



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**MISC SUCCESSION CAUSE NO. 44 OF 2018**

**IN THE MATTER OF THE ESTATE OF RIUNGU NKUURI ALIAS M'RIUNGU RINKUURI (DECEASED)**

EVANGELINE KAARI KITHINJI.....1<sup>ST</sup> PROTESTOR/APPLICANT

CATHERINE KARIMI MUKINDIA.....2<sup>ND</sup> PROTESTOER/APPLICANT

VERSUS

GAKURIE M'RIMI.....PETITIONER/RESPONDENT

**RULING**

1. The application pending before this court is a Notice of Motion dated 24/11/2020 which is filed by Evangline Kaari Kithinji who is the 1<sup>st</sup> protestor. She seeks the following orders:

- i. **THAT** the application be certified urgent and be heard ex parte in the first instance.
- ii. **THAT** the ruling of this court given on the 12<sup>th</sup>.05.2020 be and is hereby reinstated and admitted for hearing forthwith.
- iii. **THAT** a stay of execution of the grant that was confirmed on the 24<sup>th</sup>.09.2009 be granted.
- iv. **THAT** the cost of the application be provided for.

The application was based on the following grounds:

- i. **THAT** on the 9<sup>th</sup>.03.2020 the summons for revocation of grant dated 5<sup>th</sup>.11.2018 was scheduled for hearing before **Honourable Limo J.**
- ii. **THAT** applicants were unaware of the said date as they were not duly informed by their advocate.
- iii. **THAT** the applicants only came to know about the dismissal after visiting the court registry.
- iv. **THAT** the advocate on record has been unreachable and we had no way of knowing the said date.
- v. **THAT** we have since hired a new counsel to take conduct of the matter and ensure justice is done.
- vi. **THAT** the mistakes of an advocate should not be meted upon the client.
- vii. **THAT** the applicant remains willing and ready to prosecute the matter.

2. The respondent opposed the application and filed a replying affidavit sworn on 18/1/2021 and a further affidavit sworn on 1/2/2021. His contention is that he is the administratrix of the estate of the deceased and he is the only surviving child of the deceased. He avers that the applicant is not an heir of the deceased but a busy body hunting for land where she does not have any. He further contends that the issue in the instant application was heard and determined in the application dated 5/11/2018 in **Chuka High Court Misc Application No.44/2018** and that the present application is therefore *res judicata*. He further contends that the application is statute barred as the issues raised have been heard and determined by this court vide a ruling dated 12/5/2020. The respondent has also raised the issue that the 2<sup>nd</sup> protestor is none existent as she has since died, fact which has not been disclosed in this court. The respondent further submits that the applicant is guilty of latches as she has filed this application six months after the ruling of the court was given and appears to be forum shopping.

3. The respondent also filed a notice of Pre-liminary Objection under **Section 7 of the Civil Procedure Act** and contends that the instant application is *res judicata* having determined vide a ruling dated 15/5/2020.

4. The respondent filed a further affidavit sworn on 1/2/2021 and depones that the application has been overtaken by events as the grant was executed ten years ago and the same cannot be undone.

5. The applicant filed another affidavit sworn on 11/2/2021 and avers that she is the daughter of the deceased by his 2<sup>nd</sup> wife. She further contends that the application was not heard on merits but that it was dismissed for none attendance. She avers that her former advocate did not inform her of the hearing date and the mistake of advocate cannot be visited on her. Her contention is that the court has jurisdiction to revoke the grant to avoid hardship or injustice resulting from inadvertence, mistake or error.

6. When this matter came up for hearing, the parties agreed to argue the Pre-liminary Objection. I have considered the application. Mr. Mutani, counsel for the respondent submitted that the issues raised in this application were determined on 25/5/2018. He submits that the court is *functus officio* and the issues cannot be argued in this court. He submits that the grant complained of as dated 24/8/2009 does not exist. That the grant on record is dated 7/4/2010 and is not the one complained of.

7. On the issue of *res judicata* he submits that the application dated 24/11/2020 is *res judicata* as it was determined in a ruling dated 12/5/2020. The respondent relies on the case of **James Gitonga and Others -v- Elizavan Irungu** and Another **High Court Chuka Succession Cause No.12/2015** on the issue of *res judicata* and **Mohammed Enterprises Ltd-v- Nastar (2013) E.A 249** of *functus officio*.

8. For the applicant it is submitted that she wished to address her grievances and is seeking review of the orders to allow the 1<sup>st</sup> applicant to ventilate her case as the applicant was not in court on the alleged date for cross-examination. It is her submission that her case was not determined on merits due to mistake of her advocate. She relied on **Succession Cause No.28/2017** in the High Court at Machakos, the authority was however not availed. On the issue of the date of the grant, it is submitted that the ruling of 24/5/2020 referred to the grant issued on 24/8/2009. She submits that the court can correct the error.

9. There are two issues which arise for determination. These are:-

1. Whether the application is *re judicata*.
2. Whether the court is *functus officio*.

#### **Whether the application is Res Judicata**

The test for determining the application of the doctrine of *res-judicata* in any given case is spelt out under Section 7 of the Civil Procedure Act. In **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

**"(a) The suit or issue was directly and substantially in issue in the former suit.**

**(b) That former suit was between the same parties or parties under whom they or any of them claim.**

**(c) Those parties were litigating under the same title.**

**(d) The issue was heard and finally determined in the former suit.**

**(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."**

In the case of **Attorney General & another ET vs (2012) eKLR** where it was held that;

**"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".**

**In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata....."**

The application which gave rise to the ruling dated 12/5/2020 was dated 5/11/2018. I will list the prayers for ease of reference and the grounds.

- a. **"THAT this application be certified as urgent and the same be heard exparte in the first instance.**

**b. THAT the Honourable court be pleased to issue an order of inhibition prohibiting any sale, transfer, lease or subdivision of land parcels no. SOUTH MWIMBI/S. MUGUMANGO3062, SOUTH MWIMBI/S. MUGUMANGO3063, SOUTH MWIMBI/S. MUGUMANGO3064 and any other resultant subdivisions until this cause is heard and determined.**

**c. THAT the Honourable court be pleased to consolidate Chuka P.M. Court succession cause for hearing and determination.**

**d. THAT the Honourable court be pleased to issue an order revoking the grant of letters of administration to the petitioner herein on the 7<sup>th</sup>.04.2010.**

**e. THAT the petitioner be ordered to pay the costs of this summon.”**

“ Which application is supported by an affidavit sworn by Evangeline Kaari Kithinji on the following grounds:

**a. THAT** the proceedings to obtain the grant was defective in substance.

**b. THAT** the grant was obtained fraudulently by the making of false statement

**c. THAT** the grant was obtained by the concealment from the court of material facts to this suit.

**d. THAT** the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

**e. THAT** the petitioner left out some children of the deceased in her affidavit in support of summons for confirmation of grant administration intestate and included a stranger to the estate.”

The respondent had opposed application based on the facts deposed in her affidavit sworn on 10/12/2018. She averred that:-

**a. THAT** she is the only child of the deceased and the 1<sup>st</sup> and 2<sup>nd</sup> protestors are merely imposters.

**b. THAT** the deceased had only one wife namely: Ciamundi Riungu.

**c. THAT** the only estate left by the deceased is only one property known as: land parcel MWIMBI/S. MUGUMANGO/217.

**d. THAT** the protestors were never involved since they are not the blood relative of the deceased herein.

**e. THAT** at the time Ciarangu Riungu(deceased’s concubine) cohabited with the deceased, the said Ciarangu Riungu left one child behind; and that is Eliphaz Mbabu Riungu.

**f. THAT** the protestors have never lived in the deceased’s home and their return is just to claim land parcel MWIMBI/S. MUGUMANGO/3062 owned by Julius Kaaria Riungu.

**g. THAT** the claim is untenable and incompetent since the estate has since been divided into land parcel MWIMBI/S. MUGUMANGO/3062,3063 and 3064.

**h. THAT** the claim by the protestors is for all intents and purposes a claim over ownership of land which is disguised as a succession suit.

**i. THAT** the protestors have recently from unknown place occupied land parcel MWIMBI/S. MUGUMANGO/3063 owned by the late Julius Kaaria.

**j. THAT** to the extent that the suit is a claim over late Kaaria’s land MWIMBI/S. MUGUMANGO/3062 the same be dismissed in its entirety and be filed afresh succession suit so that the true heirs of Julius Kaaria Riungu be determined.

**k. THAT** the protestors are strangers to the estate of the deceased.

10.The Judge gave directions that the application be heard by way of *viva voce* evidence. When the matter came up for hearing on 9/3/2020 counsel for the applicant informed the court that she was ready to proceed. She later at the same sitting informed the court that the applicant had disappeared. The Judge proceeded to give ruling on 12/5/2020. I have read the ruling of my brother **Justice Limo** and found that he considered the affidavit evidence by the parties and determined the application on merits. The Judge stated- **“In the end this court finds no merits in the application dated 5/11/2018, the same is disallowed but I make no orders as to costs.”**

11. The merits of the application was considered. The application by the applicant is flawed as prayer – 2 seeks to reinstate the ruling given on 12/5/2020 and stay execution of the grant (sic) confirmed on 24/8/2009 be and is hereby granted. The 2<sup>nd</sup> protestor is deceased and has not been substituted. That ruling has not been set aside and the grant she seeks to set aside is none existent.

12. It is clear from the record that the present application has not raised any new matter. The fact that the applicant has engaged another advocate cannot aid the applicant. The former advocate was in no way to blame as the applicant is the one who disappeared after the court

ordered her to proceed. The question of mistake of counsel does not arise.

13. In the case of **Dave vs. Business machine Ltd [1974] E.A.** where the Court held:

**“ Now if an appearance had been entered and the defence filed and if only failure on the Defendant’s part had been failure to appear, either personally or through his advocate on the day the suit was called on for hearing, then I think the plaintiff ought to have been called upon formally to prove his claim, that is to say, to prove everything the burden of proof of which, on the pleadings, lay on him in order to establish his claim. “ [He did not do so].**

The protestors herein failed to dispense with the burden that squarely lay on them to prove their case on a balance of probabilities before a competent court.

Expounding further on the essence of the doctrine the Court in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** pronounced itself as follows:

**“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”**

The court went further to reason that the essence of the principles of res-judicata is to not only to protect the courts from disrepute, but also to protect litigants from unending litigation, that this principle is so classic in that it includes points or issues that ought to have been brought before the court but which did not find their way there due to the inadvertence of the parties or their counsel.

In light of the constitutional imperative under **Article 159** of the constitution on expedition in the resolution of disputes, there must be expeditious disposal of the administration of estate proceedings for the good of all parties, relying on the evidence and the law and using just means to achieve just ends.

The court vide a ruling dated 12<sup>th</sup>.05.2020 did put to rest this matter before all the parties. It therefore points out that the same matter was dealt with effectively by a court of competent jurisdiction and the same ought to be brought to a finality.

#### 14. **2. Whether the court is functus officio**

Similarly in **Raila Odinga –Vs- IEBC & 3 Others Petition No. 5 of 2013** the Supreme Court of Kenya cited with approval the following passage from “**The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law**” by **Daniel Malan Pretorius:-**

**...“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”**

In addition, the Supreme court also referred to the case of **Jersey Evening Post Limited –Vs- A. Thani [2002] JLR 542** at pg. 550 where the Court stated: -

**“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.” [own emphasis]**

The issue of *functus officio* attaches to the jurisdiction of the court to deal with the matter at hand. It has been stated that jurisdiction is everything and without it the court must lay down its tools. See **Owners of Motor Vessel Lilians -v- Caltex Oil Kenya Limited (1989) eKLR.**

15. The application dated 24/11/2020 is fatally defective. It is hard to discern what the applicant is seeking in the two prayers. The issue of revocation of grant was determined on merits and this court lacks jurisdiction to entertain an application to revoke the grant.

I find that the Preliminary Objection has merits I allow it. I order that the application dated 24/11/2020 be struck out.

I make no orders as to costs.

**Dated, signed and delivered at Chuka this 25<sup>th</sup> day of May 2021.**

**L. W. GITARI**

**JUDGE**

**25/5/2021**

Ruling read out in open court.

**L.W. GITARI**

**JUDGE**

**25/5/2021**