



**In re Estate of GSK (Deceased) (Probate & Administration
369 of 2004) [2022] KEHC 12282 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 369 OF 2004**

**EKO OGOLA, J
JULY 28, 2022**

BETWEEN

PKS 1ST PETITIONER

HKS 2ND PETITIONER

AND

SCS OBJECTOR

AND

HC INTERESTED PARTY

(SUING AS THE NEXT FRIEND TO AJK

RULING

1. By way of Chamber Summons dated 25th January 2021, the applicant herein seeks the following orders;
 - 1) Spent
 - 2) That the honourable court be pleased to make an order for reasonable provision as the court may deem fit in favour of the applicant from the share of the estate of JKS (Deceased). The application is based on the grounds contained therein and the in the supporting affidavit.
2. There is a preliminary objection dated 20th April 2021 raised on the following grounds;
 - 1) The honourable court did make its pronouncement in this matter vide the judgment of the court delivered on the 14th day of August 2020 and therefore lacks jurisdiction to deliberate on this matter that is now pending before the Court of Appeal at Eldoret vide Civil Appeal No. (Eld) 9 of 2020.



- 2) That the applicants' instant application violates the provisions of section 3 (1) of the Judicature Act, Cap 8, Laws of Kenya.
- 3) That the applicants' instant application violates the provisions of Articles 165(2)(e) as read together with Article 164(3) of the Constitution of Kenya 2010.
- 4) That the applicants' instant application is sub judice and as such violates the provisions of Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya.
- 5) That the applicants' instant application violates the provisions of the Law of Succession Act, Cap 160, Laws of Kenya.
- 6) That the applicants' instant application dated 25th January 2021 violates the principle of *functus officio*.
- 7) That the applicants' instant application dated 25th January 2021 violates the finality principle.
- 8) That the applicants' instant application dated 25th January 2021 lacks the requisite threshold to warrant the exercise of this Honourable court's residual jurisdiction.
- 9) That the honourable court lacks jurisdiction to conduct a succession within a succession that has been concluded and is now pending in the superior court.
- 10) That the instant application is an abuse of the due process of the court and untenable in law.

The Applicant's Case and Submissions

3. The applicant herein sought for orders for reasonable provision from the estate of the deceased herein. The applicant's claim is that she is the granddaughter of the deceased and has been dependent on the estate of the deceased's son upto the time of his death.
4. The applicant filed submissions on 3rd December 2021. The applicant's case is that she is the biological daughter of the JKS, and at the time of his demise, he was a dependant of the estate. Being a daughter to the beneficiary of the estate of the deceased the minor is a dependant as a grandchild. The deceased was confirmed to be a beneficiary by the court and was duly entitled to inherit the deceased's property as a dependant and son of the 1st house.
5. The applicant submitted that in its judgment delivered on 14th August 2019 the court specifically allocated JKS 12 Acres in L.R xxxx/x and 3 acres in Nandi/Cheptil/xxx. Further; that it is not denied that the applicant is the only surviving child to JKK who is by law entitled to her father's share out of the estate.
6. The applicants' case is that the minor is in need of support throughout her education and upkeep which she can only access the same through her father's share of the property.

Respondent's Case and Submissions

7. The respondent opposed the application vide a replying affidavit dated 27th May 2022. The respondent also filed submissions dated 27th May 2021. The respondent's case is that JKS is her brother from the 1st house and pursuant to the judgment of the court delivered on 14th August 2019 the first house that comprises of 5 beneficiaries was allocated 46 acres in respect of parcel L.R xxxx/x and 13 acres in respect of land parcel Nandi/Cheptil/xxx.



8. Citing section 6 of the Civil Procedure Code, the deponent contends that the court lacks jurisdiction to deliberate on this matter in view of the sub judice rule. This matter was deliberated upon by the court which rendered its judgment on 14th August 2019 and referring to annexure SS1 and SS2, she stated that this matter is now pending before the Court of Appeal as Eldoret Court of Appeal Civil Appeal No. 9 of 2020. The orders sought by the applicants are akin to reviewing the judgment of this court that is now the subject of the court of appeal and as such the court lacks jurisdiction.
9. The respondent submitted that estate of the deceased herein is independent from the estate of her late father and hence it is not proper for the court to conduct a succession within a succession. The only dependant known to them is ES and he already obtained a Limited Grant in respect of the estate of JKS. She cited *In Re Estate of Tuaruchiu Marete* (Deceased) (2019) eKLR HC at Meru Succession Cause No. 82 of 1989 in support of her submissions.
10. The respondent further stated that the applicant is a stranger and there is no birth certificate proving that the minor is indeed the child to the late John Kerich Sawe. The child health card/immunization card is a forged document and she stated that they were pursuing the same with the police. She urged the court to dismiss the application with costs.
11. Upon perusing the pleadings, responses and submissions by counsel I shall proceed by determining the preliminary objection. Notably, the issues raised in the preliminary objection are substantially similar to the issues raised in opposition to the application by the respondent's replying affidavit.

Whether the Court has jurisdiction

12. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989) the court held:

“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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
13. The court delivered its decision on this matter vide its judgment delivered on 14th August 2019. I take cognizance of the fact that there is a pending appeal on this particular cause being Eldoret Court of Appeal No. 9 of 2020.
14. In *Leisure Lodge Ltd vs Japhet Asige and Another* (2018) eKLR the court said and held:

“On the question that this court is functus officio, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act.

In *Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others* [2018] eKLR, this court said of the doctrine of functus officio: -

“I understand the doctrine, like its sister, the res-judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the



determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.

15. The court had already concluded the succession cause and as such it is functus officio. Further, the matter being before the court of appeal, any orders issued would be sub judice. Section 6 of the *Civil Procedure Act* provides as follows on the issue of sub judice:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

16. Addressing the issue of subjudice in *Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [202] eKLR) the Supreme Court of Kenya stated as follows:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

17. My attention is also drawn to the fact that the applicants’ claim is anchored on being the granddaughter of the deceased. Her father’s share of inheritance will form part of her father’s estate thus the proper forum to apply for provision from his estate would be in the cause relating to her father’s estate.
18. In the premises the court cannot entertain the present application as that would be in violation of the sub judice rule as the same is pending before the Court of appeal. The application is dismissed with each party to bear own costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH OF JULY 2022.

E. K. OGOLA

JUDGE

