



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

SUCCESSION CAUSE NO. 98 OF 2000

THE MATTER ESTATE OF MUKOYANI TOILI (DECEASED)

ERASTUS SASAKA WACHILONGA.....DECEASED/PETITIONER

AND

SIMON WACHILONGA TOILI.....OBJECTOR/APPLICANT

AND

SASAKA HENRY MAKOKHA MUSIMA.....RESPONDENT

RULING

The objector/applicant filed summons for revocation and annulment of grant dated 22/6/2017 together with supporting affidavit of **Simon Wachilonga Toili**, on the grounds;

- i. The respondent be substituted in place of the deceased petitioner.**
- ii. That the grant of letters of Administration issued to the Petitioner herein on 21st day of march 1996.**

The application was supported by supporting affidavit of Simon Wachilonga Toli in which he briefly stated that the deceased petitioner died on 25th October 2016 and the respondent who is biological son has obtained grant of letters of administration over his estate. That the deceased petitioner fraudulently mis-represented to this court that he was the only person surviving the deceased. Simultaneously the respondent filed notice of preliminary objection dated 24th May 2019 to the summons of revocation on the ground that it is res judicata in light of judgement delivered in Bungoma ELC cause number 38 of 2014.

By consent the preliminary objection herein was canvassed by way of written submissions. Mr. Wesutsa counsel for the Objector submitted that deceased petitioner sued the objector herein in Bungoma ELC cause number 38 of 2014 seeking eviction from plot 153 and the judgement was delivered objector ordered evicted therefrom. He submitted that therefore the respondent herein relies on the said judgement to state that the summons herein is res judicata.

He submitted that the ELC court is not competent court for revoking grants and it stated under page 6 of the judgement that the question of revocation belongs to High Court and the same should be placed before the High Court.

He relied on the case law in **John Karumwa Maina Vs Susan Wanjiru Mwangi[2013]eKLR**. He submitted that the a fresh grant be issued in joint names of the respondent and objector.

The counsel Respondent herein Advocate Lusinde submitted that applicant in Bungoma ELC Case No.38 OF 2014 claimed to be entitled to a share as a beneficiary in Bungoma/Naitiri/153 but his claim was dismissed.

He submitted that the subject matter herein has been subject in **Bungoma 38 of 2014** therefore the applicant is trying to re-litigate the claim. He relied on the case law in **ET V. Attorney General & Another [2012]eKLR** .He submitted that the grant sought to be nullified does not exist and applicant cannot revoke what is not in existence

From the parties pleadings, affidavits and submissions it is clear that the matter for determination is;

i. Whether the preliminary objection raised is sustainable

ii. Whether the present suit is Res Judicata

On issue one raised I am obliged to revisit the case decided by the court of appeal in **Mukisa Biscuits Manufacturing Company Limited Vs. West End Distributors Limited(1969)** EA 696 A preliminary objection per law J.A. was stated to be thus:-

“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings, and which if argued as preliminary point may dispose of the suit.’

In the instant proceedings it is the respondent contention that this suit is res judicata and should be dismissed for reasons that the matter had been previously determined in **BUNGOMA HCC NO.38 of 2014**. It is the applicant contention that the suit is not res judicata and ELC court does not have jurisdiction to revoke a grant and power is vested in the high court they are that the Res Judicata rule cannot apply in the instant case and if the P.O. is allowed it will stifle matters that were never canvassed in court and that the deceased had put the interested party in suit property as bonafide purchaser and should not be evicted.

Applicable law

Res-judicata is provided for under **Section 7 of the Civil Procedure Act** in the following terms:-

“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.”

Before res-judicata can be proved, the party raising it must establish the following:-

- a. That the issue in dispute in the former suit was directly and substantially in issue in the suit where the doctrine of res-judicata is being pleaded.**
- b. That the former suit was between the same parties or those under whom they or any of them claim litigating under the same title.**
- c. That the former suit was heard and finally decided.**
- d. That the Court or Tribunal which determined the former suit must have been competent.**

From records in ELC Suit number 38 of 2014 the Judge isolated 4 issues for determination.

What was the effect of the decision of the Bungoma High Court Civil Appeal No. 15/2005 on,

- i. Land dispute Tribunal decision.
- ii. On the resultant subdivisions of land parcel Bungoma/Naitiri/153.
 - a. Was the land parcel Bungoma/Naitiri/153 held in trust for the defendants?
 - b. What was the effect of Bungoma Land Succession Case No. 98 of 2000?
 - c. Did the land dispute tribunal have jurisdiction to determine title to land?
 - d. What orders should be made?

In the issue No. (b) the learned Judge stated;

The issue for determination in this case are as follows:

Trust

The defendant claim that that land parcel Bungoma/Naitiri/153 was held in trust for them cannot be so because their titles are founded on the decision of the land disputes tribunal whose orders though still subsisting, have never been adopted as the order of the court. This was a requirement of the new repealed Act 18 of 1990. The purchaser of the said land are also on the same bought. The order that gave them title were quashed by the High Court. There has been no appeal preferred from those orders of the High Court.

On the issue of effect of Bungoma Succ. Cause No. 98/2000 the Judge said;

Succession Cause No. 98 of 2000

The Plaintiff filed the above case to be appointed the administrator of the estate of Mukoyani Toli who died on 26/7/1994. He was granted the letters of Administration of his estate and was identified as the sole beneficiary. He obtained title for the entire land 14.0 ha. This Succession case file is still in Court and open. The defendants have had every opportunity to move the court in that cause and challenge the letters of administration granted to the plaintiff and establish their claim of trust if any, and/or any dependency through purchase. Crying wolf and saying that the Succession Case was filed secretly will elicit no sympathy from the court. Clear avenues for redressing such grievances are available.

From the above decision by Mukunya – J it is clear he did not make over finding in revocation of the grant that though canvassed was clearly outside the ELC jurisdiction. Indeed he advised the applicants to pursue the matter in this court. The applicant in obedience filed this application in this court.

After perusing the Judgment I satisfied that the matter in this application is not res-judicata. I therefore dismiss the preliminary objection. I therefore direct that the application dated 13.3.2007 do proceed to hearing by way of viva voce evidence.

Dated at Bungoma this 11th day of March, 2020.

S.N. RIECHI

JUDGE