High court.
 5. That based on the aforesaid reasons, the jurisdiction of this court has been improperly invoked.
 6. That the Application is an abuse of the court process and is meant to delay distribution of the deceased's estate.
 7. That the application as filed herein is frivolous, vexatious and utter abuse of the court process and should be dismissed with costs to the Respondents”.
12. I have carefully considered this Notice of Preliminary Objection, the Affidavit filed in Reply as well as the written submissions filed by both parties. The definition of what constitutes a Preliminary Objection was set out in the celebrated case of *Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Co. Ltd* [1969] EA which the court observed as follows:-

“As 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, or 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. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper practice of raising points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop.” (own emphasis).

13. Closer home, the Supreme Court of Kenya in the case of *Independent Electoral & Boundaries Commission – v – Jane Cheprenger & 2 others* [2015] eKLR stated thus:-

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of



dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

14. Therefore it is clear that a Preliminary Objection can only be raised on a pure point of law, one which upon determination may dispose of the suit entirely.
15. The Respondents in their objection have stated that the issues which have been raised by the Applicants in their summons dated 10th January 2021 are ‘*Res Judicata*’.
16. 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”.
17. 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)
18. 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.
19. Undoubtedly, this succession dispute has been ongoing since the year 1995 when the Deceased passed away. The matter has been litigated all the way of the Court of Appeal and back.
20. The Applicants mother who was the 1st wife of the Deceased was embroiled in a dispute with the 2nd Respondent’s father who being the only son of the 2nd wife represented the 2nd House. After the demise of the Deceased the mother of the Applicants filed a Succession Cause in Kerugoya being Succession Cause No. 37 of 1998. That suit was referred to arbitration and the elders decided that the family of Jane Mbaya Mbariri (representing the 1st House be awarded 8 acres of the suit land whilst the family of Njagi Mburugu (representing the 2nd House be awarded six (6) acres. The court adopted this Arbitration Award.



21. The Applicants allege that they were not involved and did not participate in the previous suits involving the estate of the Deceased. This allegation is not borne out by the facts. The Succession Cause in Kerugoya was filed by the mother of the Applicants on behalf of the 1st House which included the Applicants herein. Indeed they were awarded eight (8) acres of the suit land.
22. The interests of the Applicants in this matter were represented first by their mother Jane Mbaya Mbariri and thereafter by their sister Ann Wambura Mbaya. At no time did any of the Applicants move to court to challenge the filing of the suits on behalf of the 1st House. Their claim not to have been involved in the Succession Cause to date is disingenuous and is simply untrue.
23. It is manifest therefore that the issues now being raised in the summons for Revocation of Grant filed by the Applicants have been conclusively dealt with.
24. The issues now being raised were conclusively dealt with by Hon Lady Justice Rawal in her Ruling dated 15th October 2008. In that Ruling the learned Judge observed as follows:-

“It does not need a deep consideration of the facts to find that the administratrix herein has misled the court with stark defiance of the order made by the competent court and concealment of the fact that from this court. The objector’s summon for revocation of the grant dated 21st March 1995 and certificate of confirmation of grant dated 6th December 1996 is allowed and I direct that the grant of representation made in favour of the Administratrix and the certificate of confirmation dated 6th December 1996 are revoked”.

25. The Applicant Ann Wambura (representing the 1st House) filed an application seeking to review and/or set aside the Ruling of 15th October 2008 as well as the courts orders of 14th May 2019. In dismissing that application Hon Lady Justice Ali-Aroni in her Ruling delivered on 27th February 2020 observed as follows:-

“I will echo the sentiments of Rawal J, and add that the current applicant is not only defiant but completely dishonest and every move taken by her in this cause is in total disregard of the law, and out of circumvent and defeat the cause of justice. I also stop to wonder whether counsel currently on record read the record for the reasons above and to be expounded further in this Ruling as indeed this is a court of record”.

26. In short, this matter has been litigated to death. The Applicants should stop bombarding the court with applications over a matter which has already been determined. This amounts to an abuse of court process not to mention it being a monumental waste of judicial time. A decision has been made. The Applicants will have to live with that decision as unpalatable as it may be to them. Litigation must come to an end. This summons for revocation of Grant is another attempt by the Applicants to flog a dead horse. I find that this matter is Res Judicata. Accordingly, I find merit the Preliminary Objection. The Summons for Revocation of Grant dated 10th January 2021 is hereby struck out. This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 1ST DAY OF APRIL 2022.

MAUREEN A. ODERO

JUDGE

