In re Estate of Dominic Mutuku Mwole (Deceased) (Succession Cause 1035 of 2012) [2022] KEHC 12106 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEHC 12106 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

SUCCESSION CAUSE 1035 OF 2012

GV ODUNGA, J

JUNE 30, 2022

IN THE MATTER OF THE ESTATE OF DOMINIC MUTUKU MWOLE (DECEASED)

BETWEEN

RAPHAEL KYALO ILUNGA ..... 1ST APPLICANT

URBANUS MUINDE MUTUKU ..... 2ND APPLICANT

AND

DANIEL MBITHUKA MBINDA ..... RESPONDENT

RULING

1. By summons for revocation or annulment of grant dated March 14, 2022, the applicants herein, Raphael Kyalo Ilunga and Urbanus Muinde Mutuku, seek the following orders:

    1) That this application be certified as urgent, service dispensed with and heard *ex-parte* in the first instance.

    2) That the grant of letters of administration intestate of the deceased's estate issued by this honourable court to Daniel Mbithuka Mbindaon January 17, 2014 and rectified on November 6, 2019 be revoked and/or annulled.

    3) That this honourable court be pleased to unconditionally set-aside the proceedings in Citation Cause No 453 of 2009 and all consequential orders thereto.

    4) That this honourable court be pleased to grant leave to the applicants and/or their advocates to cross-examine two court process servers namely Francis M Mwanziaand Andrew Kyalo Mwanziaon oath.

    5) That this honourable court be pleased to vary, review and/or set aside its orders of November 6, 2019.

6) That this honourable court be pleased to issue an order directing the Machakos County Surveyor and The Machakos County Lands Registrarto hold any pending applications and/or transactions regarding land parcel No Machakos/Mua Hills/650 in abeyance pending the hearing and final determination of these summons.

7) That this honourable court do grant an order staying any mutation and/or subdivision of all that property known as Machakos/Mua Hills/650 pending hearing and final determination of this application.

8) That this honourable court be pleased to issue an order directing the Machakos County Surveyor to undertake a survey of all that property known as Machakos/Mua Hills/650 in the presence of all parties, beneficiaries, interested parties and/or purchasers taking into account the position development and/or *bona-fide* interests of all parties, beneficiaries, interested parties and/or purchasers thereon.

9) That this honourable court's deputy registrar be present for the above pleaded exercise and file a report thereabout in court.

10) That upon granting prayers 2 and 3 hereinabove, this honourable court be pleased to issue a fresh grant in the names of Raphael Kyalo Ilunga, Urbanus Muinde Mutuku and Daniel Mbithuka Mbindaas joint administrators.

11) That costs of this application be provided for.

Applicant's Case

2. According to the 2nd applicant, Urbanus Muinde Mutuku, the deceased herein, Dominic Mutuku Mwole was his father and that the respondent herein is not related to the deceased. However, the respondent is the administrator of his late father's estate pursuant to a grant of letters of administration issued by this honourable court on January 17, 2014 and rectified on November 6, 2019. He deposed that the said grant was obtained by the respondent pursuant to citation proceedings *vide* Citation Cause No 453 of 2009 which culminated in the respondent herein obtaining leave of this court to petition for letters of administration for his deceased father's estate vide the order dated June 18, 2012.

3. It was averred that the respondent was granted audience by this court to petition for the said grant owing to his representation that he was a creditor of the estate of the deceased having allegedly bought 15 acres of parcel No Machakos/Mua Hills/650 from the deceased before his demise, the same having not been transferred into his (the respondents') name as at the time of the demise of the deceased herein. It was however averred that in the said citation, only the deponent's mother, Jane Katunge Mutuku-deceased who at the time was elderly and did not participate in the proceedings, was cited.

4. Based on legal advice, the 2nd applicant averred that the respondent ought to have cited all beneficiaries known to him since at the time of filing the citation proceedings, the respondent herein knew his brother, John Nzivo Mutuku who was a witness to the sale of the portion of Machakos/Mua Hills/650 to the respondent and wilfully omitted to cite him as well.

5. The 2nd applicant believed that service of both the citation proceedings as well as the hearing notice of the summons for confirmation of grant were made irregularly as the two concerned process servers who were instructed on different occasions to serve his elderly mother with proceedings appear to refer in their respective affidavits of service to have effected service upon the same person but in different geo-locations yet one claims to have served her before there which is clearly not the case. On the strength of legal advice, the 2nd applicant averred that service is at the core of citation proceedings as well as

proceedings regarding confirmation of a grant and owing to the said manifest discrepancies the citation as well as the confirmation proceedings are defective in substance and further that there is an urgent need to have the two concerned process servers cross-examined on oath over the averments they made.

6. It was disclosed that after the issuance of the grant on January 17, 2014in favour of the respondent, the said grant was rectified on November 6, 2019to the extent that the property, Machakos/Mua Hills/650 where the respondent claimed 15 acres out of the total 39.22 hectares (approximately 97 acres) be registered in the name of the respondent and the remaining portion revert to the estate of the deceased the total acreage of Machakos/Mua Hills/650 was 39.22 acres (Approximately 97 Acres) and that the respondent was claiming only 15 acres therefrom.

7. According to the 1st applicant, the grant issued in favour of the respondent is ambiguous, defective and inoperative as it does not specify which part of Machakos/Mua Hills/650 which measures a total of 39.22 ha (approximately 97 acres) that the respondent is to claim his 15 acre parcel.

8. It was averred that the beneficiaries and interested parties noted with tremendous concern that the administrator herein on the strength of the said grant and further with the ambiguity apparent on the face of it as elaborated hereinabove may cause eviction, demolition of structures erected by the beneficiaries and/or interested parties or cause parts of the 39.22 ha already established by the courts as being the entire parcel belonging to the estate of the deceased to be registered in his name as a result of his cherry picking of prime portions of the property to claim as his own seeing that he is entitled according to the grant to 15 acres thereof. It was further averred that the grant omitted other properties owned by the deceased and the distribution thereto.

9. It was disclosed that the beneficiaries have recently discovered that the deceased had further sold other portions of the said Machakos/Mua Hills/650 to other parties in his lifetime. It was asserted that owing to the ambiguity of the said grant, the respondent herein has been cherry-picking his preferred section of 15 acres different from where he has been occupying causing anxiety among other bona-fide purchasers settled thereon. In addition, on the strength of the said grant, the respondent has, to the detriment of other bona-fide purchasers for value, caused land parcel No Machakos/Mua Hills/650 to be further subdivided into 12 smaller portions.

10. In the 2nd applicant's view, the present impasse on the concerned property can simply be solved by having a fresh survey undertaken in presence of all the parties to ascertain the true state of affairs on the ground and a fresh grant issued as the one presently in force is defective in substance. The said applicant believed that this court sitting as a succession court has got such wide powers enabling it to make any order for the ends of justice to be met.

11. There was also an affidavit sworn by the 1st applicant, Raphael Kyalo Ilunga, in which he averred that while the respondent averred that he was a purchaser for value of a total of 15 acres being part of Machakos/Mua Hills/650, the respondent failed to disclose the existence of any other beneficiaries and/or interested parties to the estate of the deceased. The 1st applicant disclosed that vide several written sale agreements the deceased during his lifetime sold a portion of Machakos/Mua Hills/650 to the 1st applicant. It was therefore his view that being a purchaser for value of a portion of Machakos/Mua Hills/650, he ranks in equal priority as the respondent herein in consideration for grants of letters of administration.

12. It was averred by the 1st applicant that sometime in the year 2004, after he had already purchased a portion of the deceased's land from him during his lifetime, the applicant had some form of dispute with the deceased herein which escalated into being heard by the lands dispute tribunal.

13. According to the 1st applicant, pursuant to grant of letters of administration issued by this court on January 17, 2014 and rectified on October 6, 2019, the respondent has abused the powers conferred to him by threating the occupation and use of the aforementioned parcel of land by purporting to hive off prime and developed portions on which other beneficiaries (who include the deceased's immediate family) and himself have been in use and occupation of the right since the deceased's lifetime todate under the guise, that the same fall within the 15 acres he is entitled to. The 1st applicant contended that he has erected permanent structures on his said purchased portion and further undertaken numerous developments thereon which he risks to losing should the respondent herein not be called to order. He disclosed that part of his aforementioned permanent structures is a dwelling house which he considers as home.

14. It was therefore his position that the prayers sought herein are well merited in view of the fact that in confirming or rectifying the grant herein the court was not presented with a sketch map on the basis of which actual position of the respondent's position could have been ascertained. He noted that the administrator, on the strength of the said grant which does not disclose the exact whereabouts of his said 15-acre parcel out of the total 39.22 ha parcel owned by the deceased, has been traversing the property in apparent bravado picking out prime portions of the said property which he intends to claim as his own. It was further averred that the respondent is hurriedly engaging in survey and mutation processes which must be stopped until the position of his aforementioned 15 acres is clearly ascertained.

15. The 1st applicant was apprehensive of an imminent risk that the survey and mutation exercise being undertaken by the administrator on the strength of a defective grant that is ambiguous as to where the administrators said 15-acre portion is located on the deceased parcel which measures a total of 39.22 hectares (approximately 97 acres) may result in eviction of bona fide beneficiaries and/or interested parties by causing title documents to issue with respect to parcels already occupied and developed by beneficiaries and/or interested parties and consequent demolition of the structures erected on my portion.

16. The 1st applicant further deposed that he had ascertained that physical service upon the deceased's wife and on which the citation proceedings herein were premised on was not effected hence the prayer that the said process server who is said to have effected the said service be cross examined on oath to bring out this position.

17. In the further affidavits sworn by the two deponents, they averred that they had discovered that the process sever who purportedly served the said citation on the now deceased Katunge Mutuku Mwole was not and is still not in fact registered with the process Servers Licencing Committee thereby making the entire citation proceedings a sham and an illegality ab-initio.

18. In response to the summons, the respondent, Daniel Mbithuka Mbinda, admitted that he became an administrator of the deceased estate by virtue of citation proceedings necessitated by the fact that he bought land from the deceased who died before transferring the same to him hence forcing him to cite his now deceased wife. Upon the deceased's wife failing to take out letters of administration he was allowed to take out the letters of administration, which he did through this succession cause, all in the interest of acquiring the 15 acres he lawfully purchased from the deceased.

19. However, before he could successfully subdivide and transfer his portion of land lawfully bought by him from the deceased, the deceased's wife filed an application seeking to revoke letters of administration duly issued to him and stopping any registration and/or any dealings with the deceased property known as Machakos/Mua Hills /650 from where his 15 acres were to be excised. The

deceased's wife unfortunately passed on before the application was heard and the 2nd applicant herein was substituted in place of his mother.

20. It was averred that the application was then heard through viva voice evidence and dismissed for lacking merit and the court ordered that he proceeds to administer the 15 acres due to him and the balance of the acreage being 24.22 acres revert back to the deceased estate. The 2nd applicant sought leave out of time against the ruling but his application was similarly found to have no merit and was dismissed.

21. The respondent explained that his powers in respect of the administration of the deceased's estate were only limited to the portion of 15 acres lawfully bought and allocated to him by the court since the balance of the acreage of 24.22 acres reverted back to the estate.

22. Based on legal advice, the 1st applicant averred that the 2nd applicant is barred by law to seek for the same orders of revocation of grant as this same prayer was heard and determined in his earlier application which makes this application *res judicata* and the court functus officio. In his view, the 2nd applicant is using the back door to attempt to retry issues that have already been heard and determined by this court and the court of appeal and urged the court to strenuously condemn this mischief.

23. According to the respondent, if the 1st applicant bought land from the deceased as he claims, his portion can only be claimed from the balance of 24.22 acres that reverted back to the estate, and the Respondent does not possess the powers or the legal capacity to transfer and/or administer the deceased estate in respect to the portion that reverted back to the estate hence this application before the court is a non-starter and a waste of judicial time.

24. In the respondent's view, the available recourse for the 2nd applicant is to congregate his siblings and start off the succession proceedings in respect to the 24.22 acres that reverted back to the estate and disclose all liabilities to the estate for the benefit of the 1st applicant and the other creditors to the estate. As for the 1st applicant, being an alleged purchaser, he has two available recourses namely cite the beneficiaries of the deceased as the respondent did for them to take out letters of administration failure to which he can apply to take them out or in the alternative ask the 2nd applicant to start off the succession in respect to the 24.22 acres so that his rights can be included as a liability to the deceased estate.

25. According to the respondent, the prayers sought by the applicants to have the letters of administration issued in his names to be revoked or annulled and citation proceedings be set aside is misconceived and incompetent as the claim they have is against the 24.22 acres that reverted to the estate, and the letters of administration issued to him limit his powers to his 15 acres, therefore their interests are not in any way affected by the letters of administration issued to me.

26. Based on legal advice, he averred that an applicant can only seek to cross examine a process server or servers, when such applicant is disputing service of court documents upon himself/ herself to proceedings s/he was a party to. In this case, since the 1st applicant was not party to the citation proceedings where the process servers effected service upon the citee, now deceased, there is no logical explanation as to what would be achieved by the cross examination of the said process servers by the 1st applicant other than a waste of judicial time.

27. It was averred that since the 2nd applicant fully participated in the application seeking to revoke letters of administration issued to the respondent through the citation proceedings, which application was dismissed, there are no cogent reasons why he would wish to cross examine the process servers to proceedings he participated in other than to waste time and resources for ulterior motives.

28. As regards the allegations that he was cherry picking prime land, it was his contention that the said allegation is preposterous and defaming as clearly evidenced by the ruling which clearly evidences the fact that he bought his 15 acres way back in the year 1988, 8 years before the 1st applicant allegedly bought his, and when the 2nd applicant was a boy of 10 years, and the Respondent's portions were identified by the deceased, his late wife the original respondent in this cause, their son John Nzivo Mutuku and the respondent.

29. The respondent further denied that he concealed material facts. According to him, as a citor his only interests were the portion of 15 acres purchased from the deceased, and there was no way he would be privy or concerned with the interests of other parties who had similar claims over the estate. According to him, had he trespassed on land already developed by the applicants as falsely purported, by now the 1st applicant would have pressed criminal charges of trespass and filed a civil claim at the Environment and land court for unlawful and illegal trespass and encroachment of land instead of pursuing this misguided and ill motivated application a clear indication that the applicants are just crying wolf in order to give their application forged credence.

30. The respondent averred that his 15 acre surveyed and amended by the map is vacant land, portions and were identified by the deceased, his late wife, their son John Nzivo Mutuku way back in 1988. The respondent lamented that he has incurred substantial expenses to have the land known as Machakos/ Mua Hills /650 surveyed and the map amended and the mutation is about to be registered that would give rise to two titles, namely 15 acres registered in his names and 24.22 acres registered in the names of the deceased as per the court orders.

31. He therefore prayed that this application be dismissed for lacking merit and he be allowed to continue to administer his 15 acres so that he can finally procure a title deed in his names and the remaining 24.22 acres are registered in the names of the deceased so that any person such as the applicants herein claiming purchaser interest can be able to legally pursue such claims and the deceased beneficiaries can also be able to administer the outstanding deceased's estate.

32. On behalf of the applicants, it was submitted that discretion of this court to set aside *ex-parte* proceedings is wide and unfettered based on *Shah v Mbogo and another* [1967] EA 116. In this case it was submitted that it is undisputed that the now deceased widow of the deceased did not in any way participate in the impugned citation proceedings. In this regard the applicants relied on *Captain Philip Ongom v Catherine Nyero Owota* SCCA 14/2/2001 [2003] KALR, and submitted that service of the impugned citation was not properly effected, the same having been shown to have been purportedly undertaken by an unlicensed individual who is a stranger to the Process Servers Licencing Committee, hence the non-attendance of the citor in the said proceedings.

33. It was contended that the defective service (if at all there was any service) directly caused the non-attendance of the citation proceedings hence the exigent need to have the concerned process servers cross-examined. In this rgard relian was sought in *Andrew Kiptonui Biegon & another v Thomsa Kiplangat Chirchir & another* [2019] eKLR where it was held that;

> "...Then there was the issue of service. The applicants said they were not served. The respondents said there was service. There was then an apparent shift by the applicants and they averred that the alleged service was done by an unlicensed process server. They even challenged the respondents to show that the server was licensed. I have looked at the records. It appears to me that there was service. I think the applicants themselves may have noticed this, hence the shift to allege that the server was not licensed. In my view, if the applicants wanted the court to fault the respondents for seeking services of unlicensed

server, they should have done more than merely allege. Such an allegation should have been accompanied by a letter or any other relevant document from the licensing body showing that the alleged server had no licence. That is what is normally done. But the applicants merely allege and shift the burden to the respondents. This is not acceptable. They should have done it well themselves before shifting the burden.

Besides, a more prudent move of calling the sever for cross-examination in court by them may have helped. Again this was not done. On a mere allegation therefore, the court is supposed to believe that the server was not licensed and, on that basis too, task the respondents with the duty to prove otherwise. Needless to say, this is not the proper way to do it..."

34. In the circumstances, it was submitted that the applicants herein have followed the proper procedure as contemplated by the court hereinabove. Not only have they registered their apprehensions pertaining the said alleged service, they have gone a step forward and sought this courts permission to have them cross-examined, and, further have independently established the licencing status of one of them (who purportedly served the impugned citation) as being non-existant. This not only warrants their (the process servers) cross examination but further invalidates the entire citation *ab-initio*.

35. According to the applicants, whereas the ruling dated November 6, 2019 rectifies the grant as issued to the respondent herein to reflect the 15 acres to be administered by him, the said ruling on the face of it as well as the grant as issued are erroneous since an official search of Machakos/Mua Hills/650 conducted reveals that the total acreage of the said land parcel is 39.22 Hectares (HA) (approx 90 acres) and not 39.22 Acres as represented in the ruling along with the confirmed grant. Reference was made to *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR and *Muyodi v Industrial and Commercial Development Corporation & another* (2006) 1 EA 243 and it was submitted that the variance of the true dimensions of Machakos/Mua Hills/650 as they appear on the title and the grant constitutes an error on the face of it which needs no elaborate argument to establish. By implication, therefore, the grant conferred upon the respondent herein empowers him to administer 15 hectares rather than the 15 acres belonging to him. On the strength of the said error the respondent herein has been shown to have initiated the process of subdivision and registration of these erroneous portions in his name which actions will ultimately lead to insurmountable loss on the part of other beneficiaries and *bona-fide* purchasers thereby necessitating needless litigation which can simply be prevented by granting the orders sought herein.

36. It was further submitted that this court, in consideration of the fact that the grant herein was indeed being issued to a purchaser and not a direct beneficiary of the estate of the deceased ought to have issued the same with certainty that the said administration was limited in scope only to the portion of property apportioned to the said purchaser (this being 15-acres). The only substantive way to achieve this certainty is to have the entire Machakos/ Mua Hills/650 surveyed and the respondent's true portion be hived off, then confirm the grant in his name. In the applicant's view, this constitutes an error on a substantial point of law which cannot reasonably have differing opinions. Premised on the foregoing, it was submitted that the applicants herein have substantively met the conditions precedent for an order of review of the ruling dated November 6, 2019 which we so pray your lordship to find and hold.

37. The applicants implored the court to invoke the inherent powers saved in rule 73 of the *Probate and Administration Rules* and proceed to revoke the grant, issue an order that a survey of the entire estate of the deceased, this being the entire Machakos/Mua Hills/650 be undertaken in the presence of all parties with a view to ensuring the ends of justice are met by confirming that every party (beneficiaries, interested parties and the respondent herein) are not adversely affected by the actions of the applicant

in his said subdivision of the 15 acres purchased by him. As such, the occupation and developments of every party ought to be taken into account.

38. On the other hand, it was submitted on behalf of the respondent that the 2nd applicant herein sought for the same prayers he is seeking in the present application in his earlier application in which he sought inter alia for orders of the revocation of the respondent's letters of administration. The said application was heard and determined by a ruling dismissing the same on the November 6, 2019. According to the respondent, the present application before the court, is in respect to the same title, one of the applicants, the 2nd applicant herein was the applicant in the said application, the 1st applicant claims under the 1st applicant and the main prayers/issues being sought for by the applicants were already decided upon by the said ruling and additionally, the application was heard through viva voice evidence, all the issues now being raised by the applicants in respect to the said proceedings were canvassed in the hearing and a determination made.

39. It was further submitted that the applicants have identified themselves as a purchaser to the deceased's estate and one of the beneficiaries to the deceased's estates respectively. The grant of letters of administration they seek to revoke are letters issued to the respondent limited to his purchaser's interests of 15 acres. These letters do not affect the interest of the beneficiaries to the deceased's estate nor do they affect the interests of any purported purchaser of the deceased's estate. In the respondent's contention, both applicants do not have the capacity to seek for revocation of this grant which was issued limited specifically to the respondent's interests. The argument in the applicants' affidavits that the respondent did not disclose other purchasers to the deceased's estate is preposterous as the respondent being a purchaser there was no way he would have been privy to the interest of the other purchasers or liabilities to the deceased's estate and he could only legally pursue his interests, as he did.

40. It was submitted that since none of the applicants is an administrator to the deceased's estate none of them possesses the legal capacity to seek for any orders in respect to the deceased's estate. Only an administrator to the deceased's estate can supervise a survey of his land or any other dealings to the deceased's estate. Any other person is considered an intermeddler.

41. It was submitted that the applicants having filed this application with the knowledge that the orders being sought for have already been determined against them through lengthy viva voice proceedings, and the fact that they have no capacity to seek for orders they are seeking makes this application nothing but an abuse of the court process.

42. According to the respondent, based on *Martha Wambui v Irene Wanjiru Mwangi & another* [2015] eKLR as quoted in the case of *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR, it is settled matter of law that an applicant cannot pursue an appeal and a review against the same orders. Once an appeal is lodged against an order/s the right of review is automatically lost and vice verse.

43. It was submitted that the 2nd applicant did file an application seeking to file an appeal out of time and that the application having not succeeded in the court of appeal the applicants have now chosen to go on a shopping spree with the hope that the court would look away and pretend that they are not abusing the court process. To the respondent, as long as the 2nd applicant filed an appeal, the applicants' rights to a review was extinguished.

44. It was submitted that there are no new facts allegedly discovered that would affect the outcome of the earlier proceedings. The letters of administration issued to the respondent limit his powers to the administration of his 15 acres. The interests of the applicants can only be pursued from the land that reverted back to the estate. There are no new facts placed before the court that would alter the

determination made by the court 4 years ago. It was further submitted that the application for review has been sought 4 years after the delivery of the ruling. The applicants have not in any of their affidavits attempted to explain this inordinate delay. This application is an afterthought and a vehicle to thwart the ends of justice.

45. Guided by the depositions in the replying affidavit and the submissions, the respondent urged the court to dismiss the application with costs to the respondent.

Determination

46. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed. It is clear that the substance of the summons is the revocation of the grant.

47. Section 76(a), (b) and (c) of the *Law of Succession Act* provides as hereunder:

> A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
>
> (a) that the proceedings to obtain the grant were defective in substance;
>
> (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
>
> (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

48. Before proceeding to determine the merits of the case, it is important to note that by summons dated June 2, 2015, the subject of this ruling, the 2nd applicant herein sought an order that the grant issued herein be revoked and/or annulled on the ground that the respondent herein gave false information and deliberately misled the court and concealed material facts to wit the lawful beneficiaries of the estate of the deceased. That application was however, on November 6, 2019 found unmerited and was disallowed. In doing so, the court expressed itself as hereunder:

> " Based on the foregoing I also find merit in the summons for rectification of confirmed grant dated July 9, 2018. Accordingly, I direct that the confirmed grant herein be rectified to reflect the correct acreage to be administered by the petitioner as 15 acres of the said land parcel Machakos/Mua Hills/650 instead of the entire parcel which measures 39.22 acres and that the remaining portion of the same measuring 24.22 acres revert to the estate of the deceased."

49. In those circumstances, can the 2nd applicant properly bring another application seeking to have the grant revoked or annulled. Section 7 of the *Civil Procedure Act*, 2010 provides as hereunder:

> " 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."

50. As regards the rationale of the doctrine of *res judicata*, reliance was placed on the decision of the Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR.

> " 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."

51. In the *Maina Kiai* case (*supra*), the court quoted with approval the Indian Supreme Court in the case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789 where it was stated;

> " The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

52. In *Lotta v Tanaki* [2003] 2 EA 556 it was held as follows:

> " The doctrine of *res judicata* is provided for in order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are:
>
> (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;
>
> (ii) the former suit must have been between the same parties or privies claiming under them;
>
> (iii) the parties must have litigated under the same title in the former suit;
>
> (iv) the court which decided the former suit must have been competent to try the subsequent suit; and
>
> (v) the matter in issue must have been heard and finally decided in the former suit."

53. In *Gurbachan Singh Kalsi v Yowani Ekori* Civil Appeal No 62 of 1958 the former East African Court of Appeal stated as follows:

> " Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

54. In *Apondi v Canuald Metal Packaging* [2005] 1 EA 12 Waki, JA stated as follows:

> " A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the court process to allow litigation by instalments."

55. However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the *Civil Procedure Act*, where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

56. In the cases of *Mburu Kinyua v Gachini Tuti* [1978] KLR 69; [1976-80] 1 KLR 790 and *Churanji Lal & Co v Bhaijee* (1932) 14 KLR 28 it was held that:

> " However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura v MJE Morgan Civil Application No 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:
>
> > "The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res*

> *judicata*...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application."

57. In *Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others* [2014] eKLR the court quoted the case of *ET v Attorney General & another* [2012] eKLR wherein the court noted thus:

> " 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 a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and 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, in the case of Njangu v Wambugu and another Nairobi HCCC 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 fact lift on every occasion he comes to curt, then I do not see the use of the doctrine of *res judicata*....."

58. It is therefore clear that parties are not to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit.

59. In this case, I don't see any reason why the 2nd applicant could not have raised the issues raised herein with respect to the limb seeking for revocation in the earlier application. Explanation (4) of section 7 of the *Civil Procedure Act* provides that:

> Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

60. As was held in *Pop In (K) Ltd & 3 others & Habib Bank Zurich* Civil Appeal No 80 of 1988 [1990] KLR 609:

> "Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject matter of litigation in respect of a matter which might have been brought forward as part of the subject matter in a contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

61. In this case the applicants' case is that the respondent did not serve the members of the deceased's estate when he moved the court for citation. The respondent in this matter is not a member of the deceased's family. Therefore, since his claim to the estate was based on a sale agreement entered into between himself and the deceased. He could only claim his interest therein by way of citation. Rule 22(1) of the *Probate and Administration* Rules (hereinafter referred to as "the Rules") provides that:

> A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.

62. A citation, it was held in *In the Estate of Sheikh Fazal Ilahi* [1957] EA 697 in which the court relied on Henderson on *Testamentary Succession* (4th Edn), is an instrument issued by the court, citing persons to come in and show cause why a grant should not issue to a particular person. It was therefore held in *Maamun Bin Rashid Bin Salim El-Ruhmy v Haider Mohamed Bin Rashid El-Basamy* [1963] EA 438 that:

> "Where a person claiming to be an heir (or the heir of an heir) of a deceased person applies for a grant of administration, citations should not be issued to other heirs whose existence is disclosed in the petition having an equal right as a matter of course but only when for some special reason the court sees fit to make such an order. The object of a non-contentious citation is to call upon a person who has a superior right to a grant to take the grant. Thus any person who is interested in having an estate administered may apply for a grant of representation, but if there are persons who have a superior right to obtain the grant, he must cite such persons calling upon them to apply for the grant. If the person cited fails to apply for a grant or renounce their right to it, the grant may, subject to the usual conditions, be given to the citor. It follows that, save in cases where the court thinks it necessary to do so; non-contentious citations should not be issued unless the petition discloses that the person seeking the grant has a lesser right than some other person who has failed to take the necessary steps to obtain it...If on the other hand the person cited concedes that the person who has applied has a right to the grant but contends that he has a superior right, then, the proper course for him to adopt (after he has been served with citation) is to enter appearance to the citation and himself apply for a grant to be made to him if he so wishes. If the person cited enters appearance but takes no further step, the citor may apply on summons for an

order that the person cited to take the grant within a stated time and in the event of the latter neglecting to do so, the grant will be ordered to be made to the citor..."

63. It was therefore held by Kneller, J (as he then was) in *Kiboko v Assistant Land Registrar and others* [1973] EA 290 that:

> " Citations need not be ordered to issue to all persons shown as heirs in the petition of the deceased for a grant of letters of administration of the estate. They need not be ordered as a matter of course to issue for heirs shown in the petition to have an equal right. They should go forth to anyone shown to have a superior right to take up the grant or for any other special reason."

64. In this case it is contended that the citation was served on the 2nd respondent's mother who is now deceased. Whereas the mother had applied to have the matter set aside, she seemed to have passed away before the matter was determined. Accordingly, the 2nd respondent cannot rely on the said application as the basis for seeking a finding that the citation was never served.

65. Still on the issue of service, it is contended that the person who allegedly effected service was not a licenced process server. This issue calls for a determination as to the objective of service. In *Mohamed Bwana Bakari v Abu Chiaba Mohamed & others* [2003] KLR 557, the court held that:

> The purpose of service is to let the other party involved in the litigation upon whom orders are sought to know that the dispute is before the court and that way he has a right to take action he may deem right to defend his rights or take any position he deems necessary as it is fundamental requirement in keeping with the principles of rules of natural justice and the practice of the rules of law.

66. Therefore order 5 rule 5(3) of the *Civil Procedure Rules* provides that:

> No objection maybe made to the service of a summons on the grounds that the person who served the summons either was not authorized so to do or that he exceeded or failed to comply with his authority in any way.

67. Therefore, once it is proved that the respondent's attention was sufficiently drawn to the existence of legal proceedings and what was expected of him, he cannot rely on want of or excess of authority on the part of the person who served him as a ground for nullifying an otherwise valid process. That ground therefore fails.

68. It is also contended that the respondent, in his petition did not include all the assets of the deceased's estate and that he failed to disclose the existence of other parties ranking in priority as him such as the 1st applicant. In determining this issue, it is important to appreciate the position of a citor whose interest in the state is that of being a creditor as oppose d to a citor who is a family member. The ormer's interest in the estate is limited to the determination of his interest and not the administration of the whole estate. Once his interest in the estate is determined, his interest in the estate ceases and he nolonger has any interest in the remainder of the estate. Further, he cannot be expected to know all the assets of the estate or even other purchasers of the estate. His omission to include all the assets of the estate cannot therefore be aground for revoking or annulling the grant issued to him. If the remaining part of the estate can be administered separately from his interest, nothing bars the court from directing that the

other part of the estate that he is not interested in be administered by such other persons as the court may direct. As was held *In Re The Estate of the Late Suleman Kusundwa* [1965] EA 247:

> " The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased's property as he was entitled to dispose of by will under the applicable law of inheritance."

69. As was held by Musyoka, J *In the Matter of the Estate of Elizabeth Wanjiku Munge (Deceased)* [2015] eKLR:

> " ...the power granted under Section 76 of the Act for revocation of grants is discretionary. Where a case is made out for revocation of a grant under Section 76, the court has the option to either revoke the grant or make other orders as may meet the ends of justice."

70. As held by Mwita, J, *Albert Imbuga Kisigwa v Recho Kavai Kisigwa*, Succession Cause No 158 of 2000:

> " Power to revoke a grant is discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of the beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interests of justice."

71. It was further contended that after the issuance of the grant on January 17, 2014 in favour of the respondent, the said grant was rectified on November 6, 2019 to the extent that the property, Machakos/Mua Hills/650 where the respondent claimed 15 acres out of the total 39.22 hectares (approximately 97 acres) be registered in the name of the respondent and the remaining portion revert to the estate of the deceased the total acreage of Machakos/Mua Hills/650 was 39.22 acres (approximately 97 Acres) and that the respondent was claiming only 15 acres therefrom.

72. According to the 1st applicant, the grant issued in favour of the respondent is ambiguous, defective and inoperative as it does not specify which part of Machakos/Mua Hills/650 which measures a total of 39.22 ha (approximately 97 acres) that the respondent is to claim his 15 acre parcel.

73. It was averred that the beneficiaries and interested parties noted with tremendous concern that the administrator herein on the strength of the said grant and further with the ambiguity apparent on the face of it as elaborated hereinabove may cause eviction, demolition of structures erected by the beneficiaries and/or interested parties or cause parts of the 39.22HA already established by the courts as being the entire parcel belonging to the estate of the deceased to be registered in his name as a result of his cherry picking of prime portions of the property to claim as his own seeing that he is entitled according to the grant to 15 acres thereof. It was further averred that the grant omitted other properties owned by the deceased and the distribution thereto.

74. In my decision under reference, I held that:

> " Based on the foregoing I also find merit in the summons for rectification of confirmed grant dated July 9, 2018. Accordingly, I direct that the confirmed grant herein be rectified to reflect the correct acreage to be administered by the petitioner as 15 acres of the said land parcel Machakos/Mua Hills/650 instead of the entire parcel which measures 39.22 acres and that the remaining portion of the same measuring 24.22 acres revert to the estate of the deceased."

75. It is contended by the applicants that whereas the ruling dated November 6, 2019 rectifies the grant as issued to the respondent herein to reflect the 15 acres to be administered by him, the said ruling on the face of it as well as the grant as issued are erroneous since an official search of Machakos/Mua Hills/650 conducted reveals that the total acreage of the said land parcel is 39.22 hectares (ha) (approx 90 acres) and not 39.22 acres as represented in the ruling along with the confirmed grant. To my mind the most important aspect of the ruling was the carving out of the 15 acres that is due to the respondent from Machakos/Mua Hills/650. The remainder of the parcel, whatever its acreage would remain in the estate. Accordingly, the said ambiguity as regards the remaining acreage can only be a matter for correction of patent error apparent on the face of the record and not review. In the premises I hereby correct the above holding to read that:

> " Based on the foregoing I also find merit in the summons for rectification of confirmed grant dated July 9, 2018. Accordingly, I direct that the confirmed grant herein be rectified to reflect the correct acreage to be administered by the petitioner as 15 acres of the said land parcel Machakos/Mua Hills/650 instead of the entire parcel and that the remaining portion revert to the estate of the deceased."

76. Let the confirmed grant be rectified accordingly.

77. I however agree that the fact that the court did not state which portion of the suit land is to be carved out for the respondent is capable of causing confusion. Since matter herein arises from a contract for sale of land I direct that the parties herein to present themselves before a court appointed mediator and agree on the portion that the respondent purchased. They are also to agree on the other unresolved issues including the 1st applicant's claim to the state of the deceased. In arriving at the determination, account ought to be taken of the portions of land in occupation by the respective parties. Pending that determination or further orders from this court, further action on the suit land is hereby suspended.

78. Each party to bear own costs of this application.

79. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 30TH DAY OF JUNE, 2022.

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Thiongo for the respondent

Ms Kwamboka for Mr Nzei for the applicant

CA Susan

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