



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
JUDICIAL REVIEW MISC APPL. NO 5 OF 2019
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW ORDERS FOR CERTIORARI AND MANDAMUS

-BETWEEN-

BEATRICE MWANGO NYAKERIA &
LAWRENCE ONDIEKI NYARURI (for the Estate of
the late Francis Nyaruri Omambia- Deceased).....APPLICANTS

-VERSUS-

PUBLIC TRUSTEE.....RESPONDENT

-AND-

LYDIAH KEMUNTO OMBWONGI.....1ST INTERESTED PARTY
NDUKU MUHIA.....2ND INTERESTED PARTY

RULING

1. This is a ruling on preliminary objection dated 19th June 2020 challenging *locus standi* of the interested parties and challenging issues raised by the interested as *res judicata*.

2. The applicants filed a Notice of Motion on 21st March 2019 seeking the following orders:

- a. That this honorable court be pleased to issue an order of certiorari directed to the Public Trustee and quash forthwith such respondent's decision and failure to transmit money requested for the applicant's use and eventual appropriation.**
- b. An order of prohibition against the respondent prohibiting and restraining them from proceeding with unreasonable decisions and acts which are a breach of trust by failing to transmit money requested by the applicants.**
- c. An order of Mandamus compelling the respondent to transmit the money requested and in any event within twenty-four (24) hours of this honorable court's judgment.**

3. Grounds on the face of the application are as follows:-

- i. That the Public Trustee holds the Deceased's Death Gratuity on behalf of the beneficiaries and is now openly refusing to comply with the trust by expressing an intention to hold the estate assets indefinitely.*
- ii. That the Public Trustee at Nakuru received money from the government pension department in accordance with rules 22 and 23 of the Public Trustee Act (Cap 163) Laws of Kenya.*
- iii. That Misc. Application No.2 of 2016, High Court at Nakuru, earlier filed by 3rd parties to revoke the grant given to the*

applicants on the Estate of deceased was dismissed.

iv. As at the time of presenting the request to close the account held at the Public Trustee, there was no pending case revolving around inheritance and beneficial interests; the same had been raised and dealt with by the decision of the court in favour of the applicants and evidence to the effect was among the bundle of documented attached and presented to the respondent.

v. That the beneficiaries are identifiable and in our capacity as administrators to the deceased's estate, we intend to close the account as the obligation to hold the money for the benefit of the beneficiaries of the deceased should come to an end.

vi. The respondent has made decisions that are a breach of the trust and ultra vires the powers that have been conferred on him and if he is not stopped from executing such the excesses, he will continue with such actions to the detriment of the image of the public office he holds.

vii. That the respondent's attempt to exercise discretionary power and intention to hold the estate assets indefinitely for an ulterior purpose is a direct attack and contempt to the court orders which is calculated to antagonize beneficiaries' interest in the deceased's estate.

4. The application is supported by affidavit sworn by **Beatrice Mwangi** a beneficiary and co-administrator of the estate.

5. In response to the application, the respondent and the interested parties filed their reply.

6. The Court directed that the Preliminary Objection be canvassed by way of written submissions

RESPONDENT'S REPLYING AFFIDAVIT

7. In response, the respondent filed replying affidavit sworn by **Anthony K. Sang** on 7th June 2019. He averred that the applicants are not being candid before this Court and stated that they received the gratuity of the deceased to the tune of kshs. 1,279,726.40/= from the Ministry of Finance and the amount is beyond the jurisdiction of the public trustee and thus it is necessary to avail a grant from the Court before the money is dispatched to the beneficiaries.

8. He averred that the applicant submitted a copy of the grant but upon conducting due diligence, the respondent learnt that the grant was obtained fraudulently by concealment of material facts and further, some beneficiaries were omitted.

9. He further averred that the interested parties objected to the monies being released to the applicant as there is a case pending in Court being Kisii Public Trustee Case No. 245 of 2010 Kenya Gazette No. 9072 Vol CX 11-73 dated 30th July 2010 which is pending determination; and the interested parties will be disinherited if the monies are released to the applicants.

10. He averred that that respondent is not in a position to release the said monies to the applicants until the case by the interested parties is determined as it would amount to the miscarriage of justice and added that before releasing any funds to any beneficiaries the respondent has to ensure that the process set out in the Public Trust Act which cuts across all boards without favoring any individual has to be followed. He urged Court to dismiss the application.

11. The interested parties filed replying affidavit sworn by **Lydia Kemunto Ombongi** on 4th July 2019. She opposed the application and stated that the copy of the grant submitted by the applicant to the public trustee is a forgery as it disinherits other beneficiaries of the deceased. She averred that she has lodged an objection with the public trustee to restrain release of money to the applicant until the succession because she has filed is heard and determined.

12. In response to the replying affidavits sworn by the respondent and interested parties herein the applicant stated that the averments are an afterthought and the 1st interested party is a stranger who is intermeddling with the estate of the deceased.

THE PRELIMINARY OBJECTION.

13. **Beatrice Mwangi** one of the applicants herein filed the preliminary objection dated 19th June 2020 stating that the 1st and 2nd interested parties do not have the requisite locus standi to oppose the applicants' application. she further raised the issue of Res judicata as their participation in the matter was decided in Nakuru Misc Application No. 2 of 2016.

14. On 2nd December 2020, the respondent was granted 21 days to respond to the preliminary objection but they failed to file their response and on 15th February 2021, the Court directed that the preliminary objection be canvassed by way of written submissions but despite counsel having been served with the directions of this honorable court he did not file their submissions.

APPLICANT SUBMISSIONS

15. On the issue of locus standi, the applicant submitted that the interested parties have no beneficial, administrative, or other interest requiring their prior consultation or intimation for the applicant to manage the account; that their presence in the management and running of the account is a nuisance meant to frustrate affairs hereto and time-wasting.

16. On the second issue of *res judicata* the applicants submitted that the interested parties had filed Misc Application No. 2 of 2016 which

was dismissed on 24th September 2018, under **order 12 rule 3 of the civil procedure rules, 2010**. The applicants submitted that the issues raised in the first application are the same as the issues raised now and submitted that the interested parties should disclose before the Court the outcome of the previous application which they were well aware of.

17. The applicants submitted that they obtained a copy of the grant through Molo SPMCC Succ No. 10 of 2014, after Nakuru Misc App. No.2 of 2016 was dismissed. He cited the case of **Njanga vs Wambugu & another HCCC No. 2340 of 1991** where the court 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 fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata”

18. The applicants urged this Court to allow the application as prayed.

ANALYSIS AND DETERMINATION

19. I have considered the preliminary objection and the submissions in support of the objection by counsel for the applicant and find that the issue for determination is whether the preliminary objection is merited.

20. In the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors (supra)** the Court stated as follows:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

21. From the record, I note that the applicant had petitioned for a grant of letters administration in Molo SPMCC No. 10 of 2014. The interested parties applied in Nakuru Misc Succ No. 2 of 2016 seeking revocation/ annulment of the temporary grant issued to the applicant herein **Beatrice Mwangi**. The said application was dismissed by the Court for non-attendance on 24th September 2018, and the Court directed that the applicant does take out a summons for confirmation of grant within 45 days' time. It was on the strength of this order that the applicant proceeded to confirm the grant of administration.

22. The doctrine of *res judicata* is provided for in **Section 7 of the Civil Procedure Act 2010** as hereunder:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

23. The suit was dismissed under Order 17 rule 2(1) which provide as follows: -

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if the cause is not shown to its satisfaction, may dismiss the suit.”

24. There is no doubt that Misc Succ 2 of 2016 was not decided on merit. The matter was dismissed for nonattendance. For a matter to be *res judicata*, the issue in dispute ought to have been decided on merit by a Court with competent jurisdiction. The issue raised now is that the grant was obtained fraudulently by concealment of material facts; the same issue raised in the application for annulment but the same was not determined on merit. The dispute having not been decided on merit, one cannot say that the matter is *res judicata*.

25. The issue of *locus standi* the **Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000**, where the Court held that: -

“Locus standi signifies a right to be heard, A person must have a sufficiency of interest to sustain his standing to sue in Court of Law”.

Further in the case of Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229, the Court also held that; - “the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

26. The applicant's contention is that the interested parties lack locus standi to bring any other suit with the same issues as the ones raised in the application for revocation of the grant which was dismissed for want of prosecution.

27. From the foregoing, I find the Preliminary Objection is not merited.

28. FINAL ORDERS

1) Preliminary objection dated 19th June 2020 is dismissed.

2) Beneficiaries to process grant and confirmation of letters of administration to enable the respondent distribute the estate of the deceased to determined beneficiaries.

3) Each party to bear own costs.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 30TH DAY OF SEPTEMBER, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Miruka - Court Assistant

Mr. Nyakeringa holding brief for Ongangi for Applicant

Public trustee absent

Interested parties absent