



REPUBLIC OF KENYA



**Salim & 4 others v Khalifa & 2 others (Succession Cause  
62 of 2000) [2022] KEHC 11305 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11305 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 62 OF 2000  
JN ONYIEGO, J  
JULY 29, 2022  
IN THE ESTATE OF ESHA MOHAMED ADAM (DECEASED)**

**BETWEEN**

**ZAINAB KHALIFA SALIM ..... 1<sup>ST</sup> BENEFICIARY  
RAHMA KHALIFA SALIM ..... 2<sup>ND</sup> BENEFICIARY  
FATUMA MOHAMED SAID ..... 3<sup>RD</sup> BENEFICIARY  
SALMA MOHAMED SAID ..... 4<sup>TH</sup> BENEFICIARY  
ABDULKARIM MOHAMED SAID ..... 5<sup>TH</sup> BENEFICIARY**

**AND**

**ABDULRAZAK KHALIFA ..... 1<sup>ST</sup> RESPONDENT  
OMAR MOHAMED SAID ..... 2<sup>ND</sup> RESPONDENT  
KINYUA CO.AUCTIONEERS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> and the 2<sup>nd</sup> respondent/applicant herein moved this honourable court vide a petition filed on 18<sup>th</sup> April, 2000 seeking a grant of letters of administration intestate. The same was issued on 9<sup>th</sup> October, 2000 and confirmed on 9<sup>th</sup> April, 2003 with the two petitioners appointed as the administrators of the estate of their late mother Esha Mohamed (deceased) (hereinafter referred to as the deceased). According to the certificate of confirmation of grant, the estate comprising LR. Mombasa block XVII/1497/MBA was to be shared out in accordance with the Islamic sharia law amongst the beneficiaries whose identification was not in dispute.
2. The two administrators having failed to agree on the actual distribution of the estate, filed parallel Chamber Summons applications making opposing proposals. Upon hearing both parties, the court



delivered its ruling on 8<sup>th</sup> March, 2013 thus directing that valuation on the suit property be done, the applicant herein be given first priority based on the valuation to buy the shares of the other beneficiaries and if not able to, the property be put on the market and be sold to the highest bidder. The court further ordered proceeds out of the sale be distributed amongst the named beneficiaries in accordance with Islamic sharia law as set out in the confirmed grant.

3. Subsequently, the suit property was valued by the Government valuer at ksh.7 million. The same was adopted by the court with the consent of the parties on 20<sup>th</sup> June, 2014 and the applicant herein directed to exercise his priority options to purchase the property within 90 days.
4. Aggrieved by the said decision, the other beneficiaries appealed to the Court of Appeal vide Civil appeal case number 102 of 2016 challenging the aspect of giving Omar (applicant) priority to purchase the subject property. The Court of Appeal in its judgement delivered on 2<sup>nd</sup> November, 2017 set aside the aspect of giving priority to Omar and instead directed that the suit property together with the developments thereon, be sold in the open market to the highest bidder and the proceeds thereof shared among the beneficiaries in accordance with the Islamic law. With the concurrence of both parties through the counsel for the respondents, this file was marked as closed on 28<sup>th</sup> January, 2020.
5. Later, the beneficiaries' counsel moved the court through a notice of motion seeking re-opening of the file to effect execution of the court order. The same was allowed vide a ruling dated 31<sup>st</sup> August, 2021.
6. However, the execution process did not materialise due to lack of cooperation from Omar the applicant herein culminating to the filing of a Notice to Show Cause by the respondents / beneficiaries seeking the administrators to show cause why execution of the court of appeal order could not be effected. When the Notice to Show Cause came up for hearing on 20<sup>th</sup> December,2021, the parties through their advocates entered into consent as follows:

“The property known as Plot No.1497/SECTION XVII/MOMBASA advertised for sale by public auction through Ms Kinyua and Co. Auctioneers with liberty to all beneficiaries to participate in the auction.

The proceeds of sale to be applied to offset the costs of the auction.

The remainder/balance be shared out amongst the beneficiaries according to Islamic Sharia.”

7. Subsequently, the applicant herein (Omar) filed a Notice of Motion application which is the subject for determination by this court seeking the following orders;
  - a. Spent
  - b. That this honourable court be pleased to issue a temporary stay of execution of the consent issued by the court on 21<sup>st</sup> December,2021 pending hearing and determination of this application inter parties
  - c. That the honourable court to issue a temporary injunction order restraining M/S Kinyua and Co. Auctioneers the 3<sup>rd</sup> respondent from selling/auctioning property known as MSA/ BLOCK XVII/1497 by public auction announced for 22<sup>nd</sup> and 25<sup>th</sup> January,2022 pending the hearing and determination of this application.
  - d. That the honourable court to set aside the consent orders issued on 21<sup>st</sup> December, 2021.
  - e. That in the alternative and without prejudice to prayer 4 above the case to be reopened for the court to hear new facts on merit.



- f. That the cost of this application be provide for.
8. The application is based on the grounds stated therein and the supporting affidavit of Omar Mohammed sworn on 12<sup>th</sup> January, 2022. It is The applicant's case that the impugned consent recorded on 20<sup>th</sup> December, 2021 at 11.30 for the sale of the suit property adversely affected his legal and registered ownership rights over the said property.
  9. He stated that; he did not understand the language used during the recording of the consent which was written in English; it was after the explanation by his advocate later that he realized there were issues he did not agree with or understand and that the court ought to have been told that;
    - a. the house had already been subdivided at the death of his late father through Mombasa Administration Cause No.113 of 1983 in the matter of the estate of Mohamed Said Sketty in which case subdivision was made on the same house without land.
    - b. That each beneficiary now claiming a share had gotten his/her shares on that distribution and are unrealistically making new claims on the entire house again.
    - c. That the present claim by the beneficiaries is to mislead the court as they have done to make mistaken judgement.
    - d. He was not engaged in choosing the auctioneer nor was he informed of the consent.
  10. The applicant further stated that there was non-disclosure of pertinent material facts and misrepresentation of facts in the succession proceedings which facts needed to be brought to the attention of the court. That it was not brought to the attention of court that Plot No.1497/SECTION/XVII was legally owned and registered in his name and that of Abdulrazak Khalifa his co-administrator hence not part of the estate of Esha Mohamed Adam. He further claimed that it was not brought to the attention of the honourable court that the estate of Esha Mohamed Adam was only 1/8 share of the house without land on plot No. MBA/1497 /SECTION/XVII and not the entire property. That the other remaining shares to the house without land were devolved to other people after the demise of their father Mohamed Said Sketty.
  11. It was his position that the order of sale of the entire property being Plot No.1497 SECTION/XVII will adversely affect the legal interests of the duly registered owners to the property which did not form part of the estate of the deceased hence prudent to have those material facts brought to the attention of the court for reconsideration and issuance of proper orders.
  12. The applicant further filed a supplementary affidavit sworn on 31<sup>st</sup> January, 2022 in which he stated that the beneficiaries were his brothers and sisters while the 1<sup>st</sup> respondent was his half-brother. That the 2<sup>nd</sup> administrator had ill feelings and malicious intention against him and his wishes were to have him removed from the house.
  13. He deposed that the beneficiaries did not inform the court that they had another brother namely Abdalla Mohamed Said (Deceased)
 

who left behind a wife and two sons (all adults now) namely; Mohamed Abdalla and Harun Abdalla. He further stated that at the time of being appointed administrators of the estate of Esha Mohamed Adam (Deceased), Esha Mohamed was not the owner of the entire house and land known as MOMBASA BLOCK XVII/1497/MSA.
  14. In response, the beneficiaries/respondents filed a replying affidavit sworn on 17<sup>th</sup> January, 2022 stating that the estate of their mother comprised of LR MOMBASA BLOCK/XVII/1497/MSA situated at



- Mombasa Island. That the applicant was frustrating execution process ordered by the court of appeal with the sole purpose of remaining in occupation of the disputed premises to the exclusion of other beneficiaries. That the impugned consent order was recorded on 20/12/2021 when the Notice to Show Cause came up for hearing in the presence of all parties and their counsel save for two beneficiaries who were out of jurisdiction at the time. Further, it was incredible and in bad faith for their brother the applicant, to use the excuse that he does not understand English yet the discussions preceding the order of 20.12.2021 were conducted openly in the presence of counsel, the judge, and the court assistant and he was also among the few beneficiaries present who asked questions in Kiswahili regarding the consent recorded on that day.
15. They further stated that the applicant had not raised any sufficient reasons to warrant the grant of the prayers sought in the application as he was the one who disclosed that the only known asset of the deceased was the land known as plot MOMBASA BLOCK XVII/1497/MI. That it was mischievous for the applicant to introduce to these proceedings a new matter on alleged distribution of the same property under Mombasa Administration Cause No.113 of 1983 whereas there was no evidence on the same.
  16. In their view, there is no new issue that has not been canvassed before to warrant review of the orders of this court and those of the Court of Appeal or reopening of the case as the same would contravene the doctrine of finality to proceedings.
  17. They averred that no one in their family who was alive when the deceased died can be disinherited in the circumstances of this case. They further stated that the applicant had not given any evidence to show that the money to be realised from the sale could not be distributed to the beneficiaries fairly.
  18. In a nutshell, the beneficiaries filed grounds of opposition dated 17<sup>th</sup> January,2022 summarising their position as follows; the application herein amounts to an abuse of court process; that the High Court was being asked to sit on its own appeal and set aside an order made by consent by the parties before the judge; the applicants remedy lied elsewhere and not in an application to set aside a consent order post two judgements; the applicant all along knew about the administration cause but didn't raise it either before the High Court and/or the Court of Appeal thus it was too late to raise it at this stage; the registration of the title in the name of the administrator was criminal and fraud by the applicant on the estate of Esha Mohamed Adam (Deceased)and the other beneficiaries; fraudulently acquired title cannot attract an equitable remedy; the applicant was not a preferential beneficiary relative to the free asset of the estate of the deceased.
  19. They also filed a notice of preliminary objection dated 3<sup>rd</sup> February,2022 basically restating their grounds of opposition thus emphasizing the point that the entire application amounted to resjudicata hence abuse of the court process.
  20. The 1<sup>st</sup> respondent/co-administrator swore a replying affidavit on 17<sup>th</sup> January 2022 corroborating the sentiments expressed by the beneficiaries. He simply opposed the application and urged the court to dismiss the application for being malicious and filed in bad faith. According to him, the registration of the subject title into his name and that of the applicant without indicating that it was held in trust for the other beneficiaries was done by the applicant who promised before the Chief Kadhi Nasoor to correct the error but failed to do so. He termed the registration of title in the administrators' names alone as illegal and untenable.
  21. He further stated that the consent recorded on 20.12.2021 was read in court with the participation of all the beneficiaries save for the two sisters in the presence of their advocates and with the help of interpretation of court proceedings by the court assistant. He deposed that the suit property was never



the subject nor partitioned or sub-divided in Mombasa Administration Cause Number 113 of 1983 alluded to by the applicant.

22. The third respondent filed its affidavit sworn on 19<sup>th</sup> January, 2022 by one Peter Kinyua Muchendu a licensed auctioneer, trading as Kinyua and Co. confirming that early in January 2022, they received a copy of this court's order instructing them to advertise and sell by public auction the subject property a duty they faithfully and legally undertook at their own cost by carrying out an advert in the Daily Nation issue of 10<sup>th</sup> January, 2022. That he issued a second notice which appeared in the Nation Newspaper issue of 6.11.2022 at a cost of 36,000. He expressed shock that the process was stopped by a court order mid-way after they had spent their funds in execution process.

### Submissions

23. The applicant through his advocate Chala & Co. Advocates appearing together with A.I Hayanga & Associates Advocates and Mr. Obonyo, filed written submissions dated 2<sup>nd</sup> February, 2022 which basically reiterated the content in the affidavit in support of the application. Counsel submitted that the application herein was necessitated by two facts namely; the Estate of Esha Mohamed measuring 1/8<sup>th</sup> of the house without land which she inherited from her second husband in Mombasa Probate Administration Case No.134 of 1984. That having the other shares affected by these proceedings was prejudicial to the Estate of Abdalla Mohamed Said (deceased) who was a beneficiary of the estate of Mohamed Said Sketty but was not included in these proceedings.
24. Counsel relied on Section 2 of the *Law of Succession Act* on definition of what an estate entails thus submitting that the property could not be sold as it did not belong to the estate except 1/8<sup>th</sup> of the house without land hence non-disclosure of material facts.
25. that the suit property was not listed as an asset of the estate of Esha Mohamed Adam (Deceased) contrary to section 71 of the *Law of Succession Act*. On revocation of the grant on the court's own motion, counsel referred to Section 76 of the *Law of Succession Act* which empowers a court to revoke a grant and appoint new administrators if necessary. To buttress that position, Counsel referred the court to the case of Jimmy Musotsi Molenje v Samuel Molenje Dalidi [2016] eKLR Paragraphs 18 and 19 where the court held that a court has wide powers to revoke a grant on its own motion if the interest of the estate demands.
26. On jurisdiction to determine land ownership, counsel submitted that this court lacked the requisite jurisdiction to determine ownership rights of the applicant over the subject property. That the court with jurisdiction is the Environment and Land Court under Article 162 of *the Constitution* and the *Environment and Land Court Act*. To buttress this position, counsel relied on the case of In Re Estate of Henry Kithia Mwitari (Deceased)[2021] eKLR, Article 162(b) of *the constitution* and the case of in re estate of Julius Ndubi Javan (Deceased)[2018] eKLR
27. Counsel further relied on Section 27 of the Registration of *Land Act* Cap 300(repealed) to advance the position that the applicant had demonstrated to the honourable court that he had an indefeasible title to the suit property being the first registered legal owner of the said property in the year 2007 a fact that was not rebutted. Counsel also relied on Section 26(1) of the *Land Registration Act* and submitted that a Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land was the absolute and indefeasible owner and the title shall not be a subject to challenge except on the ground of fraud or misrepresentation which the person is proved to be a party; or where the certificate of title was acquired illegally, procedurally or through corrupt scheme.



28. On setting aside the consent order, counsel submitted that there were five grounds for setting aside namely; where the consent was obtained fraudulently or in collusion between affected parties; where an agreement is contrary to the policy of the court; where the consent is based on insufficient materials facts; where the consent is based on misapprehension or ignorance of material facts and any other sufficient reason.
29. Counsel submitted that unless the grant is rectified to reflect the true properties of the estate of the deceased, there could be no legal distribution even by consent of the assets mentioned in the confirmed grant. To support this position, counsel relied on the case of *In the matter of the Estate of Evanson Mureithi Kiboi-(Deceased) [2013] eKLR*.
30. Counsel also contended that the introduction of the disputed property in the manner of the consent was a nullity in itself. That the sale and distribution could only be done upon confirmation of the property in the grant which was not done in this case making the consent a nullity.
31. The beneficiaries through their advocate Stephen [A.K.A Suleiman] Macharia Kimani filed written submissions dated 7<sup>th</sup> February 2022. Counsel submitted on three issues namely; abuse of court process; res judicata and immunity of judges and court officials;
32. On abuse of court process, counsel submitted that; the applicant could not have petitioned for a grant in respect of his mother's estate yet list his property as the estate property; the claim that he had bought the subject property in 1988 is not conceivable as he could not have mistaken his property to be his late mother's property by the time this succession cause was filed in 2000; this suit was filed by the applicant in person identifying the suit property as the free asset of the deceased available for distribution among the beneficiaries and that it was ridiculous for the applicant to belatedly attempt to move goal posts.
33. Counsel further submitted that there was no proof that Abdalla Mohamed was deceased and that he was a child of the deceased. He opined that; there must be finality to litigation; the High Court was bound by the jurisdictional hierarchy thus it does not have jurisdiction to hear this application; there was no appeal against the Court of Appeal judgement; there was nothing to show that the applicant had authority to appear on behalf of the widow and children of the deceased Abdalla Mohamed Said; it was improper to introduce third parties who were and are neither heirs nor children of Esha Mohamed the deceased herein after the judgement of the Court of Appeal and that every wrong in this case was orchestrated by the applicant and he cannot benefit from his mistakes.
34. On res judicata, immunity of judges and court officials, counsel submitted that the issues being raised by the applicant were dealt with by the High Court and the Court of Appeal.

### **Determination**

35. I have considered the application, responses thereof and rival submissions by counsel for the respective parties herein; Issues that emerge for determination are;
  - a. Whether this court has jurisdiction to entertain the suit herein
  - b. Whether the issues raised in the application herein are res judicata
  - c. Whether the consent order herein is binding.
  - d. Whether the applicant has met the threshold for revocation of the grant
36. The estate herein has remained undistributed for the last 22years. The main reason for this unreasonable delay is majorly pegged on disagreements over distribution. There is no dispute that the petition for grant of representation was filed by the applicant and his brother Abdulrazak his co-



administrator. It is a fact that it was the petitioners who listed the subject property as comprising the estate. The grant was issued on 9<sup>th</sup> October 2000 and later confirmed on 9<sup>th</sup> April 2003. Subsequently, on 14<sup>th</sup> March 2007, the administrators caused the entire property registered in their joint names in equal undivided shares a fact the rest of the beneficiaries are against and want their fair share according to the court of appeal order and directions.

37. Based on the said transfer of title by the administrators into their names against the order in the certificate of confirmation of grant, high court and court of appeal orders, the applicant is now claiming that this court has no jurisdiction to determine the issue of ownership. It is trite law that jurisdiction is everything and without it a court cannot move a step further. See the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR where Nyarangi JA stated that;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

38. Further, in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the supreme court in discussing the issue of jurisdiction stated as follows;

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

39. This court sitting as a probate and administration court does derive its jurisdiction from Section 47 of the *Law of Succession Act* which provides;

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

40. In re Estate of Julius Ndubi Javan (Deceased) (supra), the court did emphasize on the duty of the probate court as follows;

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries.

41. In this case, the applicant argued that this court lacks the requisite jurisdiction to determine the ownership rights of the applicant to the suit property. He submitted that the court with the requisite jurisdiction is the Environment and Land Court under Article 162 of *the Constitution*.

42. From the record, it is clear that the applicant did file ELC CASE NO.E002 OF 2022 vide a plaint filed on 14<sup>th</sup> January,2022 against the auctioneer seeking declaration that he was the lawful proprietor of the suit property; a declaration that the advertisement of sale by auction of the suit property was unlawful; permanent injunction and general damages. On the 26<sup>th</sup> January, 2022 Lady Justice Matheka Judge of



Environment and Land Court transferred ELC CASE NO.E002 OF 2022 to this court for hearing and determination but parties withdrew the same by consent under this file.

43. There is no dispute that the impugned orders emanated from this court and the Court of Appeal. This court is therefore implementing the same under Section 4 of the *Appellate Jurisdiction Act*. Thus, the applicant cannot be heard to dispute the issue of jurisdiction whereas he has been the petitioner/applicant since the inception of this matter. One would ask why bring up the issue of jurisdiction at this stage in an application setting aside a consent order and more so at the execution stage? At what point did the applicant discover this court had no jurisdiction?
44. Jurisdiction is a crucial factor for consideration in the course of delivery of substantive justice. In Owners of motor vessel case quoted above, the court held that a party who voluntarily submits to court's jurisdiction cannot be heard to complain over lack of it at the tail end. In any event, the issue before hand is whether the administrators did execute their mandate under section 83 of the law of the succession Act by distributing the estate as directed by the court. In this case, the administrators herein acted in breach of a court order by transferring estate property into themselves illegally. Therefore, they cannot claim the element of land dispute here. Between who and who is the dispute? The deceased was referred to have been the owner of the property and it was duly distributed. To argue that the owner of the property was the estate of Mohamed Said Sketty their father from whom their mother the deceased herein inherited 1/8 of the property under Mombasa administration case number 113 and 134 of 1984 is not correct.
45. A perusal of the distribution schedule attached to the affidavit in support by the applicant shows that the property involved in the estate Mohamed Said was Section XVII subdivision 1094 at foringi Mombasa and not block XVII/1497/MSA the subject of these proceedings. I do not see any nexus between the two estates with the property herein. Why is it that it is the applicant alone in the family who is opposed to the property being from distributed? He cannot commit an illegality by fraudulently transferring the deceased's property into himself and then hide behind the element of lack of jurisdiction to circumvent the distribution process and then ask the court to sanitize an illegality. See *Mcfoy vs United African company Ltd* 91961)ALL ER 19611169 where it was held that if an act is void, then it is in law a nullity.
46. In view of the above holding, it is my finding that, this court has a clear mandate under the law of succession to undo an illegality committed in the course of these proceedings by a party disregarding a court order. It is the applicant who should tell us where the original title went before they assumed ownership contrary to the grant. Unfortunately, even a copy is missing from the court record and the applicant should know better.
47. It is trite law that issues regarding dispute of ownership of any asset comprising the estate of a deceased person ought to be dealt with before the confirmation of grant. See the case of *In re Estate of Julius Ndubi Javan (Deceased)* (supra) where the court stated;
- “As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation.”
48. As indicated earlier, the applicant is the petitioner in these succession proceedings. It is also evident from the record that the applicant has all along participated in the proceedings and at no point did he



ever raise the issue of ownership. The question begging for an answer is, why did he decide to bring up the same 22 years later and at the execution stage.

49. Regarding the question of non-disclosure and misrepresentation of material facts in this matter, the applicant should answer that question being the petitioner in this case. Disclosure of material facts is key in any proceedings and lack of the same affects the delivery of substantive justice. See *In re Estate of Julius Ndubi Javan (Deceased)* (supra) where the court stated that;

“Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

50. The applicant being the instigator of the succession proceedings ought to have done due diligence and disclosed all material facts before the issuance and confirmation of the grant. Thus, it’s my view that if there is any person who should be held liable for non-disclosure of material facts and misrepresentation, it’s the applicant.
51. On whether the issues raised in the application are *res judicata*, the respondents submitted that the order for re-opening the file to re-hear the case on merit have already been decided by two competent courts. It is apparent that the issues raised herein have been litigated before by competent courts and a decision arrived at on merit hence the doctrine of *res judicata* comes to play.
52. In arriving at the above conclusion, guidance is drawn from the case of *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties)* [2020] eKLR where the court when dealing with the issue of *res judicata* had this to say;

“The doctrine of *res judicata* is set out in Section 7 of the [Civil Procedure Act](#). The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

A close reading of Section 7 of the Act reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine’s five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.



53. Similar position was held in the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR in which it was stated thus;

“Res Judicata is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. Res Judicata can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.[4]”

54. On whether the application amounts to abuse of the court process, one has to look at the intention and objective in filing the instant case. If it stinks malice and bad faith, it is frivolous and incompetent, the court will be justified to conclude that the applicant is guilty of abuse of the court process. see *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others*(supra) where the court stated that;

“The black law dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use ”An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use”.[11]

The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]

The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]



- f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

55. Guided by the above quoted case law, it is my conviction that this application was filed with an ulterior motive and that is to frustrate the process of execution.

56. On whether the consent order should be set aside, I am guided by the holding in the case of *Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others* [2019] eKLR where the court in dealing with a similar issue stated,

“The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig vs Mallya (1975) EA 266* where Mustafa Ag. VP stated thus;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

57. The applicant herein submitted that the consent order was obtained through non-disclosure of material facts by the parties herein. From the record, it is evident that the consent was entered to mitigate the notice to show cause filed against the applicant herein. The same was for purposes of implementing the execution of the court of appeal orders. I must also note that it is not in dispute that the consent order was entered into in court in the presence of all parties and their advocates. Accordingly, it’s my finding that the applicant has not established the outlined principles for setting aside a consent order hence this ground fails.

58. As regards revocation of the grant issued based non-disclosure of material facts, one would have to ask whether any of the grounds set out under Section 76 of the [Law of succession Act](#) has been met. It is upon the applicant to establish as to who failed to disclose material facts yet he is the one who petitioned for the grant. I do not find any basis upon which the court can revoke the grant on that ground as the applicant is making a confession on how he lied to the court.

59. The applicant has persistently frustrated the process of execution thus exposing the court to ridicule. He is introducing a third party one Abdallah who is deceased and his family as being beneficiaries who were left out. Who left them out? He was the one if at all they did or do exist. Why play the role of proxy? I do not think as an administrator the applicant has prayed his role effectively. How could he



claim to own the land in question yet allege the estate has only 1/8 stake in it and then go further to list it for inheritance in his mother's estate.

60. As an administrator and being an agent of the court charged with the responsibility to oversee administration of the estate, the applicant has failed miserably. In conclusion, this court has taken into account that these proceedings have been pending in court for the last 22 years and there has to be an end to litigation. It's therefore the order of this court that the estate of Esha Mohamed (deceased) be distributed amongst all beneficiaries as per the court order.
61. In order to fast track the process, I wish to exercise my discretion under section 47 and 66 of the [\*law of succession Act\*](#) to remove the applicant from being aco- administrator and afresh grant to issue to the remaining co-administrator one Abdulrazak alone to complete the process. Execution by way of public auction to proceed as directed by the court of appeal. Accordingly, it's my finding that the application dated 12<sup>th</sup> January, 2022 lacks merit and therefore dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED IN MOMBASA THIS 29<sup>TH</sup> DAY OF JULY, 2022**

**J.N.ONYIEGO**

**JUDGE**

