



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL NO. 115 OF 2013

ALEXANDER NJAGI NDAMBIRI.....APPLICANT

VERSUS

JANE WAGUAMA NJAGI.....1ST RESPONDENT

PHILIS KARIUKO NJAGI.....2ND RESPONDENT

JANET WAMARWA NJAGI.....3RD RESPONDENT

RULING

1. This appeal was heard and dismissed by a Judgment dated 19/12/2019 by the Hon. Gitari J. The effect of the Judgment is that the court confirmed the distribution of the Estate of the late **Evan Kagondu** (deceased) by the trial court in **Kerugoya Succession Cause No. 46 of 2007** among the deceased's three houses (wives) in equal shares.

2. A perusal of the court proceedings shows that no appeal or application for review were preferred against the said Judgment.

3. By a summons for revocation and/or annulment of grant dated 13/1/2020 and fixed on even date, the Applicant, **Alexander Njagi Ndambiri**, a son to the deceased, and therefore a beneficiary sought orders to revoke the grant confirmed on the 10/5/2010 on grounds:

a) That the proceedings to obtain the grant were defective in substance.

b) That the grant was obtained fraudulently by making false statement or by concealment from the court of something material to the case.

c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

The Applicant swore the supporting affidavit.

4. The summons are opposed by the 3rd Respondent by a Preliminary point of law dated and filed on the 20th January, 2020 on grounds that:

a) The application is *resjudicata*, misconceived, bad in law and an abuse of court process.

b) The court is *functus officio*

5. In response to the preliminary objection, the Applicant filed a reply on the 27th January, 2020 raising issues that the *resjudicata* principle is:

a) Inapplicable under Probate and Administration proceedings and that the preliminary objection does not meet the legal threshold.

b) That the principle on *Functus Officio* is inapplicable under **Sections 49, and 76 of the Law of Succession Act, and Probate & Administration Rules 63 and 73.**

6. On the 14th January 2020, upon application, the court (Gitari J.) issued an Order of Inhibition on the subject suit property, Land **Parcel No. Kabare/Mutige/283** preserving the land and an order of *status quo* as to the possession pending hearing and determination of this application.

7. To urge their respective positions, the Applicant and the 3rd Respondents filed written submissions. The 1st and 2nd Respondents have not filed any responses to the Preliminary Objection

I have considered the submission. The grant sought to be annulled and or revoked is the same one that was confirmed on the 10th May, 2010, in respect of the subject cause properties, and in issue is **Kabare/Mutige/283** comprising of 7.6 acres which the trial court ordered, in its Judgment/distribution to be shared equally amongst the deceased's surviving spouses, the three wives and his 19 children, among them the Applicant

8. Basically, the issue before the trial court was the distribution of the deceased's estate to the rightful beneficiaries, which is governed by provisions of **Section 40 of the Law of Succession Act** that advocates for the equal and equitable distribution of the estate without discrimination amongst the beneficiaries.

9. This is the same grant and property that is subject of the summons before me. I have perused the proceedings before the trial magistrate.

10. The Applicant before me is grounded on **Section 76 of the Law of Succession Act**, and **Rule 44 Probate and Administration Rules**.

Section 76 provides for revocation of grant upon application by an Interested Party, or by the court on its own motion. Thus, the court has powers and jurisdiction to revoke or annul a grant whether confirmed or not.

Rule 44 provides for the procedure of application for revocation or annulment of grant on grounds of fraud as set out under **Section 76**.

The Preliminary Objection

11. By the preliminary objection and submissions filed, the court is to consider whether it has jurisdiction to hear and determined the summons for revocation, considering the background to the application as stated above.

12. A Preliminary objection may be entertained if it meets the legal threshold as stated in **Mukisa Biscuits Manufacturing Ltd Vs West End Distributors Ltd (1969) EA 696** thus:

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

Law, JA observed that

“A preliminary objection consists of a point of law which has been pleaded, or which arises form a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...”

13. The 3rd Respondent has raised two legal issues:

On Res Judicata

The court in **Re Estate of David Wang'ang'a Gichuhi (deceased) [2020] eKLR** held that a matter has to have been directly litigated and conclusively determined by a competent court on issues directly or similar to the issues under review.

14. **Section 7 Civil Procedure Act** states that:

“No court shall try any suit or issue in which the matter directly and substantively in issue in a former suit between the same parties, or between parties under whom they or any of them claim, ligating under 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 the court”

15. The Court of Appeal in the **Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others [2017] e KLR** rendered that:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectrum of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court.... The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

See also **Tee Gee Electrics & Plastus Ltd vs Kenya Industrial Estates Ltd [2005] e KLR 97**.

16. There is no doubt that the issues raised in the application have been conclusively heard and determined before two competent courts, the Chief Magistrate's Courts (the trial court) and this court, on its appellate jurisdiction, where the appeal has been heard and determined.

17. The Applicant is one of the beneficiaries of the deceased's estate. He has benefited from the court's distribution of the estate, at equal

share with other sons and wives of the deceased. The property subject of the confirmed grant sought to be revoked was the same, and subject of the litigation. The Applicant is therefore trying to revive the case that is now closed by way of this court's Judgment.

18. In the said suits/appeal, the Respondents were litigating on behalf of the 19 children of the deceased and themselves. The Applicant was competently represented at all material times. This appeal is now resolved and concluded based on the evidence tendered before the two courts, and Judgment delivered on the actual facts giving rise to the claim.

19. I do not agree with the Applicant's submission that since it is a different party, but a beneficiary who filed the appeal challenging the trial court's decision, the decision of this court does not bind him.

If indeed the Applicant was dissatisfied with this court's Judgment on the appeal, he had several options; to appeal against the Judgment, or apply for Review orders, but not to seek to re-open the succession Cause through the present application. Multiplicity of suits is discouraged, and the court will not entertain such.

20. **On the matter of *Functus Officio***

This is a principle that prevents re-opening of a matter before a court that rendered its final decision. In the case of **Telcom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd) [2014] eKLR**, the Court of Appeal rendered that:

“the doctrine is not to be understood to bar any engagement by a court with a case that it has already divided or pronounced itself on. What it does is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued...”

21. For the Applicant to come to court seeking revocation of the confirmed grant would amount to asking the court to set aside its Judgment, and go back to taking and hearing evidence on the grounds stated by the Applicant on why the grant should be revoked, yet all that is well stated by the parties who gave evidence before the trial court, and which this court confirmed, by dismissing the appeal, and upholding the confirmation of the grant by the trial court.

22. The doctrine of *functus officio* is a mechanism that gives the court an expression of finality. Once the court gives its final decision, it is only subject to an appeal - subject to any right of appeal to a superior court. Such a decision cannot be varied or revoked by the same court that rendered the decision, **ICEA Lion General Insurance Co. Ltd vs Julius Nyaga Chomba [2020] eKLR**.

23. For the foregoing, this court having discharged its duty on the appeal is therefore barred from further engagement, therefore *functus officio*.

24. The upshot is that the Preliminary Objection raised by the 3rd Respondent is hereby allowed, and the summons for revocation and or annulment of grant dated 13th January, 2020 is hereby dismissed, with no orders as to costs.

DATED AND SIGNED THIS..... DAY OF.....2021

J. N. MULWA

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 30TH DAY OF NOVEMBER 2021

R. M. MWONGO

JUDGE