



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2758 OF 2014**

**(IN THE MATTER OF THE ESTATE OF PHYLIS MUMBI KAMAU (DECEASED))**

MARY WANJIKU MUCHINA.....1<sup>ST</sup> OBJECTOR

EUNICE WANJIKU MUCHINA.....2<sup>ND</sup> OBJECTOR

VERSUS

JOHN MUCHINA KAMAU.....1<sup>ST</sup> RESPONDENT

JESSE GITHIRE KAMAU.....2<sup>ND</sup> RESPONDENT

HANNAH NJOKI KAMAU.....3<sup>RD</sup> RESPONDENT

**RULING**

1. The Application coming for consideration is the Protest filed by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants against the Summons for confirmation of grant f on 5.4.2019.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants are opposed to the proposed mode of distribution of the Estate on the basis that the deceased herein was holding the suit properties as a trustee on behalf of the Applicants since she inherited the land from her late husband DAVID KAMAU who was holding the lead and a trustee for his brother and sister.

3. The parties gave viva voce evidence as follows:

**(i) THAT the deceased herein inherited the suit properties from David Kamau Muchina who was holding the properties as trustees for the husbands of the 1<sup>st</sup> and 2<sup>nd</sup> applicants who were his brothers.**

**(ii) THAT the 1<sup>st</sup> and 2<sup>nd</sup> Applicants were not aware that the deceased had filed a Succession cause in respect to the estate of DAVID KAMITI MUCHINA.**

**(iii) THAT the matter has been the District Land Tribunal and the award of Adoption by Limuru Magistrate's Court.**

**(iv) THAT the award was adopted but upon the Application by PHYLLIS MUMBI KAMAU being JR ELC MISC APPLICATION NO. 52 of 2009. The verdict by the Tribunal and Magistrate's Court decision were quashed.**

4. I have considered the viva voce evidence adduced by the parties together with their rival submissions filed herein. I find that it is not in dispute that the two properties the subject of this Succession Cause namely LR. No. LIMURU NGECHA 1380 and NAIVASHA/MWICIRINGIRI BLOCK 279 (hereafter referred to as the suit properties) were inherited by the deceased herein PHYLLIS MUMBI KAMAU (Deceased) from her husband DAVID KAMAU MUCHINA (Deceased) vide Succession Cause No. 172 of 1996.

5. I also find that there is no dispute that DAVID KAMAU MUCHINA (Deceased) also inherited the suit properties from his father MUCHINA KIREHU vide KIAMBU SUCCESSION NO. 135 OF 1987.

6. The issues for determination in this case are as follows:

**(i) Whether this matter is res judicata.**

**(ii) Whether the deceased herein held the suit properties as a Trustee on behalf of protestors and the Respondents.**

**(iii) Whether the Protestors are entitled to a share of the suit properties**

**(iv) Who pays for this suit**

7. On the issue as to whether this matter is res judicata, the Respondents argued that the Applicants had a case with the deceased at Limuru Land Tribunal being case No. 8 of 2009 in which the tribunal rendered a verdict on 12.3.2009 and directed that the deceased herein PHYLIS MUMBI KAMAU (Deceased) gives the 2<sup>nd</sup> Protestor Eunice Wanjiku Muchina 0.5 Acres and the rest of the Land at Limuru Ngecha/1380 be shared equally between the deceased and two children of the first protestor MARY WANJIU MUCHINA namely SOFIA WAITHIRA and ROBERT ANTONY MUCHINA.

8. The said verdict was subsequently quashed by High Court in Misc. Application JR ELC No. 52 of 2009 on the grounds that the Tribunal did not have jurisdiction to entertain the suit.

9. I find that the said decision was overturned for want of jurisdiction and it cannot be said that the same was heard and determined on merit. The principal of res judicata is found in **Section 7** of the **CPA** which provides that:

*“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.”*

10. The Court in the English case of **HENDERSON VS HENDERSON (1843-60) ALL E.R.378**, observed thus:

*“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”*

11. I find that the right forum for arbitration was in a Succession Cause. The Applicants said that they were not aware that the deceased herein petitioned for grant of Letters of Administration in the estate of DAVID KAMAU MUCHINA (Deceased) in Kiambu Succession Cause No. 172 of 1996.

12. It is not disputed that the deceased inherited the suit properties from the Estate of DAVID KAMAU MUCHINA (Deceased) who was her husband and that the said DAVID KAMAU MUCHINA had inherited the same from MUCHINA KIREHU (Deceased) who was his father and the Respondents grandfather.

13. There is evidence that MUCHINA KIREHU (Deceased ) had four wives as follows:

**(i) Waithira Muchina – 1<sup>st</sup> Wife**

**(ii) Njeri Muchina – 2<sup>nd</sup> Wife**

**(iii) Mary Wamathwe Muchina – 3<sup>rd</sup> Wife**

**(iv) Hannah Wambui – 4<sup>th</sup> Wife**

14. There is evidence that the 1<sup>st</sup> wife Waithira Muchina had three children

**(i) David Kamau Muchina (Deceased)**

**(ii) Peter Kimani Muchina (Deceased)**

**(iii) Eunice Wanjiru**

15. The 1<sup>st</sup> Applicant who is a wife to Peter Kimani Muchina (Deceased) in her oral evidence that DAVID KAMAU MUCHINA (Deceased) was registered as a trustee to hold the suit properties on behalf of his siblings who were PETER KIMANI MUCHINA (Deceased) and EUNICE WANJIKU (the 2<sup>nd</sup> Applicant).

16. I find that this matter is not res-judicata as the same was dismissed for want of jurisdiction. I also find that the suit properties can be traced from MUCHINA KIREHU (Deceased) who was the father of DAVID KAMAU MUCHINA (Deceased)

17. There is evidence that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> houses have no disputes. The 4<sup>th</sup> wife of Muchina Kirehu (deceased) testified as HANNAH WAMBUI MUCHINA, said the husband to PHYLLIS MUMBI KAMAU (Deceased) was registered on behalf of the 1<sup>st</sup> house.

18. I therefore find that the suit properties belong to 1<sup>st</sup> house and not to DAVID KAMAU MUCHINA (Deceased) alone. The Deceased herein therefore inherited properties that belonged to the 1<sup>st</sup> House.

19. I find that the doctrine of res judicata is not applicable because the issue was not conclusively determined as the tribunal did not have the jurisdiction to deal with issues of succession.

20. I find that the Probate Court is the right forum to determine this matter as this is an inheritance case. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why **rule 41(3)** of the **Probate and Administration Rules** was enacted so that claims which prima facie valid should be determined before confirmation. See rule 41 below:-

*41. Hearing of application for confirmation*

*'(1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.*

*(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.*

*(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.*

*(4) In proceedings under subrule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.*

*(5) Where the court in exercise of its power under section 71 (2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval.*

*(6) Where the court, in exercise of its power under section 71 (2) (b) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55.*

*(7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court's approval is given. (8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced. (9) On the date for approval of the accounts and on any adjourned date application may be made for an adjournment to a fixed date not longer than three months away.'*

21. The mandate of the probate court is to establish who are the beneficiaries of the estate, who should administer the state and how the estate should be distributed.

22. In this particular I find that the properties the subject of this suit were inherited by deceased DAVID KAMAU MUCHINA(deceased) to hold on behalf of his siblings. The deceased herein who was the wife of DAVID KAMAU MUCHINA (Deceased) inherited the suit properties from his father MUCHINA KIREHU (Deceased) and therefore the protestors are entitled to a share of the suit properties are entitled to a share of the suit properties. This is not land dispute but a succession issue.

23. I accordingly allow the parties in the following terms:

**(i) THAT the Summons for Confirmation dated 5.4.2019 be amended to include the 1<sup>st</sup> Applicant's children and also EUNICE WANJIKU MUCHINA**

**(ii) THAT the 1<sup>st</sup> Applicant's children and the 2<sup>nd</sup> Applicant are entitled to a share of the suit properties.**

**(iii) On the issue of costs, I direct that each party bears its own costs of this matter since this is a family dispute.**

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2020**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**