



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.117 OF 2001

IN THE MATTER OF THE ESTATE OF M'RIMBERIA BAICHU (DECEASED)

FRANCIS MURURU PETITIONER

-VS-

BURIA M'RIMBERIA BAICHU OBJECTOR

R U L I N G

1. This is a ruling on two Summons dated 6/5/2019 and 6/6/2019 that were heard together. The first Summons dated 6/5/2019 was by the objector wherein he sought the rectification of the grant to include a share of **Bartholomew Mwenda** measuring 1 ½ acre to his share.
2. That application was grounded upon the supporting affidavit of **Buria M'Rimberia Baichu** sworn on 6/5/2019. He contended that one **Bartholomew Mwenda**, who is now deceased, transferred his share of 1½ acre from **LR No. Nyaki/Mulathankari/170** to him through an agreement dated 15/10/1997.
3. That application was opposed vide the replying affidavit of **Francis Mururu M'Rimberia** sworn on 8/10/2019. He deponed that the issues raised by the objector had already been heard and determined in the Judgment of this Court made on 6/10/2014. That in the premises, the court cannot pronounce itself on the same as it is *functus officio* the issues having been litigated on and determined.
4. The second Summons dated 6/6/2019 was filed by the petitioner. It was brought pursuant to **Section 47 and Rule 63 of the Probate and Administration Rules**. The petitioner sought for the rectification of the grant in terms of the draft he annexed to the Summons.
5. The said application was grounded upon the supporting affidavit of **Francis Mururu M'Rimberia** sworn on 6/6/2019. He contended that the proper ground acreage of the estate properties has now been ascertained by the District Surveyor. That in the premises, the shares to all the beneficiaries have been adjusted accordingly commensurate with the area on the ground.
6. The application was opposed by **Buria M'Rimberia Baichu** vide his replying affidavit sworn on 11/9/2019. He deponed that the application was *res judicata* as the petitioner was attempting to alter the deceased's sharing of his properties in his lifetime. That he had in any event made a similar application which was pending.
7. I have considered the respective affidavits and the entire record. The issue for determination is whether the grant should be rectified and if so, in what terms. In determining the said issue, this Court will have in mind that, there is already on record a Judgment by Makau J made on 16/10/2014. The same was rendered after a full trial. There is also a Ruling of this Court of 7/12/2017 on an earlier attempt to rectify the grant.
8. The law is clear as to when a grant may be rectified as set out in **section 74 of the Law of Succession Act**. The first application by the objector seeks rectification on the grounds that there is an error apparent on the Judgment. The alleged error is that the alleged share of one **Batholomew Mwenda** of 1 ½ acre was not included in the objector's share. He annexed some agreement entered into in 1997 and some County Council minutes to support that allegation.
9. This issue had been raised earlier on in the Judgment of Makau J, he dealt with them with finality. In **Telkom Kenya Limited vs. John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR**, the Court of Appeal held:-

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of

the 19th Century. In the Canadian case of CHANDLER VS. ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

“The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal **In re St. Nazaire Co.**, (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. Where there had been a slip in drawing it up, and,
2. Where there was an error in expressing the manifest intention of the court. See **Paper Machinery Ltd. vs. J.O. Rose Engineering Corp.**, [1934] S.C.R. 186”

The Supreme Court in RAILA ODINGA VS. IEBC cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in which the learned author stated;

...“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.”

10. In this regard, this Court having rendered itself on the issue being raised by the objector, it is *functus officio*. He should have appealed if he was aggrieved by the determination made thereon. The application is therefore bad in law and is dismissed with costs to the petitioner.
11. The second application sought to rectify and or amend the grant on the grounds that the acreage on the ground is different from what was confirmed in the grant. The objector opposed the same on the basis that it was *res judicata*.
12. It is trite law that a litigant cannot be allowed to litigate a matter all over again once a final determination has been made. A party cannot raise issues that have already been determined with finality.
13. In **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR**, the Court held:-

“The requirements for *res judicata* are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the ‘determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.’

Res Judicata is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. Res Judicata can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by the same parties in subsequent litigation.”

14. The record shows that the petitioner had filed a similar application on 12/4/2017 on the same grounds. The same was however, dismissed vide a Ruling of this Court delivered on 7/12/2017. It was dismissed on the ground that there was no report by a qualified Surveyor to back the allegations that the Court had shared a larger area than what was on the ground.
15. In the present application, the petitioner has rectified that mistake and has annexed a report by the District Surveyor to support his allegation. I will not consider the issue to be *res judicata*. This is so because in the ruling of 7/12/2017, the Court did not make any findings as to whether or not there was an error in the distribution.
16. In this regard, having seen the report by the District Surveyor dated 11/2/2018, I am satisfied that there was an error in distribution. Under **section 47 of the Act**, it is just and fair that the error is rectified so that the confirmed grant can be perfected.
17. I have seen the proposed re-distribution. The same is pro-rata and in tandem with the Judgment of this Court. The shares have been adjusted to accord with the area of the subject properties on the ground. I find the same to be in order.
18. Accordingly, I make the following orders: -
 - a) The application dated 6/4/2019 be and is hereby dismissed with costs to the petitioner.
 - b) The application dated 6/6/2019 is allowed.
 - c) Consequently, the confirmed grant is rectified as follows: -

LR. No. Nyaki/Mulathankari/170 (2.946 Ha)

- i) Peter Ntutumi - 1.13 Acres
- ii) Philomena Kairiani Mugambi - 1.87 Acres
- iii) Francis Mururu M'Rimberia - 2.35 Acres
- iv) Buria Rimberia Baichu - 1.87 Acres

It is so ordered.

DATED and DELIVERED at Meru this 23rd day of January, 2020.

A. MABEYA

JUDGE