



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 8 OF 2019

IN THE MATTER OF THE ESTATE OF DONATO SCIACOVELLI (DECEASED)

ISKOROSTINSKAYA SVETLANA.....PETITIONER/APPLICANT

VERSUS

GLADYS NASERIAN KAIYONI.....OBJECTOR/RESPONDENT

Coram: Hon. Justice R. Nyakundi

Obinju Rondo Advocates for the Petitioner/Applicant

Nyongesa advocates for the Objector/Respondent

RULING

From an eye of a Judge Court order. On 20.2.2020 the applicant filed a certificate of urgency in Adlitem No. 2 of 2019 and Succession No. 8 of 2019 seeking interalia:

- 1. That the objection dated 8.7.2019 be struck out.**
- 2. That the honourable Court be pleased to issue letters of administration intestate to the applicant.**

These applications are grounded in the supporting affidavit of legal counsel **Mr. Obinju** for the applicant as well as the main grounds on the face of the motion.

(a). By a Judgment and decree dated 7th February 2019 in HCC O.S. NO. 39 OF 2017 – SVETLANA ISKOROSTINSKAYA & SUSANA SCIACOVELLI –V- GLADYS NASERIAN KAIYONI, this Honorable Court (W. Korir J) held interalia that:

(i). The document dated 27th November 2015 presented to the Court by the respondent in Malindi H.C.S.C. No. 161 of 2016 as the Will of the Late Donato Sciacovelli is invalid.

(ii). The deceased died intestate in respect of his properties in Kenya.

(b). On 25th March, 2019 the Hon. Court herein appointed the Applicant herein Administrator Ad Colligenda Bona in HCSC Ad Litem No. 2/2019 for purposes of collection and preservation of the assets of the deceased's estate from intermeddling by the respondent.

(c). On 30th April 2019, the applicant instructed its advocates on record to commence succession proceedings herein in compliance with the Courts' Judgment and decree and the advocates proceeded to file a petition for grant of letters of administration herein.

(d). On 7th March, 2019 the respondent appealed against the Judgment of the High Court in CA 29/2019.

(e). On 9th July, 2019 the respondent herein filed objection proceedings against the Court issuing letters of administration intestate in favour of the applicant.

(f). The said objections by the respondent were made on grounds that she is the wife of the deceased, an issue which had been dealt with finality in the High Court's Judgment.

(g). The applicant filed a notice of preliminary objection against the objections raised by the respondent on grounds that she does not have locus standi and the Court directed that the matter herein be placed in abeyance pending the delivery of the Court of Appeal's Judgment.

(h). The matter herein is coming up for a mention on 11th May 2020 for purposes of appraising the Court on the outcome of the appeal filed by the respondent.

(i). On 7th February 2020, the Court of Appeal at Mombasa upheld the High Court's Judgment and held that the appeal is devoid of merit and dismissed the same with costs to the applicant.

(j). By the decision of the High Court and Court of Appeal, the respondent has been found to be a fraudster who intermeddled with the estate of the deceased and the applicant has commenced contempt proceedings against the respondent for recovery of the monies withdrawn from the estate.

(k). The applicant continues to suffer extreme prejudice at the hands of the respondent by her persistent actions in frustrating the applicant's efforts to finalize succession proceedings.

(l). The overriding objectives of this Court as well as the wider interests of justice would best be served if the annexed application is certified as urgent and orders granted as prayed.

Background

The deceased **Donato Sciacovelli** died on 17.5.2016 at Malindi, and was survived by his wife – **Suettana Iskorostinskaya, Susan Sciacovelli**, the daughter and son – **Ederson Sciacovelli**. During his lifetime he acquired the following assets.

(a). Plot Number 13402 (Original Number 1932) Malindi, delineated and described on the survey plan Number 315934 (half share).

(b). Bank accounts (i) Equity Bank Ltd account numbers [...] and [...] total estimate value of €495,446.44.

The wife petitioned for grant of Letters of Administration in Succession Cause Number 161 of 2016 – Gladys Naserian Kaiyoni filed objection proceedings on grounds that the deceased left a valid Will in which she was appointed as a true and only executor in regard to all his properties in Kenya.

The objectors contention was that the Will made by the deceased was in all circumstances that during his lifetime they had contracted a marriage union. The deceased therefore had made and executed his last Will and Testamentary dated 27.11.2015 appointing her as the sole executrix of the Estate in Kenya. The matter was adjudicated upon by **Hon. Justice Weldon Korir** and in his Judgment dated 7.2.2019 the specific impugned Will being referred to by objector was found to be a forgery. Further, the Court also struck out the statement of claim that **Gladys Naserian** at one time happened to be a wife in any system of marriage recognized by the Laws of Kenya. The approach taken by the Judge in the Judgment determined that the deceased **Donato** died intestate.

The objector being dissatisfied the decision reached by the Court filed an appeal to the Court of Appeal.

As can be discerned from the Judgment of the Court of Appeal dated 7.2.2020, the appeal was dismissed for want of merit in terms of the orders set out in the Judgment of the High Court.

It follows therefore, that the Courts powers to grant Letters of Administration to **Svetlana Iskorostinskaya** subject to the provisions of the Law of Succession Act, was to take effect.

Determination

The ultimate question to be determined by this Court is whether **Gladys Naserian Kaiyoni**, who has undertaken proceedings in Succession Cause Number 161 of 2016 as a petitioner, objector in Ad Litem No. 2 of 2019, Succession Cause No. 8 of 2019 and respondent in Misc. Application No. 39 of 2017 has any locus standi, right or interest to be determined with regard to the Estate of the deceased **Donato Sciacovelli**.

The Court exercises this jurisdiction pursuant to Section 1A and 3A of the Civil Procedure Act on inherent jurisdiction. The issue which arises in the motions filed by the applicants seeking to struck out the proceedings initiated by **Gladys Naserian** is an affront to the Estate of the deceased. What is the status of the Judgments delivered by **Hon. Weldon Korir J** and subsequent Court of Appeal decision to the entire substrum of the Succession Cause? There has been a good deal of litigation of this estate between the petitioners and the objector – **Gladys Naserian** who commenced proceedings with a reasonable prospect of success that she had been appointed executrix of the Estate supposedly donated by the deceased. In his last Will and Testamentary.

More crucially, however was the claim that **Gladys Naserian** was a wife to the deceased. The two courts delved into the issues in detail and the essential thrust of the case on which the objector was challenging grant of letters of administration. On this basis the claim was found

wanting given the Judges overall assessment that there existed no valid Will and the objector was never a wife to the deceased.

The question thus arises as the correct approach by this Court to determine the motions filed in Court by the applicants. As **Lord Cromwell J** pointed out in **Endean v British Columbia {1970} AC**:

“the Law permitted a residual source of power which a superior Court may draw from in order to ensure due process, prevent vexation and to do justice according to Law between the parties. In short, inherent jurisdiction, among other things, empowers a Superior Court to regulate its proceedings in a way that secures convenience, expeditiousness and efficiency in the administration of justice.”

Further, the power on inherent jurisdiction implicitly recognizes that in fashioning the administration of justice one major source of permissible exercise of discretion by Courts to redress the real danger of substantial injustice and protection of the Law is to invoke the inherent jurisdiction. This is what **Jacob stated in his article the inherent jurisdiction of the Court {1985} 15 Queenstand Law Society Journal 325, 326** where he stated:

“The essential character of a Superior Court of Law necessarily involves that it should be invested with a power to maintain authority and prevent its process being obstructed and abused. Such a power is intrinsic in a Superior Court; it is its very life blood, its power, the Court would have form but lack substance. The jurisdiction, which is inherent in a superior Court of Law, is that which enables it to fulfil, itself as a Court of Law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to Law in a regular orderly and effective manner.”

Coming to the facts of the case the objectors claim in **Ad Litem No. 2 of 2019, MISC 39 of 2017, Probate Cause No. 161 of 2016** and any subsequent claim in **Succession Cause No. 8 of 2019** seeking various reliefs as instituted have been fully determined in **HCC No. 39 of 2017**. and later confirmed on appeal in Civil Appeal No. 29 of 2019. The objector is therefore restrained from initiating any proceedings against the Estate of the deceased or make attempts to re-open litigation oppressively against the petitioners and the undisputed dependants under Section 29 (a) of the Law of Succession Act.

It is quite evident that the provisions of Section 7 of the Civil Procedure Act are a bar to breathe any life to the Succession Cause in question as it relates to **Donato Sciacovelli** estate to make it possible for the objector to be recognized as a beneficiary or executrix to the Estate under an impugned Will and Last Testamentary.

As submitted by **Mr. Obinju** for the applicants, this matter falls squarely under the doctrine of res judicata. This is evident from the dictum of the **Court in Gordon Steward v Independent Radio Co. Ltd & Wilmot Perkins {2012} JMCA** where the Court observed:

“The doctrine of res judicata is to protect courts from having to adjudicate more than once on issues arising from the same cause of action and to protect the public interest that there should be finality in litigation and that justice be done between them.”

On the nature and the scope of res judicata the **Court of Appeal in Independent Electoral & Boundaries Commission v Maina Kiai & 5 others {2017} eKLR**:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to mitigation and affords parties closure and respite from spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competitive Court. It is designed as a pragmatic and common – sensical 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 could be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.” (See also **Mburu Kinyua v Gachini Tatu {1978} KLR, Henderson v Henderson {1843} 3 Hare 100**).

It is to be observed in line with summons dated 20.2.2020 the objector/respondent is persistent in invoking the Court’s jurisdiction with regard to the matter of the Estate of **Donato Sciacovelli** and the surviving dependants. From the procedural history of this succession cause, the objector is seeking to re-litigate issues previously dealt with in the Judgment of the High Court dated 7.2.2019 as affirmed by the Court of Appeal on 7.2.2020. This to me amounts to an abuse of the process.

It is to be noted that under Order 2 rule 15 of the Civil Procedure Rules the seminal test of striking out a statement on pleadings is applicable to this case on grounds that:

- (i). It discloses no reasonable cause of action or defence or Law.*
- (ii). It is scandalous, frivolous or vexatious.*
- (iii). Or it may prejudice, embarrass or delay the fair trial of the action.*
- (iv). It is otherwise of the process of the Court.*

According to the principle in **Hunter v Chief Constable of West Midlands Police {1982} A.C. 529** the Court stated on what constitutes abuse of process to include:

“Proceedings in a Court of justice for the purposes of mounting a collateral attack upon a final decision against the intending (claimant) which had been made by another Court of competent jurisdiction in previous proceedings in which the intending claimant had full opportunity of contesting the decision in the Court in which it was made.”

Be that as it may, the fact of the matter is that any disposition or material or affidavit initiated by the objector/respondent founded on the same issues canvassed in **HCC No. 161 of 2016** and subsequently decided on 7.2.2019 are the very least to state res judicata. In short the objector/respondent is estopped by Law on her ill-founded litigation I echo the words of **Lord Simon Glaisdale**:

“Important though the issues may be, how extensive so ever the evidence, whatever the eagerness for further fray, society says. We have provided Courts in which your rival contentions have been heard. We have provided a code of Law by which they have been adjudged. Since Judges are fallible human beings, we have provided appellate Courts, which do their own fallible best to correct errors. But in the end you must accept what has been decided. Enough is enough and the Law echoes res judicata, the matter is adjudged.”

I can see no reason why even now the objector/respondent cannot do the honourable thing of accepting the loss of the claim and ensure that no person shall be vexed by further litigation in the matter of the Estate of **Sciacovelli Donato**.

In lieu of it, I would strike out any such statement of claim by the objector against the applicants. Further in view of the conclusions made, the applicant, already a petitioner and appointed administrator to the estate of the deceased do move with speed to formalize confirmation of grant of letters of administration.

In the alternative there is sound basis on which the objector/respondent should be pursued to make good the loss incurred on intermeddling with the estate property in absence of a Will or grant of letters of administration.

I grant the motion to the extent that any plea, action, issue and claim by the objector/respondent is otherwise an abuse of process. I make no order as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24th DAY OF JUNE 2020

R. NYAKUNDI

JUDGE

Present

1. Obinju for the petitioners
2. Barongo for the respondent