



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NUMBER 20 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE FRANCIS MUNGAI KANGETHE

DANIEL KAMITI MUNGAI ----- PETITIONER

-VERSUS-

MARY WAIRIMU ----- 1ST RESPONDENT

THE ATTORNEY GENERAL ----- 2ND RESPONDENT

-AND-

DEPUTY REGISTRAR OF THE HIGH COURT IN NAKURU

-----INTERESTED PARTY

RULING

INTRODUCTION

1. This ruling is in respect of a preliminary objection (P.O.) raised by Mary Wairimu (1st Respondent) and dated 6th September 2016.

2. The P.O. is premised on reasons:

1. THAT Succession matters ought to be adjudicated upon under the Law of Succession Act as opposed to the Constitution.

2. THAT confirmation of grant, proceedings and or decision of a succession court cannot be challenged by way of a constitutional application since for reasons *inter alia* there is a procedure expressly provided for that purpose under the Law of Succession Act.

3. THAT a High Court being a superior court cannot be invited to sit on appeal or determine constitutionality of its own decision/proceedings.

4. THAT one cannot challenge constitutionality of High Court proceedings/decision in the same court.

5. THAT once a competent court makes a decision on an issue, a party cannot be allowed to re-litigate on the same while the said decision was still standing and the only options available were either to appeal, apply for review or set aside that decision.

6. THAT the issues raised in this petition are at their best *Res-judicata* and at their worst an *Abuse Of the Court Process* since they were raised and fully adjudicated upon in **Nakuru Succession Cause No. 614 B/09 Estate of Francis Mungai Kangethe.**

7. THAT the Petition herein is bad in law, otiose, incompetent, frivolous and an outright abuse of the court process.

THE BACKGROUND

3. Francis Mungai Kangethe died on the 5th day of March 2009. Vide a judgment of this Court dated 6th March 2015, the Grant of letters of Administration was confirmed and the distribution of the estate done as per the schedule thereon. The Petitioner in the petition herein was named as a co-administrator in the cause and was allocated a share of the estate.

4. The Applicant herein was dissatisfied with the findings of the Court on the distribution of the estate and on 12th March 2014 filed an application for revocation of grant which was dismissed.

5. The Respondent to the Petition filed an application dated 9th June, 2014 seeking orders;

“That this Honourable Court be pleased to direct the Deputy Registrar and/or Executive Officer of this Court to be executing all necessary documents to facilitate distribution and/or winding up of the estate herein in place of DANIEL KAMITI MUNGAI the 1st Respondent.”

6. An order was issued on 6th March, 2015 compelling Daniel (The Applicant herein) to sign all documents necessary to facilitate the distribution of the estate of the deceased within 45 days.

7. It is the Applicant's position that the failure by the Court to look at the merits of the Petitioner's case and failing to consider that the Court had earlier on misinterpreted the Petitioner's affidavit in support of confirmation of grant denied the Petitioner his right to a fair hearing and right to fair administrative action.

8. It is prayed for;

a) A declaration that the proceedings in Succession Cause No. 614 “B” of 2009 in the High Court at Nakuru was conducted in a manner that amounts to denial, violation, infringement and or threat to the fundamental rights and freedoms of the Petitioner as provided under Articles 47 and 50 of the Constitution of Kenya.

b) Costs of the Petition.

c) Any other orders, writs, directions the Honourable Court considers appropriate and just to grant for the purpose of enforcement of the Petitioners fundamental rights and freedoms.

9. The Petition is answered through grounds of opposition filed on 11/8/2016 (and dated 2/8/2016) and through a replying affidavit filed on the same date.

10. It is at that point that the preliminary objection is filed. Directions were taken that the Preliminary Objection be disposed off first through written submissions.

11. Only submissions by the 1st Respondent are on record eliciting no response from either the Petitioner or the 2nd Respondent.

12. I have considered the Preliminary Objection and the Submissions by counsel and the elaborate case law cited.

13. It is true from the record herein that the Petitioner in the Constitutional Petition herein is aggrieved by

the decision of this Court in the confirmation of grant and in the distribution of the estate of Francis Mungai Kangethe. He is further aggrieved by the dismissal of his application for revocation of grant and the order compelling him to execute documents within 45 days.

14. With profound respect, and arising from paragraph 13 above, the Petition as filed herein is misguided, bad in law and a non starter.

15. In her ruling refusing the application for revocation of grant, **Mulwa J** gave very sound advise on what needed to be done, advise which was not heeded culminating in the filing of the Constitutional Petition herein.

16. The Court at page 4, paragraph 9, 10, 11, 12, 13 and 14 stated;

“At this point, I wish to point out that in these proceedings leading to the confirmation of the grant, the Objector was ably represented by his able Advocates, and he willfully and knowingly fully participated in the proceedings. The court considered the Objectors affidavit in support of his proposed distribution where he proposed that all the beneficiaries should get equal shares of the land, and indeed the court proceeded to give each beneficiary 9.1 acres, including the applicant, with the variation indicated above where the Petitioner ended up with 20 acres.

The Applicant's main complaint is that his mother, the Petitioner was awarded 20 acres absolutely, that she is not entitled to the said land absolutely as she holds the same as a life interest and in trust for the children including himself.

I have considered the two applications, the supporting affidavits and submissions by both counsel for the Petitioner and the Objector/Applicant.

On the application dated on 3rd March, 2014 by the Objectors.

I have already pronounced myself that the ruling on the distribution of the estate and confirmation of the grant on the 13th November, 2013 has not been appealed from. To interrogate and or fill up any gaps that may be open would in my view be sitting on appeal in the matter. This court is now *functus-officio* having pronounced itself on the issue of distribution and confirmation of the grant.

As held in the case, Ngugi v. Kinyanjui and 3 others (1989) @ KLR, in Civil Appeal no. 1 of 1986, the Learned Judges of Appeal stated;

“In law any litigation has to come to an end. Once a decision has been reached by a competent court, it cannot be re-opened to be restarted all over again unless the decision reached has been set aside. Any decision reached, if not set aside, it can only be challenged on appeal and cannot be challenged in any inferior court, tribunal or in the same court except in case of review. The law will not allow any dispute between the same parties or between those who claim through them to re-open the dispute while the judgment still remains on record.”

In the circumstances, and without digging deeper into the merits and demerits of matter, I find the objectors application dated the 3rd March, 2014 unmerited and an abuse of the court process, and dismiss it with costs to the Respondent, Mary Wairimu Mungai.

17. It is an established principle of Law that the Court must exercise restraint in exercising its jurisdiction under Article 165 of the Constitution where there exists alternative methods of dispute resolution. This is even more relevant like in our instant case where the dispute has already been resolved through another legal mechanism and appropriately under the Law of Succession Act.

In the case of **Tom Kusienya & 11 others – vs – Kenya Railways Corporation and 2 others**

[2013] eKLR quoting with approval the decision in **Minister of Home Affairs – vs – Bickle and Others (1985) LRC Const**; it was stated;

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to an applicant under some other legislative provision or on some other basis whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the Declaration of rights.”

18. I agree with counsel for the 1st Respondent that the issues raised in the instant Petition are *Res Judicata* and at their worst an abuse of the Court process since they were raised and fully adjudicated upon in Nakuru Succession Cause No. 614 “B” of 2009, in the Estate of Francis Mungai Kangethe. The Petition herein is bad in law, otiose, incompetent, frivolous and an outright abuse of the Court process.

19. In my considered view the grievances raised in the petition ought to be subjected to an appeal, review or otherwise setting aside by the Court and cannot be resolved by initiating a parallel claim in the same Court.

20. I am satisfied that the Preliminary Objection herein meets the threshold set in **Mukisa Biscuit Manufacturing Company Limited – vs – West End Distributors**. I uphold the preliminary objection, dismiss the Petition dated 21st April 2015 with costs to the 1st Respondent.

Dated and Signed at Kisii this 10th day of January, 2018.

A. K. NDUNG'U

JUDGE