



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 497 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE PHILIP NJOKA KAMAU

RULING

(ON PRELIMINARY OBJECTIONS OF THE 2ND, 3RD AND 4TH RESPONDENTS)

1. Elizabeth Wanjiku Njoka is one of the daughters of the late Alice Kahaki Njoka (deceased) and Philip Njoka Kamau (deceased).
2. In High Court Succession Cause No. 16 of 1984 she is the administrator of the estate of her mother Alice, who pre deceased her father. She filed for and was successful in having the grant issued to her father revoked.
3. She is also named as a beneficiary of the will of her father Philip, which will is the subject of this cause.
4. As the Legal Representative of her mother's estate in Succession Cause 16 of 1984 she has filed High Court Miscellaneous Application Number 33 of 2016. She seeks the following orders:

- 1) *THAT the Court be pleased to certify this application as urgent*
- 2) *THAT this Court be pleased to dispense with service of this application in the first instance owing to the urgency of this matter*
- 3) *THAT this Honourable Court be pleased to appoint Mr. H. W. Gichohi and Mr. George Kiragu, Receivers and managers of:*
 - i. *Nakuru Municipality block 10/5;*
 - ii. *Nakuru Municipality block 5/70;*
 - iii. *Mwariki block 27/70;*
 - iv. *Mwariki block 27/73;*
 - v. *Nakuru Municipality Block 21/323;*
 - vi. *Nakuru Municipality Block 21/324;*
 - vii. *Nakuru Municipality Block 21/337;*
 - viii. *Nakuru Municipality Block 21/340;*
 - ix. *Kiambogo/ Kiambogo/ Block 2/34;*
 - x. *Dundori Lanet/Kiamunyeki A Block 5/216;*
 - xi. *Nakuru Municipality/ Block 2/531;*
 - xii. *Nakuru Municipality Block 3/ 4;*

xiii. *Githunguri/ Githunguri/3051 (Mukoe Funeral Home);*

xiv. *Gitunguri/ Githunguri/1426 (Slaughter house)*

Until further orders of this Honourable Court.

4) *THAT this Honourable Court be pleased to appoint Mr. H. W. Gichohi and Mr. George Kiragu, receivers and managers of:*

i. *Nakuru Municipality block 10/5;*

ii. *Nakuru Municipality block 5/70;*

iii. *Mwariki block 27/70;*

iv. *Mwariki block 27/73;*

v. *Nakuru Municipality Block 21/323;*

vi. *Nakuru Municipality Block 21/324;*

vii. *Nakuru Municipality Block 21/337;*

viii. *Nakuru Municipality Block 21/340;*

ix. *Kiambogo/ Kiambogo/ Block 2/34;*

x. *Dundori Lanet/Kiamunyeki A Block 5/216;*

xi. *Nakuru Municipality/ Block 2/531;*

xii. *Nakuru Municipality Block 3/ 4;*

xiii. *Githunguri/ Githunguri/3051 (Mukoe Funeral Home);*

xiv. *Gitunguri/ Githunguri/1426 (Slaughter house)*

Pending the hearing and determination of this application

5) *THAT this Honourable Court be pleased to determine the remuneration to be paid to the said Mr. H. W. Gichohi and Mr. George Kiragu as receivers and managers*

6) *THAT the 2nd Defendant/ Respondent be restrained by herself, her agent and servants from selling, charging, transferring or dealing in any manner whatsoever with Nakuru Municipality Block 21/323 until further orders of this Honourable Court.*

7) *THAT the 2nd Defendant/ Respondent be restrained by herself, her agent and servants from selling, charging, transferring or dealing in any manner whatsoever with Nakuru Municipality Block 21/323 pending the hearing and determination of this suit.*

8) *THAT the 2nd Defendant/ Respondent be restrained by herself, her agents and servants from collecting rent from Nakuru Municipality Block 21/324, Nakuru Municipality Block 21/337 and Nakuru Municipality 21/340 respectively pending the hearing and determination of this suit.*

9) *THAT the 3rd Defendant/ Respondent be restrained by herself, her agents and servants from selling, charging, transferring or dealing in any manner whatsoever with Kiambogo/ Kiambogo/Block 2/34 and Bahati/Bahati/ Block 1/489 until further orders of this Honourable Court*

10) *THAT the 3rd Defendant/ Respondent be restrained by herself, her agents and servants from selling, charging, transferring or dealing in any manner whatsoever with Kiambogo/ Kiambogo/Block 2/34 and Bahati/Bahati/ Block 1/489 pending the hearing and determination of this suit*

11) *THAT the 3rd Defendant /Respondent be restrained by herself, her agents and servants from collecting rent from Kiambogo/Kiambogo Block 2/34 pending the hearing and determination of this suit.*

12) *THAT the 4th Defendant/ Respondent be restrained by herself, her agents and servants from collecting rent from Dundori Lanet/Kiamunyeki A Block 5/216, Nakuru Municipality Block 27/70 and Nakuru Municipality Block 27/73 until further orders of this Honourable Court*

13) THAT the 4th Defendant/ Respondent be restrained by herself, her agents and servants from collecting rent from Dundori Lanet/Kiamunyeki A Block 5/216, Nakuru Municipality Block 27/70 and Nakuru Municipality Block 27/73 pending the hearing and determination of this suit.

14) THAT the 4th Defendant/ Respondent be restrained by herself, her agents and servants from collecting revenue from public toilets/ showers, the restaurant and loading bay located on Nakuru Municipality Block 10/5 until further orders of this Honourable Court

15) THAT the 4th Defendant/ Respondent be restrained by herself, her agents and servants from collecting revenue from public toilets/ showers, the restaurant and loading bay located on Nakuru Municipality Block 10/5 pending the hearing and determination of this suit

16) THAT the 5th Defendant/ Respondent be restrained by himself, his agents and servants from selling, charging, transferring or dealing in any manner whatsoever with Lion Hill Pipeline Plot 37 until further orders of this Honourable Court.

17) THAT the 5th Defendant/ Respondent be restrained by himself, his agents and servants from selling, charging, transferring or dealing in any manner whatsoever with Lion Hill Pipeline Plot 37 pending the hearing and determination of this suit.

18) THAT the 6th Defendant/ Respondent be restrained by himself, his agents and servants from selling, charging, transferring or dealing in any manner whatsoever with Nakuru Municipality/ Block 3/ 4 until further orders of this Honourable Court

19) THAT the 6th Defendant/ Respondent be restrained by himself, his agents and servants from selling, charging, transferring or dealing in any manner whatsoever with Nakuru Municipality Block 3/ 4 pending the hearing and determination of this suit

20) THAT the 8th Defendant/ Respondent be restrained by himself, his agents and servants from Nakuru Municipality Block 2/531 until further orders of this Honourable Court

21) THAT the 8th Defendant/ Respondent be restrained by himself, his agents and servants from collecting revenue from Nakuru Municipality Block 2/531 pending the hearing and determination of this suit

22) THAT the 8th Defendant/ Respondent be restrained by himself, his agents and servants from receiving advertising revenue from advertisements placed on Nakuru Municipality Block 10/5 until further orders of this Honourable Court.

23) THAT the 8th Defendant/ Respondent be restrained by himself, his agents and servants from receiving advertising revenue from advertisements placed on Nakuru Municipality Block 10/5 pending the hearing and determination of this suit.

24) THAT the 2nd to 4th 7th and 8th Defendants be restrained by themselves, their agents and servants from collecting rent pending the hearing and determination of this suit from

i. Nakuru Municipality block 10/5;

ii. Nakuru Municipality block 5/70;

iii. Mwariki block 27/70;

iv. Mwariki block 27/73;

v. Nakuru Municipality Block 21/323;

vi. Nakuru Municipality Block 21/324;

vii. Nakuru Municipality Block 21/337;

viii. Nakuru Municipality Block 21/340;

ix. Kiambogo/ Kiambogo/ Block 2/34;

x. Dundori Lanet/Kiamunyeki A Block 5/216;

xi. Nakuru Municipality/ Block 2/531;

25) THAT the 2nd to 4th 7th and 8th Defendants be restrained by themselves, their agents and servants from collecting revenue until further orders of this Honourable Court, from:

i. *Githunguri/ Githunguri/3051 (Mukoe Funeral Home);*

ii. *Gitunguri/ Githunguri/1426 (Slaughter house)*

26) *THAT the 2nd to 4th 7th and 8th Defendants be restrained by themselves, their agents and servants from collecting revenue pending the hearing and determination of this suit, from:*

i. *Githunguri/ Githunguri/3051 (Mukoe Funeral Home);*

ii. *Gitunguri/ Githunguri/1426 (Slaughter house)*

27) *THAT the 2nd to 4th 7th and 8th Defendants be restrained by themselves, their agents and servants from operating account no [...] with Githunguri Branch of the 10th Defendant until further orders of this Honourable Court*

28) *THAT the 2nd to 4th 7th and 8th Defendants be restrained by themselves, their agents and servants from operating account no [...] with Githunguri Branch of the 10th Defendant pending the hearing and determination of this suit*

29) *THAT the 9th Defendants/ Respondent be restrained by himself, his agents and servants from selling, charging, transferring or dealing in any manner whatsoever with Kiambogo/Kiambogo/ Block 2/519 until further orders of tis Honourable Court. pending the hearing and determination of this sui*

30) *THAT the 9th Defendants/ Respondent be restrained by himself, his agents and servants from selling, charging, transferring or dealing in any manner whatsoever with Kiambogo/Kiambogo/ Block 2/519 pending the hearing and determination of this suit.*

THAT the cost of this application be provided for.

5. Her father, in his will appointed Juma Kiplenge as the executor and named the children of Alice, his second wife and her children as beneficiaries.

6. Juma Kiplenge brought High Court Succession Cause Number 497 of 2013 to administer the estate.

7. It is Elizabeth's position that the bulk of the properties set out in the will and subject to the Succession Number 497 of 2013 belong to the Estate of Alice Kahaki, and that her father held them in trust for Alice Kahaki's children.

8. It is also Elizabeth's position in Miscellaneous Application Number 33 of 2016 that there is need to separate the two (2) estates that of Alice Kahaki and that of Philip Njoka before any administration of the two estates can proceed.

9. Upon filing High Court Miscellaneous Application Number 33 of 2016, three preliminary objections were files against it. The three were nevertheless dismissed by the *Hon. Justice A. K. Ndung'u* in the Ruling of 26th July, 2017. He stated that the matters in the suit were **not** directly and substantially in issue in the Succession Causes as they are not between the same parties or capacities and neither had been heard or determined. That the claim in Miscellaneous Application Number 33 of 2016 was a distinct suit pitting the Estate of Philip Njoka Kamau (deceased) against the estate of Alice Kahaki Njoka (deceased) through their legal representatives. He proceeded to find that all the preliminary objections were unmerited, leaving the way open for the legal representative of Alice Kahaki's estate to have her day in court to articulate her case in furtherance of the interests of the estate, and the other parties would have the opportunity to defend their respective claims as the case would be.

10. Earlier, in the same suit the Judge had issued conservatory orders to preserve the part of the estate subject to the suit High Court Miscellaneous Application Number 33 of 2016, but allowed the status quo in the collection of revenue and rent, with a rider that parties so doing would be held to account.

11. It is in this backdrop that Elizabeth filed the application dated 30th January, 2020, seeking the removal of Juma Kiplenge as the administrator of her father's estate. She comes as a beneficiary of his estate, and feels aggrieved by the manner in which he is managing the estate.

12. The orders sought in the application are:

1. *THAT service of the said application be dispensed with in the first instance owing to the urgency of the matter*

2. *THAT this Honourable Court be please to revoke the grant issued herein to the 1st Respondent.*

3. *THAT this Honourable Court be pleased to remove Juma Kiplenge from the Office of Executor*

4. *THAT this Honourable Court be please to issue letters of Administration with Will annexed to Rtd. Major Kenneth Kinuthia Kamau and Johnson Kibunja.*

5. THAT the 1st Respondent do furnish to this Honourable Court an inventory of liabilities and Assets

6. THAT the 1st Respondent do furnish to this Honourable Court an account of the estate of the deceased between 1st of May 2012 and the date the same is filed in Court including/ reflecting rent and revenue from the following assets:

i. Income from the deceased's funeral home in Githunguri town standing on Githunguri/ Githunguri 3049.

ii. Proceeds of sale of tea grown on Githunguri/ Githunguri 3046

iii. Income from the deceased's slaughter house in Githunguri town standing on Githunguri/ Githunguri 1426.

iv. Rent yielded by Molo house Nakuru Municipality Block 5/70

v. Rent yielded by Pinkam House standing on NAKuru Municipality Block 10/5

vi. Income received from users of public toilets located in Pinkam house

vii. Rent from 20 apartments on Dundori/ Lanet (Kiamunyeke-A) Block 5/216

viii. Rent from 20 apartments on Nakuru Municipality Block 27/70

ix. Rent from 20 apartments on Nakuru Municipality Block 27/73

x. Rent from 20 apartments on Nakuru Municipality Block 21/337

xi. Rent from 20 apartments on Nakuru Municipality Block 21/340

xii. Rent from 7 apartments on Nakuru Municipality Block 21/324

xiii. Rent from apartments on Nakuru Municipality Block 21/323 (Ngatha House)

xiv. Income from the hay grown on Kampi ya Moto (Menengai Block 1/670)

xv. Rent received from 9 flats standing on Kiambogo/Kiambogo Block 2/34

xvi. Fixed deposit of the deceased with Barclays Bank Account no. [...]

xvii. Fixed deposit of the deceased with NIC bank Account No. [...]

xviii. Fixed deposit of the deceased with Family Bank Githunguri Branch Account No. [...]

xix. Dividends paid for shares held by the deceased in the following companies

a. Barclays Bank of Kenya

b. CFC Stanbic

c. CFC Insurance Company LTD

d. Sameer

e. Kengen

f. National Bank of Kenya

g. NIC Bank

h. Total Kenya

7. THAT this Honourable Court be pleased to hold and declare that Account No. [...]with Githunguri Branch of Family Bank Limited is an estate account.

8. THAT the 2nd, 5th, 7th and 8th Respondents be restrained by themselves, their servants and/or agents from operating the said Account no. [...] with Githunguri Branch of Family Bank Ltd until further orders of this Honourable Court.

9. THAT the 2nd, 5th, 7th and 8th Respondents be restrained by themselves, their servants and/ or agents from operating the said Account No. [...] with the Githunguri Branch of Family Bank LTD pending the hearing and determination of this cause.

10. THAT the 6th Respondent do account to the Court all the money received from the properties described in (5) above since 1st May 2012

11. THAT the 7th Respondent be restrained from collecting fees from the slaughter house standing on Githunguri/Githunguri/1426

12. THAT the 8th Respondent be restrained from collecting fees from Mukoe Funeral Home at Githunguri standing on Githunguri/Githunguri/3049

13. THAT the 7th and 8th Respondents be restrained by themselves, their servants and/or agents from receiving proceeds of sale of tea grown on Githunguri/ Githunguri/3046 until further orders of this Honourable Court.

14. THAT the 7th and 8th Respondent be restrained by themselves, their servants and/or agents from receiving proceeds of sale of tea grown on Githunguri/Githunguri/3046 pending the hearing and determination of this Cause.

15. THAT the 7th and 8th Respondents do render an account to this Honourable Court in respect of the proceeds of sale of tea growing on Githunguri/Githunguri/3046 since 1st of May 2012

16. THAT the cost of this application be provided for.

13. A perusal of the prayers in the High Court Miscellaneous Application Number 33 of 2016 shows that the prayers sought in the Notice of Motion dated 6th September 2016 are more or less the same. By his Ruling of 27th July 2017 on the Preliminary Objections raised to this application the Judge settled some of the concerns raised by Elizabeth in the application of 30th January 2020. In effect;

- There is already a conservatory order preserving the estate.

- There is an order allowing the parties collecting revenue and rents to continue doing so while well aware that they will be held to account.

14. It is in this light that the Preliminary Objections raised in High Court Succession Cause Number 497 of 2013 to the application dated 30th January 2020 must be viewed.

The Preliminary Objections

15. The 2nd Respondent filed a Notice of Preliminary Objection dated 12th of June 2020 on summons for removal of Executor and Accounts dated 30th of January 2012 on the following grounds:

i. *The application is bad in law, frivolous vexatious and an abuse of Court process*

ii. *This Court has no jurisdiction to entertain the said application*

iii. *The Court is functus Officio in respect of the matters raised in the said application*

iv. *The Application amounts to unlawful multiplicity of similar litigation over the same subject matter, and, is purely to vex the Respondents and the Court, and to confuse, muddle up, delay and derail the substantive matter before the Court.*

v. *The said Application is similar and raises similar issues to a previous and still pending application by the very same Applicant herein being the Summons for Revocation /Annulment of Grant dated 20th November 2013*

vi. *The issues and the subject matter in the said application dated 30th January 2020 are the same or are similar to the issues pending and partly determined in another pending suit filed before this Court by the same Applicant herein against the very same Respondents herein being **Nakuru High Court Miscellaneous Court 33 of 2016 Elizabeth Wanjiku Njoka v Juma Kiplenge & 12 others***

vii. *This Court has already previously addressed and pronounced itself on the very same issues raised in the said application dated 30th January 2020 vide its rulings dated 8th of September 2016 and 26th of July 2017 in the aforesaid Nakuru High Court Miscellaneous Case No. 33 of 2016.*

16. The 2nd Respondent prays for the following:

a. *The Summons for the removal of executor & accounts dated 30th of January 2020 be struck out and/or dismissed.*

Or alternatively

b. The summons for removal of executor & accounts dated 30th of January 2020 be stayed pending the hearing and final determination of **Nakuru High Court Misc. Case 33 of 2016- Elizabeth Wanjiku Njoka v Juma Kiplenge & 12 others**

c. The Summons for removal of executor & accounts dated 30th January 2020 be stayed pending the hearing and determination of the summons for revocation/ annulment of grant dated 20th November 2013 herein

17. The 3rd and 4th Respondents also filed their Notice of Preliminary Points of Law dated 19th of June 2020. There in they raise the following grounds:

a. *THAT the said Application is bad in law, frivolous, vexatious and inept it offends the Rule of sub judice. There exist two other similar matters pending for hearing and determination in respect of the same subject matters, relating to the similar estates vide;*

i. *The hearing and determination of Nakuru H.C. Misc. Application No. 33 of 2016*

ii. *Summons for revocation/Annulment of grant dated 20th November, 2013 pending in this succession cause*

b. *The Application offends the doctrine of Res Judicata. A similar application relating to the same parties and the same subject matter was heard on merit and determined vide ruling dated 8th September, 2016 and 26th July, 2017.*

c. *The Court is functus officio and lacks jurisdiction to re-adjudicate the matter.*

The application should be struck off with costs as the same is an abuse of Court process and meant to vex the court and harass the Respondents.

18. Parties through their counsel filed details submissions. In my considered view the issues that seek determination are;

(a) Whether this court has jurisdiction on the basis of res judicata/sub judice rules.

(b) Whether the issues raised in this application have been dealt with in accordance with Section 6 & 7 of the Civil Procedure Act.

(c) Whether the preliminary objections are merited.

(d) Whether the prayers sought by the 2nd respondent in the P.O are tenable

(e) What orders to issue

19. It is notable that together with the Preliminary Objections there are prayers seeking either the striking out of the application/dismissal with costs or in the alternative, the same be stayed pending the hearing and determination of Nakuru High Court Miscellaneous Application Number 33 of 2016 or hearing and determination of the Summons for Revocation of Grant dated 30th November 2013.

20. The applicant's position is that she wears two (2) hats, one of legal representative of her mother's estate, the other one, named beneficiary of her father's will. In this application, she comes as the latter, seeking to ensure that the estate is well administered.

21. It is her position that the rule of *sub judice* can only attract a stay of further proceedings pending the determination of the earlier suit or proceeding (**Section 6 of the Civil Procedure Act**) hence it cannot found a Preliminary Objection. Neither can it found a plea of *res judicata*, for the reason that, orders made by *Ndung'u J* in the High Court Miscellaneous Application were not final orders but injunctions which the court could vary or discharge under **Order 40 rule 7 of the Civil Procedure Rules**. In any event the reliefs sought in this application are under **Section 47 and 65 of the Law of Succession Act** which have not been determined upon.

22. Regarding the alternative prayers by the respondent, it is argued for the applicant that a Preliminary Objection does not give the objector the luxury to seek such prayers. The outcomes of a preliminary objection is either it is sustained and the suit or application struck out or it is dismissed, and the suit or application allowed to proceed.

23. I have carefully considered all the submissions filed by counsel. I have read the authorities and with the help of Sophia, the legal researcher, combed through the humongous records of the three causes 16 of 1984, 497 of 2013 and HC Misc. 33 of 2016 to make head and tail, of the two matters, taking into consideration that these matters was first heard by another Judge, and numerous applications have been filed and orders issued.

24. I will not reproduce the submissions here and the authorities, as the main issue is whether the Preliminary Objections have merit.

25. **Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited (1969) EA 701** is the point of reference, a Preliminary Objection ought to be based on a pure point of law, which if determined, brings the matter to an end.

26. To the issues; - the issue of jurisdiction is challenged on the grounds of *res judicata* and *sub judice*. Are the matters raised in this application *sub judice*?

27. The issue of removal is also sought in a different way through the Summons for Revocation of Grant dated 30th November 2013.

28. It is sought again through the prayers in High Court Miscellaneous Application Number 33 of 2016 to replace the executor with two (2) other named persons. Should either the Summons for Revocation of Grant or the Application in Miscellaneous Application 33 of 2016 be allowed, the outcome would be the same. Hence, it is true that the issue of the removal of the executor through whatever means available to the applicant is pending before court in three (3) different forms, this application, the Summons for Revocation of Grant, and High Court Miscellaneous Application 33 of 2016. On this one, I would agree with the objectors that this is clearly a multiplicity of litigation seeking the same outcome through different routes. Putting the court process and the risk of embarrassment.

29. The other prayers, various restraining orders and orders to account and for the preservation of the estate, these were again raised in the High Court Miscellaneous Application 33 of 2016 where the Hon. Justice A. K. Ndung'u granted both conservatory orders to preserve the estate, and status quo orders for beneficiaries to continue collecting rents, fees, and other revenues pending the hearing and determination of that suit. Those orders are still in force yet the applicant has not prosecuted that suit.

30. While I agree with the applicant that indeed she comes in two (2) different capacities in each of these cases, as the legal representative of her mother's estate in 33 of 2016, and a beneficiary named in her father's will in this cause and that these two (2) capacities come with different obligations as per the Law of Succession Act, the subject matter remains substantially the same, the pitting of her mother's estate and that of her father. There is no difference between the properties she claims in 33 of 2016 and those claimed in the application in Succession Cause Number 497 of 2013, no difference in the orders sought, even though brought under different provisions of the law the fact of the entwinement of the matter the intended ultimate outcome remains the same: the exit of the first respondent as the executor of her father's will, the restraint of the respondents from dealing with the properties of the estate that are in their possessions and from collecting rent, revenue, fees proceeds or otherwise from the same, and the determination of what consists each of the two estates. To my mind this application, the 33 of 2016, and Summons for Revocation of Grant in High Court Succession Cause Number 497 of 2013 have the same goal.

31. So, when the objectors complain about the multiplicity of litigation that may confuse issues and ultimately delay the determination of these cases, the evidence is before me. The delay in delivering this ruling is partly caused by the numerous documentation that the court has to go through, yet it is not the only matter.

32. So, while the injunctive orders of *Justice A. K. Ndung'u* in 33 of 2016 were not final orders but interim orders, pending the hearing and determination of that suit, they substantially deal with exactly the same issues raised in this application. The question then is as a court of concurrent jurisdiction, why would this court be expected to render itself on the same issues through a different avenue? I think that that is what brings this application to the verge of being vexatious and an abuse of the court process.

33. However it does not fall squarely into *res judicata* because there are no final orders in 33 of 2016.

34. Have the objectors established their Preliminary Objections to warrant the striking out of this application?

35. In **Oraro vs Mbaja [2005] eKLR**, *Ojwang J* as he then was said,

"I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that "where a Court needs to investigate facts, a matter cannot be raised as a preliminary point."

In that same case several authorities speaking to issue are discussed, for instance in **El-Busaidy v. Commissioner of Lands & 2 Others [2002] 1KLR** where the Judge (*Onyancha J*) stated at (516);

"The preliminary objection herein was raised by the Defendants. Can it be said that they do accept the facts as pleaded by the Plaintiff to be true; in which case they could then apply the provisions of section 136(1) to it to make the Plaintiff's pleadings a non-starter? But the Defendants defend this suit because they do not accept the Plaintiff's facts as pleaded. Clearly therefore, the Defendant's preliminary point is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and accepted in our jurisdiction."

36. The same question applied to this application returns a similar answer. The facts are contested.

37. I am alive to the fact that the jurisdiction of this court has been challenged on the basis of *res judicata*. However, I have shown that the matter herein is not *res judicata*.

38. Clearly therefore the two (2) Preliminary Objections cannot stand and each is dismissed. Each party will bear their own costs.

39. Should the respondent proceed with this application?

40. As I have pointed out the issues herein were dealt with by *Justice Ndung'u* and there are interim orders in HC Misc. Application No. 33 of 2016 against which no appeal has been filed. They are in force and they touch on issues that are before me in this application.

41. It is the duty of this court to give directions so that the matter can move on. It is my view that the orders made in 33 of 2016 by *A. K. Ndung'u J*, sufficiently cover the issues raised in this application and takes care of the applicant's concerns. There is need to deal with the issues as to what forms each estate to enable the distinction to be made and administration to proceed.

42. The existence of the three matters **Succession Cause 16 of 1984**, **Succession Cause 497 of 2013** and **HC Misc. Application no. 33 of 2016**, and the nature of the prayers sought therefrom, provide a recipe for the abuse of the court process, and ultimately the unnecessary delay of their determination. It is my considered view that this is such a case, where the court is called upon to do what it deems fit to in the interests of justice and definitely, protect its process from abuse. To that end I invoke the provisions of **Article 159 (2) of the Constitution and Rule 73 of the P&A rules** which provides for the exercise of the inherent powers of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

43. Hence I direct as follows;

There be a stay in the proceedings in Succession Cause Number 497 of 2013 and Succession Cause 16 of 1984 pending the hearing and determination of the High Court Miscellaneous Application 33 of 2016.

Orders accordingly.

Dated this 17th day of January, 2021.

Mumbua T. Matheka

Judge

Delivered virtually this 25th day of January 2021.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Edna

Dr. Kamau Kuria SC for the Applicant

Ms Magana for 2nd Objector

Ms Magana holding brief for Mr. Ndolo for 3rd and 4th Objectors

Mr. Waiganjo for the 1st 5th 6th 7th and 8th Respondents

Ms. Alwala holding brief for Githui for the 9th and 10th Respondents

Dr. Kamau Kuria: We can proceed as your ladyship has directed and fix dates for hearing in HC Misc. 33 of 2016.

Court: Directions will be taken in HC Misc. 33 of 2016

Mumbua T Matheka

Judge

25th January 2021