



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 995 OF 1991

IN THE MATTER OF THE ESTATE OF MOHAMED TAYEBALI (DECEASED)

JOOZER MOHAMAD TAYEBALI.....PETITIONER/APPLICANT

VERSUS

JALAL TAYEBALI.....RESPONDENT

RULING

1. There are three applications coming for determination in this Court as follows:

(i) The Application dated 23.1.2017 seeking orders to restrain the Respondent from collecting rent from houses on LR No. 209/7/2 Nairobi and also seeking leave for the Applicant to file for letters of administration.

(ii) The Application dated 20.2.2019 seeking injunction to restrain the respondent from evicting or otherwise interfering with the Applicant's peaceable and quiet possession of flat 2F.

(iii) An Application dated 27.6.2019 seeking access as well as taking possession of Flat No. 2F by the Applicant pending determination of the two Applications dated 23.1.2017 and 20.2.2019 respectively.

2. The Applicant also filed a citation dated 2.9.2019 against the Respondent which has not been determined.

3. The Parties filed written submissions in the three Applications which I have duly considered. I find that it is not in dispute that the deceased herein died intestate on 20.8.1991 domiciled in Nairobi.

4. The Applicant herein Joozer Tayebali Hussein Abdul Hussein and Mustafa Tayebali Hussein Abdul Hussein (now deceased) were issued with limited grant of Letters of Administration Ad Colligenda bona on 17.8.1999.

5. I find that no petition has been filed for full grant of letters of Administration in this case hence the three Applications and the citation filed by the applicant.

6. The deceased herein had the following beneficiaries:

(i) Joozer Mohamed Tayebali (the Applicant)

(ii) Sheikh Amatuzehra

(iii) Dilqhad Oanali Zavery

(iv) Jalal Mohamed Tayebali

(v) Anies Mohamed Tayebali

(vi) Rubab Mohamed Tayebali (deceased)

(vii) Mustafa Mohamed Tayebali (deceased)

(viii) Alharazi Nafisa Mustafa (deceased)

7. The deceased left a number of assets including Land Parcel No. LR 209/7/2. Nairobi (hereafter referred to as the suit property) situated at parklands where the beneficiaries of the Estate lived with their families.

8. The suit property was purportedly transferred to a company called DAR-UL-HAYAT enterprises owned by the Respondent (JALAL MOHAMED TAYEBALI) and his wife Arifa Adhan Adnanji.

9. The transfer was purportedly done on 7.8.1991 and the deceased herein died on 20.8.1991 and the transfer of the deceased's wife was also transferred to the Respondent's Wife on 19.5.1995 and the deceased's wife died on 23.1.1998.

10. The parties filed written submissions but the weighty issues raised in the three Applications require to be ventilated by viva voce evidence.

11. I find that this case is not res judicata for reasons that the probate court is by law empowered to handle issues of Succession which include determining the beneficiaries of the estate of the deceased, identifying the assets which belong to the estate, appointment of administrators and overseeing the distribution of the estate.

12. The remaining question is whether this matter is res judicata. The principal of re 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.”

13. The doctrine of res judicata as stated in the said Section has been explained in a plethora of decided cases. I only need to cite one of those cases. In the recent case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**, the Court of Appeal held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

The Court explained the role of the doctrine thus:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

14. I find that the transfer of the assets of the deceased to a company owned by the Respondent and his wife is suspicious and the said issue should be determined by viva voce evidence.

15. I also find that the beneficiaries and assets of the estate need to be identified and an administrator appointed to petition for letters of administration.

16. I direct that the parties appear before this court within 30 days of this date for purposes of appointment of Administrators.

17. In the meantime, the rent from the suit property to be deposited in court until this matter is heard and determined.

18. The applicant to continue staying in the house No. 2F until this case is heard and determined.

19. The Respondent is also restrained from dealing with the suit property in any way until this case is heard and determined.
20. The parties are also directed to file witness statements before the next mention date to enable this court to expedite this case.
21. Mention on 1.4.2020 for compliance and for a hearing date.
22. All the beneficiaries to be summoned to appear in court on 1.4.2020.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 6TH DAY OF MARCH, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.