



REPUBLIC OF KENYA



**Mbugua & another v Wacuka & 2 others (Miscellaneous Case 150 of 2021)
[2022] KEHC 15954 (KLR) (Family) (18 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS CASE 150 OF 2021
MA ODERO, J
NOVEMBER 18, 2022**

BETWEEN

**LEORNARD MUNYUA MBUGUA 1ST APPLICANT
SAMUEL KAMAU NGUHI 2ND APPLICANT**

AND

**JAMES MUCHIRI WACUKA 1ST RESPONDENT
ELIZABETH WANGUI MUTHIORA 2ND RESPONDENT
PETER WAWERU MUTHIORA 3RD RESPONDENT**

RULING

1. Before this Court is the Notice of Motion application dated August 2, 2021 by which the Applicant Leornard Munyua Mbugua and Samuel Kamau Nguhi seek the following orders:-
 - “1. Spent.
 2. That this Honourable court be pleased to withdraw Kikuyu Succession Cause No. 166 of 2016 (in the matter of Estate of John Muthiora Waweru – deceased) and thereafter try the same.
 3. That this Honourable court be pleased to consolidate Kikuyu Succession Cause No 1665 of 2016 (In the estate of John Muthiora Waweru – deceased) which is pending before this court.
 4. That the costs of this application be in the cause.”



2. The application which was premised upon order 51 Rule 1, Order 11 Rule 3 (h) and (I) of the [Civil Procedure Rules](#). Section 3A and 18 (1), (b) (1) and (2) for the [Civil Procedure Act](#) and all other enabling provisions of the Law and was supported by the Affidavit of even date sworn by the Applicants.
3. The Respondents James Muchiri Wacuka, Elizabeth Wangui Muthiora and Peter Waweru Muthiora all opposed the application through the Replying Affidavit dated April 20, 2022 sworn by the 1st Respondent.
4. The matter was canvassed by way of written submissions. The Applicants filed the written submission dated July 29, 2022. However, the Respondents though being granted an opportunity to do so failed to file any submissions.

Background

5. The Succession Cause No 228 of 2014 filed in the High Court in Nairobi relates to the estate of Irene Wangui Waweru (hereinafter ‘the Deceased’) who died interstate on March 2, 1993 at the Kenyatta National Hospital. The Deceased was survived by the following persons:-
 - (i) Beatrice Wanjiku Nguhi – Daughter
 - (ii) Leonard Munywa Mbugua – son
 - (iii) Samuel Kamau Nguhi – son
 - (iv) David Kirui Nguhi – sonOne of the assets forming the estate of the Deceased was the property known as LR No Dagoretti/Riruta/1302 (hereinafter ‘the suit property’)
6. Following the demise of the Deceased Grant of letters of Administration Intestate were issued to Francis Ndungu and John Muthiora Waweru. That Grant was duly confirmed on October 22, 2002 and was later amended on May 15, 2013. In the confirmed Grant the suit property Dagoretti/Riruta 1302 was to devolve to the two (2) Administrators in equal shares.
7. The Applicants aver that there is another Succession Cause No 166 of 2016 which relates to the estate of one John Muthiora Waweru in which the beneficiaries and assets are the same as those in this Succession Cause. That the issues for determination in the two Succession Cause are similar.
8. The Applicants are the sons of the late Catherine Nguhi Waweru, who was a daughter to Irene Wangui Waweru (the Deceased herein). Therefore, the Applicants are the grandchildren of the Deceased. The Applicants allege that some of the assets which were distributed in the Kikuyu Succession Cause were fraudulently acquired by the Deceased in that cause John Muthiora Waweru.
9. The Applicants contend that the suit property which forms part of the estate of the Deceased herein was fraudulently registered in the sole name of John Muthiora Waweru whilst the said property ought to have been registered jointly.
10. The Applicants state that in order to avoid the risk of contradictory orders being issued by two different courts the High Court ought to withdraw Kikuyu Succession Cause No 166 of 2016 Re: Estate of John Muthiora Waweru and consolidate it with Nairobi Succession Cause No 2281 of 2014: Re Estate of Irene Wangui Waweru. They pray that the consolidated cause be heard in the High Court in Nairobi.
11. As stated earlier the application was opposed. The 1st Respondent told the court that he was one of the Administrators of the estate of John Muthiora Waweru who was his father in Kikuyu Succession No 166 of 2016.



12. According to the 1st Respondent his fathers estate comprised of only one asset being Dagoretti/ Riruta/6988. He told the court that the Grant in the Kikuyu case had been issued and confirmed. That the estate of the Deceased had been fully distributed to the beneficiaries. That Kikuyu Succession Cause No 166 of 2016 has been finalized and the file has been closed. That the sole property having been distributed, there was nothing left to litigate upon.
13. The 1st Respondent states that the remedy now available to the Applicants is to institute a suit in the Environment and Land Court. The 1st Respondent states that the present application is misplaced, vexatious and amounts to an abuse of court process. He prays that the application be dismissed with costs.

Analysis and Determination

14. I have carefully considered this application, the Reply filed thereto as well as the written submissions filed by the Applicants. The Applicants prayer is that Kikuyu Succession Cause No 166 of 2016 be withdrawn and that the same be consolidated with Succession Cause No 2281 of 2014 for trial in the High Court in Nairobi.
15. Section 18 (1) (b) of the *Civil Procedure Rules* provides:-
 - “(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
 - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(i) Transfer of Kikuyu Succession Cause No 166 of 2016

16. According to the Respondent the Kikuyu Succession Cause has already been concluded. The Grant issued in that matter was confirmed on July 13, 2018. The court is informed that the estate has been distributed fully.
17. If the Applicants have any issue with the Grant issued in Kikuyu Succession Cause No 166 of 2016 or if they take issue with the mode of distribution of that estate then their remedy would be to file a summons seeking to have the Grant issued in that particular case revoked. Indeed, I note that the Applicants had filed in the Kikuyu cause a summons for Revocation of Grant dated 31st My 2021. (Annexure JMW ‘1’ to the Replying Affidavit dated April 20, 2022). The magistrates courts have jurisdiction to revoke grants, which have been issued in their courts.



18. There is no indication as to whether this summons was ever prosecuted, and if not, why. I do agree with the Respondents that in filing this application for transfer the Applicants are merely attempting to revive the Kikuyu Succession Cause.
19. In any event it would serve no purpose for this court to transfer a matter which has already been finalized. The Applicants had indicated that the Kikuyu matter was due for mention on August 4, 2021. That date is long past the urgency (if any) no longer exists. I find that any issues arising from Kikuyu Succession Cause No 166 of 2016 can and ought to be dealt with in the court where the Grant was issued. Accordingly, I find no justification for the prayer seeking transfer of the matter to the High Court and I decline to order such transfer.

(ii) Consolidation of the Files

20. The Applicants seek to have this Succession Cause consolidated with the Kikuyu case on the basis that both matters touch on the same subject matters and involve the same parties (beneficiaries). At the outset, it must be pointed out that the two Succession Causes relate to different estates. Nairobi Succession Cause No 2281 of 2014 relates to the estate of the late Irene Wangui Waweru whilst Kikuyu Succession Cause No 160 of 2016 relates to the estate of the late John Muthiora Waweru. Each estate is separate and distinct and must be dealt with individually. For this reason alone the two matters cannot be consolidated.
21. In the case of *Law Society of Kenya vs The Centre for Human Rights and Democracy* [2014] eKLR the Supreme Court of Kenya stated:-

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.

From the above jurisprudence a broad principle emerges relating to consolidation of suits. That is, where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matter should be disposed at the same time, consolidation should be ordered. However, it is succinct position of law that precedential verdicts are to be followed where the facts of the case are almost identical in nature or the question of law involved is identical.”

22. In the case of *Municipal Council of Mombasa vs – Municipal Council of Mombasa* [2004] eKLR Maraja J (as he then was) stated:-

“Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.

The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-

1. Some common question of law or fact arises in both or all of them or
2. The rights or relief claimed in them are in respect of, or arise out of the same transactions or series of transactions, or



3. For some other reason it is desirable to make an order for the consolidating them.

The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action.

Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated.”

23. The Applicants claim that as per the confirmed Grant issued in that in Nairobi Succession No 2281 of 2011 (the property known as Dagoretti/Riruta/1302 was to be vested jointly in equal shares to John Muthiora Waweru and Gicheru Waweru Wakinya. They allege that John Muthiora Waweru (the Deceased in the Kikuyu cause) fraudulently had the suit properly registered in his name alone and not in joint names as was required by the Grant issued on May 15, 2013.
24. The Respondent on their part assert that the property which formed part of the estate in Kikuyu Succession Cause No 160 of 2016 was Dagoretti/Riruta/6988. It is clear that the two estates involved, two (2) different parcels of land. Thus, the Applicants claim that the two matters involved the same subject matter is not true.
25. Further the Applicants have all along made reference to Nairobi Succession Cause No 2281 of 2014 yet the confirmed Grant which has been annexed to LMM ‘1’ to this Notice of Motion relates to Succession No 263 of 2000 which is an entirely different cause. The Applicants have not sought consolidation with Succession Cause No 2634 of 2000. The Grant issued in Succession Cause No 2634 of 2000 remains valid as the same has not been set aside. Therefore the estate would I believe be distributed in accordance with that Grant.
26. Moreover I reiterate that the estate in the Kikuyu Succession cause has been distributed. This means that the property known as Dagoretti/Riruta/6988 has been subdivided and distributed to the beneficiaries. The same no longer exists.
27. All in all, I find there exists no commonality between the two Succession Causes to warrant consolidation. It is not even clear which files the Applicants wish to have consolidated
28. Finally, I find no merits in the present application. The Notice of Motion dated August 2, 2021 is hereby dismissed in its entirety. Costs will be met by the Applicants.

DATED IN NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

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MAUREEN A. ODERO

JUDGE

