



REPUBLIC OF KENYA



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**Ayub & another v Mwaisanya; Kingori (Interested Party) (Succession Cause 3 of 2019) [2022] KEHC 11476 (KLR) (2 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11476 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
SUCCESSION CAUSE 3 OF 2019  
JM MATIVO, J  
AUGUST 2, 2022**

**BETWEEN**

**JOHNSON RUEL MWAWASI MALAGHO AYUB ..... 1<sup>ST</sup> APPLICANT**

**SAMMY GIBSON GOYA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MARY MANYASI MWAISANYA ..... RESPONDENT**

**AND**

**PETER THUKU KINGORI ..... INTERESTED PARTY**

**RULING**

1. Ayub Manyasi Ruel (the deceased) died intestate on 11<sup>th</sup> April 2010 leaving behind a vast estate as listed in paragraph six of form P& A 5 filed in the lower court on 7<sup>th</sup> March 2012 by Mary Manyasi Mwaisanya- the Respondent herein. The estate comprised of 42 parcels of land and one motor cycle Registration number KMCE 998 U as listed in the Petition for Grant of Letters of Administration. This list is in tandem with an agreed list of properties filed in this court on 8<sup>th</sup> December 2020 pursuant to the court's directions made on 10<sup>th</sup> March 2020.
2. The deceased was survived by the following persons: -
  - a. Mary Manyasi Mwaisanya- Wife.
  - b. Johnson Ruel Mwawasi Malagho Ayub- Son- 54 years.
  - c. Eddah Samba Ayub-Daughter-53 years.
  - d. Winnie Pauline M. T. Ayub-Daughter-52 years.
  - e. Sammy Gibson Goya-Son- 51 years.



- f. Ephraim Joab Kachula Ayub- Son-48 years.
- g. Jones Stephen Mwaghol Ayub-Son-46 years.
3. All the deceased's children except the applicants herein consented to their mother petitioning for the grant. On 22<sup>nd</sup> March 2022, the matter came up in the lower court for confirmation of the grant. Of all the beneficiaries, only Johnson Ruel Mwawasi Malagho Ayub objected to the confirmation. The court granted him 10 days to file an objection and the matter was scheduled for mention on 2<sup>nd</sup> May 2014. However, he never filed any objection or protest within the said period nor did he attend court on 9<sup>th</sup> March 2014, so, the court confirmed the grant his failure notwithstanding.
4. Aggrieved by the confirmation, vide the application dated 30<sup>th</sup> September 2019 the subject of this ruling, Johnson Ruel Mwawasi Malagho Ayub and Sammy Gibson Goya (the applicants) seek to Revoke the Grant of letters of administration issued to their mother (the Respondent) on 10<sup>th</sup> December 2012 and confirmed on 9<sup>th</sup> June 2014 citing the following grounds:- (i) the grant was obtained fraudulently and or untruthfully by concealment of facts; (ii) the grant was obtained and confirmed without the consent of the applicants; (iii) the gross value of the estate was not ascertained to satisfy the lower court on the jurisdiction; and (iv) the Senior Principal Magistrate did not have jurisdiction to handle the matter.
5. On 6<sup>th</sup> February 2020 the court directed the parties to consider mediation and to prepare a schedule of properties, agree on administrators, list of assets and beneficiaries. On 10<sup>th</sup> March 2020, the court directed each beneficiary to file an affidavit detailing any matters they desired to bring to the court's attention together with all the documents they desired to rely on.
6. The Respondent filed a Replying affidavit dated 7<sup>th</sup> March 2019 in opposition to the application. The substance of her affidavit is that on 22<sup>nd</sup> April 2014 the court granted the applicants 10 days to file their objection but they failed to comply; that the confirmed Grant shared the properties among all the beneficiaries including the applicants; that plot number Ronge/Nyika/2574 and No. Ronge/Nyika/2565 which are part of the deceased's estate were transferred by way of transmission to the applicants and motor cycle Registration number KMCE 998 U has been under the sole custody and use of the 1<sup>st</sup> applicant.
7. Also, the Respondent states that the 2<sup>nd</sup> applicant Sammy Gibson Goya Ayub has since sold and transferred L.R. No Ronge/Nyika/2574 to John Mwawongo Mwakughu and Joyce Kambe Mwachia, and, that some properties sold by the deceased prior to his death have also been transferred to the respective purchasers using the same grant the applicants now seek to revoke, so, allowing the instant applicant will have the implication of breaching contracts relating to the said properties. Lastly, the instant application was filed more than 5 years after the grant was confirmed.
8. The 1<sup>st</sup> applicant Mr. Johnson Ruel Mwawasi M. Ayub filed an affidavit dated 11<sup>th</sup> November 2020. The crux of the affidavit is that prior to his death, the deceased had sub-divided and given out the following properties: - namely, Ronge/Nyika/2565 to Johnson Ruel Mwawasi M. Ayub- Ronge/Nyika/2566, Eddah Samba Ayub- Ronge/Nyika/2573- Winnie Tuswa Ayub- Ronge/Nyika/2574 to Sammy Gibson Goya although converted to Job J. Mwawongo and Joyce K. Mwachia; Ronge/Nyika/2575 to Ephraim Kachula Ayub which was changed to Ronge/Nyika/2558 to Jones Stephen Mwagholo Ayub so as to be adjacent to all the siblings. Further, that Ronge/Nyika/2549 will be his second plot, while Ronge/Nyika/2553 and 2559 shall be given to Sammy Gibson Goya and Ephraim Kachula Ayub as their second plots.



9. The 1<sup>st</sup> applicant also averred that the remainder of the undistributed land was also to be distributed, and that the deceased inherited part of his land from his father in trust for the rest of the family. Additionally, the deceased sold some of his land inherited from his father without his consent, and that his father died before the transactions were completed. He urged the court to remove his mother as an administrator and appoint Eddah Samba Ayub, Sammy Gibson Goya and Johnson Ruel Mwawasi Ayub as the administrators.
10. Also, he deposed that his mother transferred parcels of land which were left un transferred by the deceased using the grant obtained by way of concealment of material facts. He faulted his mother for transferring Ronge/Nyika/2148 to his cousin using the grant. That together with his co-applicant they refused to sign the consent. Lastly, his mother has been collecting rent from the premises on Plot No. Ronge/Nyika/2547.
11. Eddah Samba Ayub, the deceased's second born child swore the supplementary affidavit dated 3<sup>rd</sup> September 2020. The salient points are that among the properties her father owned was plot number 1374 which he subdivided and subsequently he sold 25 of the plots and allocated each of his 6 children one plot leaving plot number 2547 for himself and his wife on which they had constructed a rental property while plot number 2576 currently in her mother's name remained in the deceased's name. Except the applicants herein, four of the deceased's children agree to their mother administering the estate. She also averred that the applicants failed to file an objection in the lower court as directed by the court; that 4 plots were transferred to 4 out of the 6 children using the same grant while 2 plots are yet to be transferred to Winnie Tuswa Ayub-Plot No. 2573 and Jones Mwaghola Ayub-Plot No. 2549.
12. She also deposed that Sammy Goya Ayub sold plot number 2574 which was allocated to him and transferred it to John Mwawongo & Joyce Kambe Mwachia. Also, 25 plots which had been sold by the deceased to various purchasers were transferred to the buyers/owners, and apart from plot number 1374, the deceased also owned 7 other plots including plot number 1294 which was the homestead and plot number 1876, their farm and plot numbers 1375, 1357, 1979, 2148 which their mother intended to sub-divide into 6 plots for the 6 children. She deposed that their mother has never sold any land after the demise of the deceased. Also, the deceased left behind motor cycle number KMCE 998 C which their mother gave to Johnson Mwawasi Ayub but he has since grounded it. She deposed that Johnson Mwawasi Ayub was always disobedient and rude to his parents.
13. She averred that the deceased secured a job for her and Johnson Mwawasi Ayub at the Kenya Ports Authority but he could not retain the job because of his irresponsible behaviour. She averred that Sammy Goya Ayub was casually engaged in car brokerage business which cannot sustain him and that since the demise of the deceased, their mother has endured a lot of harassment from the applicants who have been insulting her claiming that everything left behind by the deceased is theirs and asking their mother to go back to where she came from.
14. M/s Eddah Ayub deposed that the applicants do not work, that they expect their mother to provide for them and if she does not, they insult and harass. That they chase relatives who visit their mother and that Sammy chased her from home and attempted to assault her which was reported to the police. That he claimed that she belongs to where she is married and Sammy has severally harassed her mother's workers at the farm and vandalized the store and he also demanded rent from their property agents. She deposed that it would be prudent if the grant is issued to their mother so that she can continue to ensure that plot numbers 1308, 1315, 1357, 1979, 2148 and 2576 are divided among the 6 children. Lastly, their mother cannot afford to pay the purchasers if the grant is nullified.



15. Also, on record is the Replying affidavit of Winnie P. M. Ayub, the deceased's third born daughter dated 30<sup>th</sup> September 2020. Her averments are essentially replication of the contents of her mother's affidavit and the affidavit by Eddah Ayub. It will add no value to rehash the same here.
16. Mr. Ephraim Kachula Ayub, the deceased's 5<sup>th</sup> born son swore the supplementary affidavit filed on 8<sup>th</sup> December 2020 whose contents are substantially similar to the affidavit of M/s Eddah Ayub. It will add no value to replicate the same here.
17. Mary Manyasi Mwaisanya swore the supplementary affidavit dated 1<sup>st</sup> December 2020. She deposed that she obtained copies of the land sale agreements from a broker who was working with the deceased and also some purchasers contacted her directly, and pursuant to the said agreements she transferred the properties to the purchasers. She also deposed that the deceased sold Plot numbers 2546 to a one Lucy Mwakio Mwazala for Kshs. 200,000/=, No. 2556 and 2557 to Mwangemi Civil Engineering, 2558 and 2559 to Directors of Mwangemi Civil Engineering and that the deceased received the purchase price for the said properties.
18. She averred that the Petition was filed in the lower court by mistake. She deposed that in December 2019, her son, Sammy Goya Ayub asked her to leave the homestead and go back to where she came from, that the applicants live in her house and they constantly demand money from her expecting her to take care of their meals, upkeep, utility bills and other expenses and they insult her if she does not give them money. Also, that Sammy chased visitors and assaulted their mother's grandson.
19. Also on record is the supplementary affidavit of Jones Mwahgolo Ayub, the deceased's 6<sup>th</sup> born child dated 22<sup>nd</sup> January 2020. His averments are essentially a replication of the contents of the affidavits filed by his other siblings in opposition to the application, so, it will add no value to rehash them here.
20. Sammy Gibson Goya Ayub, the 2<sup>nd</sup> applicant filed the further affidavit dated 20<sup>th</sup> January 2021. He averred that his mother does not know how their late father handled his affairs because he did so secretly; that the information relating to plot number 2556 and 2557 was obtained from an unknown land broker, and that there is no evidence that plot number 2547 was constructed by his mother and the deceased, and that plot number 1294 is not matrimonial home
21. On 1<sup>st</sup> December 2022, I allowed an application dated 30<sup>th</sup> November 2021 filed by a one Peter Thuku Kingori, who sought to be enjoined in these proceedings as an Interested Party. His interest in the estate is that he purchased Ronge/Nyika/2546 which formed part of the estate from a Mr. Wilson who had purchased the property from the deceased's family.
22. In addition to the affidavit evidence, the parties also testified orally. Sammy Gibson Goya's testimony was essentially a replication of his affidavits and the grounds in support of the application. It will add no value to rehash the same here but it will suffice to state that his case is that his mother petitioned for the grant without their consent; that the agreements allegedly signed by the deceased were not witnessed; that his mother did not list the liabilities to show that some people had bought the land; that there was no prove of payment; that the transfer documents are not supported by sale agreements nor did they agree on the rental income.
23. The 1<sup>st</sup> applicant Mr. Johnson Ruel Mwawasi testified that they petitioned for grant of letters of administration and as they waited for the same, they learnt that a Mr. Mwawasi, their cousin had encroached on plot number 2148. He said they did not understand how the plots were sold. On cross-examination, he said he was given time to file an objection but he did not manage. He said his father never told him he was selling the land to his cousin.



24. The Respondent Mary Manyasi Mwaizanya, the deceased's wife's testified that she had six children with the deceased. Her testimony was essentially a replication of the contents of her affidavits. It will add no value to repeat it here. It will suffice to state that she testified that she petitioned for grant of letters of administration because buyers who had purchased land from the deceased needed ownership documents for their parcels of land. She said all her children signed the consent except Sammy, and that, the applicants failed to file an objection as directed by the court, so the court proceeded to confirm the grant after which she transferred the plots to the various purchasers and to her children except Winne and Ayub because the court stopped the grant. She said Johnson stays with him and he does not speak except when he is asking for money and that he sleeps all the time and wakes up at 11am. She said he does not help in the shamba and that she cooks for him. She said he is violent and at one time he beat Winnie. Regarding Sammy, she said at times he talks badly, that he asked whether she came with a house to their home. She said at one time Sammy was arrested for injuring Raymond, her grandchild. She said Sammy has three children from different mothers and that she lives with one of them and caters for her. She said the applicants cannot act as administrators because they are irresponsible and greedy.
25. Eddah Samba testified in support of her mother's evidence. She adopted her affidavit dated 30<sup>th</sup> September 2020. It will add no value to rehash the contents here. The Respondent also relied on the affidavits of Winnie T. Ayub and Ephrahim Ayub and Jones Ayub.
26. The Interested Party Mr. Peter Thuku Kingoro adopted his witness statement dated 1<sup>st</sup> February 2022 and his list of documents. His claim is that he bought Ronge/ Nyika/2546 and that he is an innocent purchaser for value.
27. The applicants filed written submissions on 22<sup>nd</sup> February 2022. The substance of their submissions is that transfer of all parcels of land alleged to have been sold by the deceased are null and void; that her mother did not disclose the liabilities of the estate; that there was no witness at the time of transferring the titles and that the titles were transferred using a discharged grant. They submitted that the agreements in support of the transactions are invalid because they were drawn by a broker and three years lapsed from the date of the agreement to the date of the transfer; that there is no proof of payment; that there was no consent at the time of the sale; and that the agreements do not show which plot was sold to who.
28. Additionally, they argued that Michael Mwawasi their cousin constructed hostels on plot no 2148 without the consent of all the beneficiaries. Regarding plot no. 2148, they submitted that their mother lied yet the interested party provided evidence that she was paid Kshs. 450,000/= for the said land. They urged this court to ascertain damages payable to them.
29. Regarding the Interested Party's claim, they submitted that no contract has been provided to support the purchase of the plot; that there was no instrument of conveyance; that there is no prove of payment and that the law was not followed so the transaction is null and void.
30. The Respondent's counsel submitted that the application has been superseded to some extent by the Partial Mediation Agreement which was adopted as an order of this court on 7<sup>th</sup> February 2022 because only the properties listed at paragraph D of the said agreement were left for determination by this court and the issue of who will administer the estate. Counsel argued that even though the applicants seek to revoke the grant, they do not want the revocation to affect the properties already bequeathed to them using the same grant. He argued that the revocation will affect the rights of third parties who purchased the properties from the deceased.
31. Regarding the argument that the Petition was filed in the lower court which the applicants argued had no jurisdiction, counsel urged the court to consider that the applicant was acting in person. He cited



Isaac Gathungu Wanjohi v Simon Moloma Nkaru & another in support of the proposition that the applicant should not be prejudiced for filing the matter in the lower court.

32. Additionally, counsel submitted that the Partial Mediation Agreement dated 12<sup>th</sup> July 2021 and the consent order dated 7<sup>th</sup> February 2022 renders the grant incapable of being revoked because the grant cannot be revoked to affect part of the undistributed estate and leave out others which have already been distributed. He submitted that the applicants have already received part of their share of the estate, but, two beneficiaries are yet to receive their share after the court “suspended” the grant. He argued that the revocation if allowed will affect bona fide purchasers who purchased properties from the deceased.
33. Regarding the properties transferred to the persons who purchased the properties from the deceased, counsel cited section 93 of the *Law of Succession Act* in support of her argument that the validity of the transfers cannot be affected by the revocation of the grant. He relied on Isaac Gathungu Wanjohi v Simon Meloma Nkaru & another (supra) which held that the effect of lack of jurisdiction on a purchasers’ interest is insulated by the said section.
34. Regarding the suitability of the applicants to be appointed as administrators, he cited section 66 of the Act which sets out the order of preference to persons to administer the estate where the deceased dies intestate who are ranked as the surviving spouse(s) following by the children of the deceased. He also cited Rule 7(7) of the Probate and Administration Rules which requires that a person with a lessor right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get the person or persons to renounce their right to administration or cause citation to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.
35. He submitted that the evidence tendered in court leaves doubts on the applicants’ ability to administer the estate. He cited Rule 73 of the Probate and Administration Rules which provides that nothing in the rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Regarding the distribution of the properties in paragraph D of the Mediation Agreement, counsel proposed that they be distributed equally among the widow and the six children. He urged the court not to revoke the grant but to re-issue and confirm the grant.
36. Counsel for the Interested Party submitted that the Interested Party purchased Ronge/Nyiks/2546 from Wilson Mugambi and Lucy Wakio Mwanzia who had purchased it from the deceased during his lifetime. He argued that the Interested Party took possession and charged the property to a bank. He cited section 93 (2) of the *Law of Succession Act* and urged the court to find that the Interested Party is a bona fide purchaser for value. He cited Kaumbuthi Mathiu v John Mwirigi & another which upheld the said provision and Thomas Kenyatta Gichwa v Jackline Kemuma & another in which the court declined to issue orders which would potentially affect a third party in whose name the property had been transferred.
37. Before addressing the issues presented in this case, I find it necessary to recall that hearing proceeded before me on 7<sup>th</sup> February 2022. After hearing evidence from all the parties, it became manifestly clear that all the parties were in agreement that after the court referred them to mediation, they partially resolved the dispute and signed the Mediation Partial Settlement Agreement dated 12<sup>th</sup> July 2021. As per the said agreement and the evidence tendered by all the parties, they all agreed that the deceased gifted the following properties to his children: -
  - a. Plot No. Ronge/Nyika/ 2565 to Johnson Ruel Malagho M. Ayub.
  - b. Plot No. Ronge/Nyika/2566 to Edda Samba Ayub.



- c. Plot No. Ronge/Nyika/2573 to Winnie Tuswa Ayub.
  - d. Plot No. Ronge/Nyika/2574 to Sammy Gibson Goya
  - e. Plot No. Ronge/Nyika/2575 to Kachla to Ephrahim Ayub.
  - f. Plot No. Ronge/Nyika/ 2549 to Jones Stephen Mwangholo Ayub.
38. In the agreement, the parties also agreed that Ronge/ Nyika/1357 shall be shared equally among the six children while the following plots shall not be sub-divided but shall remain in the family, namely, Ronge/Nyika/ 2576; Ronge/Nyika/1294 (the homestead) and Ronge/Nyika/1876. Lastly, the parties did not agree on the distribution of the following properties:-Ronge/Nyika/2547;Ronge/Nyika/2148; Ronge/Nyika/1308; Ronge/Nyika/1315 and Ronge/Nyika/1979 and who should administer the estate.
39. On 7<sup>th</sup> February 2022 after hearing all the parties and after each one of them confirmed that they had signed the Mediation Partial Settlement Agreement dated 12<sup>th</sup> July 2021, and appreciating the great step taken by the parties in an attempt to resolve this dispute, and guided by the provisions of Article 159 (2) (c) of *the Constitution*, with the concurrence of the parties, I recorded the following order by consent: -
- “By consent, the partial agreement dated 12<sup>th</sup> July 2021 be and is hereby adopted as an order / decree of this court.”
40. I requested the parties to sign the consent and both the applicants and the advocate for the Respondent signed the court record, so, they all endorsed the consent. The effect is that the Partial Settlement Agreement dated 12<sup>th</sup> July 2021 became an order of this court binding upon all the parties. The said consent narrowed down the dispute to the distribution of the parties listed in paragraph D of the said agreement and who should administer the estate. Despite the said agreement and the said consent orders, the applicants adduced evidence touching on matters touching on issues already resolved by the said consent.
41. Also, in his submissions, the applicants argued that transfer of all parcels of land alleged to have been sold by the deceased are null and void; that her mother did not disclose the estate’s liabilities; that there was no witness at the time of transferring the titles and that the titles were transferred using a discharged grant. They submitted that the agreements in support of the transactions did not qualify to be legal agreements because they were drawn by a broker; those three years lapsed from the date of the agreement to the date of the transfer; that there is no proof of payment; that there was no consent at the time of the sale; and that the agreements do not show which plot was sold to who.
42. Also, the applicants argued that Michael Mwawasi their cousin constructed hostels on plot no 2148 without the consent of all the beneficiaries. Regarding plot no. 2148, they submitted that their mother lied because the interested party provided evidence that she was paid Kshs. 450,000/= for the said land. They also urged this court to ascertain damages payable to them.
43. On the Interested Party’s claim, the applicants submitted that no contract has been provided to support the purchase of the plot, that there was no instrument of conveyance, that there is no prove of payment and that the law was not followed so the transaction is null and void.
44. A pertinent question which calls for an answer is whether having willingly and voluntarily signed the agreement and the consent order, it is open for the applicants to introduce claims outside the properties listed in paragraph D of the said agreement, which agreement was by consent adopted as an order of



this court. Simply put, the question is whether the applicants are estopped by the said consent and the said agreement from raising matters outside the dispute as narrowed in the said agreement and the consent. Differently put, does the doctrine of estoppel apply in the above circumstances.

45. There are two species of estoppel per rem judicatam namely: - (i) cause of action estoppel; and (ii) issue estoppel. The particular type of estoppel in this case is issue estoppel. The classic modern statement of the nature of issue estoppel is to be found in a passage from the judgment of Diplock LJ (as he then was) in *Mills v Cooper* approved subsequently by the House of Lords in *DPP v Humphreys*. Diplock LJ said: -

“This doctrine [namely of issue estoppel], so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him.”

46. This doctrine applies even though the decision on the first occasion, said to give rise to the estoppel, had resulted from a mistaken appreciation of the underlying facts, or from an incorrect view of the underlying law, as is apparent from what Coleridge J said in *R v Hartington Middle Quarter (Inhabitants)* when delivering the judgment of the court: -

“The question then is, whether the judgment concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue. And we think it does conclude to that extent. It is unnecessary now to rely on the judgment having been in rem; for it was a judgment between the same parties: the matters which are cardinal in the present litigation cannot now be disputed, without asserting that the decision upon them in the former case was erroneous. But this they cannot do directly; they have passed their time, and neglected the lawful mode; they cannot now shew by adducing new evidence that the Court was misled as to the facts, nor by new argument or authority that it drew a wrong conclusion in law. In the case of *Regina v. Wye* ((1838) 7 Ad & El 761, 112 ER 656), a case sometimes misunderstood, this principle was very clearly affirmed, in accordance with prior decisions. If, then, the former decision cannot be impeached, and these facts are so cardinal to it that without them it cannot stand, on principle, when these facts are again in question between the same parties, they must be considered as having been conclusively determined.”

47. To establish an issue estoppel there must have been a final judgment/Order between the same parties or their privies, litigating in the same capacity in the same issue, and the estoppel must be pleaded. The operation of issue estoppel, therefore, is subject to the following five requirements being met: - Finality of judgment/order, Identity of parties, Identity of capacity, Identity of issue and pleading of estoppel. To me, the consent order recorded before me is final and binding. No acceptable exceptions have been shown to exclude the doctrine of estoppel.
48. The authorities show that the doctrine of issue estoppel has been expressed to be subject to exceptions, as is apparent from the passages quoted earlier from the judgement of Wigram V-C in *Henderson v*



Henderson and the judgment of Diplock LJ in *Mills v Cooper*. As Browne-Wilkinson V-C in *Arnold vs. National Westminster Bank*

“It is therefore clearly established (and counsel for the landlords accepts) that there can be exceptional circumstances which prevent an issue estoppel from arising. In my judgment it is equally clear that in order for such special circumstances to exist it must be shown earlier that the first decision is impeachable on the usual grounds (that is to say fraud, collusion, etc) or that the first relevant new material, not available at the time of the first decision, has since become available.”

49. And at 982D: -

“Res judicata, whether cause of action estoppel or issue estoppel, is based on the fundamental principle that it is unjust for a man to be vexed twice with litigation on the same subject matter coupled with the public interest in seeing an end to litigation. So far as cause of action estoppel is concerned, the rule is absolute: you cannot sue twice for the same relief based on the same cause of action even if new facts or law have subsequently come to light. But it is clear that the rule as to issue estoppel is different as the authorities which I have quoted demonstrate; there are circumstances in issue estoppel where the injustice of not allowing the matter to be relitigated outweighs the hardship to the successful party in the first action in having to relitigate the point...”

50. Authorities show that the exception relating to 'special circumstances' is designed to ensure that where justice requires the non-application of issue estoppel, it shall not apply. As Lord Upjohn said: - "All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

51. In the instant case, the parties agreed on the properties gifted to each child by the deceased. The properties are clearly identified. Four of the beneficiaries had the properties transferred to them using the same grant they claim was obtained fraudulently. When they received their shares, the applicants raised no objection nor did they question the grant. In fact, the applicants proceeded to sell the same properties. They pocketed the proceeds. In the agreement, they agreed each child got a plot. To crown it all, they endorsed the consent in court. They are bound by the consent. They cannot now purport to apply for revocation of the same grant. The grant was "suspended" by the court at the applicants instance before two of the beneficiaries, namely, Winnie Tiswa Ayub and Jones Stephen Mwaghola Ayub could have their plots transferred to them. The applicants cannot benefit from the same grant, then purport seek to nullify it to the detriment of the other beneficiaries who are yet to receive their share and the purchasers who purchased the properties from their father.

52. At the time of signing the agreement and the consent, they did not raise issues touching on the purchasers' rights and the rights of the Interested Party nor did they raise the issues relating to the rental income. To me, this is a clear case where by the doctrine of estoppel applies. The applicants are estopped from raising any dispute on the distribution of the estate outside paragraph D of the said agreement.

53. The other pertinent issues which cannot escape this courts attention is the applicants' attempt to challenge transfer of titles to various persons who are said to have purchased their properties from the deceased. The Respondent relied on the sale agreements and or claims by the affected persons and using the grant she transferred the respective properties to the various owners. The applicants are disputing the validity of the sale agreements and or the manner the transfers were done. Three pertinent questions arise from the applicants' claim. One, is whether the applicants can raise issues relating to properties



which were not included in the disputed ones in the mediation agreement. As stated above, any claim on the properties outside paragraph D of the agreement is caught up by the doctrine of estoppel as discussed above.

54. Two, is whether this court in its right senses can issue an order which has the effect of nullifying titles held by the various purchasers who are not parties to this case without affording them an opportunity to be heard.
55. The purchasers having acquired their respective titles, and having taken possession of the properties and even developed them, they have established occupational, property, personal, social, family and other ties that make it less than a simple matter to be deprived of rights to property guaranteed under *the Constitution* without being given an opportunity of being heard or without being afforded a fair process or being afforded the right to contest the case against them or to apply for various forms of relief from the court. In other words, some socio-economic rights protected by *the constitution* have accrued in their favour. This court is now being asked to terminate those rights by declaring the transfer of their titles null and void yet they are not parties in these proceedings. Only one of them, namely the Interested Party moved this court to assert his right. The others are not before this court and there is nothing to show they are aware of this case.
56. The proprietors of all the affected titles are necessary parties to these proceedings and they ought to have been enjoined in this case. Accrued rights cannot be taken away even by a judicial pronouncement without affording the affected persons the opportunity of being heard. Such a decision will have been arrived at in total breach of the rules of natural justice, and it would be unconstitutional and a mockery of justice.
57. A was held by the Supreme Court of India in *Prabodh Verma v State of U.P. and Tridip Kumar Dingal v State of W.B.*, a person or a body becomes a necessary party if he is entitled in law to defend the orders sought. The term “entitled to defend” confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. A person or an authority must have a legal right or right in law to defend or assail. The following excerpt from the Supreme Court of India decision in *Canara Bank v Debasis Das* is relevant: -

“Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.”

And again: -

“Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case,



the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance....”

58. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person’s rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it. As the Supreme Court of India put it succinctly in *J.S. Yadav v State of U.P. & Anr* in Paragraph 31:-

“No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the... Code of Civil Procedure,.... provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In service jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person are terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the petitioner-plaintiff succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without removing the person who filled up the post manned by the petitioner-plaintiff.....More so, the public exchequer cannot be burdened with the liability to pay the salary of two persons against one sanctioned post...”

59. The above cited decisions are graphically clear that a court ought not to decide a case without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large. On this ground alone, the invitation to this court to nullify titles passed to the various purchasers who are not parties to these proceedings’ collapses.
60. The third ground mounted by the applicants is their attempt to challenge the validity of the agreements in respect of the said properties. The applicants argued that the agreements were not witnessed, that they were not consulted and or that they never consented to the sale of the properties. These arguments have no place in the proceedings before me. The applicants’ titles are protected by section 93 of the Law of Succession Act. As herein above stated, the applicants are inviting this court to issue an order affecting parties not before this court which is impermissible.
61. I now turn to the merit of the application. The key issue here is whether the applicants have demonstrated any grounds for court to revoke the grant as provided for under Section 76 of the Law of Succession Act which provides: -

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an 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 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 untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. ....

62. The following principles distilled from Court of Appeal decision in *Matheka and Another v Matheka* are worth citing: -

- i. A grant may be revoked either by application by an interested party or by the court on its own motion.
- ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.

63. The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds. A reading of section 76 shows that the grounds can be divided into the following categories: - the propriety of the grant making process; mal-administration or where the grant has become inoperative due to subsequent circumstances.

64. If a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled.

Black's Law Dictionary defines fraud as "an intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right - A false representation of a matter of fact, whether by words or by conduct by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury." The fraud must be attributed to the Petitioner either directly or by necessary implication. From the material before me, no fraud has been demonstrated in this case nor do I see any.

66. The applicants are accusing their mother of concealing material facts. It's true one who does not come to court with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. Courts have univocally held that suppression of material facts & not coming with clean hands disentitles the petitioners of discretionary reliefs. The doctrine is often stated as those seeking Equity must do Equity or Equity must come with Clean Hands.

67. A person who approaches the court for granting relief, equitable or otherwise, is under a solemn obligation to candidly & correctly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. He owes a duty to the court to bring out all the facts and desist from concealing/suppressing any material fact within his knowledge or which he could have



known by exercising due diligence expected of a person of ordinary prudence. However, they miserably failed to point out the material facts which were concealed.

68. A grant can be annulled if the Petitioner has made a false statement. A false statement is statement that is known or believed by its maker to be incorrect or untrue and is made especially with intent to deceive or mislead. The burden lies on the applicants to demonstrate that the Petitioner made a statement which she believed to be incorrect or untrue so as to deceive or mislead. There is nothing before me to suggest that the applicants have established this ground. It is not enough to rehash the provisions of section 76 of the *Law of Succession Act*. The applicants bear the burden of proving that the Petitioner intentionally made a false statement.
69. I find that there is nothing before me to suggest the existence of a deliberate non-disclosure of relevant materials. A grant obtained fraudulently by the making of a false statement can also be revoked by the court. A grant is defective if the procedure followed in obtaining the grant is defective in substance, when the grant is obtained fraudulently by making a false statement, making an untrue allegation of fact essential in point of law to justify the grant and or when the person who has the grant has failed to proceed diligently with the administration of the estate. No evidence was tendered before me to demonstrate any of the above grounds.
70. The other ground is the expression "defective in substance" which has judicially been defined to mean a defect of such a character as to substantially affect the regularity and correctness of the previous proceeding. It is an imperfection in the body or substantive part of a legal instrument, plea, indictment, etc., consisting in the omission of something which is essential to be set forth. There is nothing before me to suggest that the proceedings were defective in substance.
71. It was argued that the lower court had no jurisdiction to issue the grant. This ground of attack is premised on the value of the estate which the applicants claim was not disclosed and also exceeded the pecuniary jurisdiction of the court. This argument is attractive. But that is how far it goes. It collapses not on one but several fronts. First, the law is that objections touching on a court's jurisdiction should be raised at the earliest opportunity possible. One wonders why the applicants never raised the objection before the lower court. Second, the applicants benefitted from the grant. They not only had their properties transferred to them pursuant to the same grant, but they went further and sold the properties using the same grant. After they enjoyed the money, they now turn round and claim the court had no jurisdiction. This amounts to speaking from both sides of the mouth. It is unacceptable. If the court were to accept their argument, then the first casualty should be the properties they sold.
72. Third, by using the same grant to receive and sale the properties given to them, they submitted to the jurisdiction of the court. Fourth, even as they challenge the pecuniary jurisdiction of the lower court, they did not disclose the value of the estate to show that it exceeded the pecuniary jurisdiction of the lower court. He who alleges must prove. Fifth, even if I were to be persuaded by their argument that the lower court had no jurisdiction, this matter is now before the High Court which has unlimited original jurisdiction. This court would be minded only to grant an order which will serve the interests of justice. To be avoided is an order which will injure or prejudice the parties before me or prolong this dispute which has been in court since 2012. Sixth, the parties went for mediation and the question of jurisdiction was not raised. Why raise it now.
73. Lastly, the agreement signed by all the parties required that this court appoints the administrator. Four out of six of the deceased's children prefer their mother. Only the applicants are opposed to her appointment. The evidence before me is that both applicants are over 50 years old, that they are still living in their mother's house. Their mother is 72 years old and they depend her including demanding food and pocket money from their mother. She cooks for them and provides for them including giving



them pocket money. They were described as hostile to her sometimes telling her to her face that she came to their home with nothing and even telling her to return to her home. They admitted that at times they too disagree. One of them was described as violent. I do not think it will be in the best interests of the estate (even to their own interest since the two admitted that at times they differ) to appoint any one of them or both as administrator(s) nor do I see any reason to remove their mother as the administrator. In any event, as the law provides, their mother is ranked first in order of preference while appointing an administrator.

74. In a nutshell, I find and hold that the applicants have not established any grounds to merit any of the prayers sought in their summons for revocation of Grant dated 30<sup>th</sup> September 2019. Accordingly, I hereby order as follows: -
- a. That the applicant's application dated 30<sup>th</sup> September 2019 is hereby dismissed with no orders as to costs.
  - b. That the consent order recorded on 7<sup>th</sup> February 2022 is hereby adopted as a final order of this court as follows: -
    - i. That the deceased, Mr. Ayub Mwaisanya Ruel gifted the following plots to his children, namely: - (a) Plot number Ronge/Nyika/2565 to Johnson Ruel Malagho M. Ayub; (b) Plot Number Ronge/Nyika/2566 to Edda Samba Ayub; (c) Plot Number Ronge/Nyika/2573 to Winnie Tuswa Ayub; (d) Plot Number Ronge/Nyika/2574 to Sammy Gibson Goya; (e) Plot Number Ronge/Nyika/2575 to Ephraim Kachula Ayub; and (f) Plot Number Ronge/Nyika/2549 to Jones Stephen Mwagholo Ayub.
    - ii. That Plot number Ronge/Nyika/1357 shall be shared equally among the 6 children of the deceased.
    - iii. That the following plots shall not be sub-divided but shall remain in the family; namely, (a) Plot Number Ronge/Nyika/2576 (University Plot un allocated); (b) Plot Number Ronge/Nyika/1294-Homestead; (c) Plot Number Ronge/Nyika/1876-Shama-Mlegwa.
  - c. That the properties listed in paragraph (d) above shall be shared equally among the wife and children of the deceased who are:- (a) Mary Manyasi Mwaisanya- Wife; (b) Johnson Ruel Mwawasi M. Ayub- Son; (c) Eddah Samba Ayub-Daughter; (d) Winnie Pauline M. T. Ayub-Daughter; (e) Sammy Gibson Goya-Son; (d) Ephraim Joab Kachula A; (e) Jones Stephen Mwaghol A.
  - d. That for avoidance of doubt, the properties referred to in paragraph (c) above are:-
    - i. Plot Number Ronge/Nyika/2547;
    - ii. Plot Number Ronge/Nyika/2148;
    - iii. Plot Number Ronge/Nyika/1308;
    - iv. Plot Number Ronge/Nyika/1315;
    - v. Plot Number Ronge/Nyika/1979.
  - e. That Mary Manyasi Mwaisanya shall remain the administrator of the deceased's estate.
  - f. That Title Number Rongo/Nyika/2546 belongs to Peter Thuku Kingori who is the bona fide registered proprietor and accordingly the conservatory order recorded against the title on 27<sup>th</sup> November 2019 be and is hereby removed.



Right of appeal 30 days

**SIGNED AND DATED AT MOMBASA THIS 2ND DAY OF AUGUST 2022**

**JOHN M. MATIVO**

**JUDGE**

**SIGNED, DATED AND DELIVERED AT MOMBASA THIS 2ND DAY OF AUGUST 2022**

**OLGA SEWE**

**JUDGE**

