



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. SUCCESSION CAUSE NO. 200 OF 2010

CONSOLIDATED WITH SUCCESSION CAUSE NO. 315 OF 2010

IN THE MATTER OF THE ESTATE OF JOSPHAT NJOKA MBIRIRAI ALIAS NJOKA MBIRIRAI (DECEASED)

JOYCE WANJUKI NJOKA.....1ST APPLICANT/ADMINISTRATRIX

GRACE KARAU NJOKA.....2ND APPLICANT/ADMINISTRATRIX

TERESIA GATURI NJOKA.....3RD APPLICANT/ADMINISTRATRIX

VERSUS

ROBERT NJOKA MUTHARA.....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling on the summons dated 19th June 2018 seeking for several orders listed on the face of the application and supported by the supporting affidavit of the 2nd Applicant/Adminstratrix.

2. The respondent filed grounds of opposition dated 9th July 2018 opposing the aforementioned summons on the following grounds: -

a) That the application is res judicata

b) That the applicants were parties in a similar application dated 25th July 2012

c) That the application is misconceived, bad in law and an abuse of the court process

d) That the application has failed to satisfy the conditions precedent to granting of the orders sought

e) That the application is flawed with no chance of success and offends the provision of the Law of Succession Act.

3. A beneficiary, Margaret Kairu Njoka, also filed a grounds of opposition to the application dated 19th June 2018 stating that the application was bad in law, incompetent, frivolous and an abuse of the court process.

4. The parties agreed that the application be determined by consideration of their written submissions.

B. Applicants' Submissions

5. The applicants submitted that the respondent was one of the sons of the deceased herein and had in his possession 10 original title deeds belonging to the deceased which he should be ordered to surrender to the applicants as the Adminstratrix of the deceased's estate namely;

a) Gaturi/Nembure/268

b) Gaturi/Kevote/T.147

- c) Gaturi/Kevote/T.148
- d) Gaturi/Nembure/T. 23
- e) Gaturi/Nembure/T. 42
- f) Gaturi/Nembure/T. 69
- g) Embu/Gangara/1779
- h) Embu/Gangara/2377
- i) Kyeni/Kigumo/1533
- j) Gaturi/Nembure/T.18

6. The applicants' further submitted that the respondent should be ordered to return to the deceased's estate titles over Gaturi/ Nembure/104, Kagaari/Weru/1582 and Kagaari/Weru/2248 which he had used as security to procure a loan from the I.C.D.C.

7. The applicants further submitted that the respondent had not accounted for proceeds amounting to USD 121,874.32 which is equivalent to Kshs. 12,431,180.60 from a coffee pulping factory known as Mbiriai Farm BD 001 which belonged to the deceased.

8. The applicants' submitted that the respondents action amounted to intermeddling as enshrined in section 45 of the Law of Succession and as enshrined in the case of **Morris Mburugu v Denis Kimathi M'Mburugu [2016] eKLR.**

9. The applicants' further submitted that the court had never made any findings on the prayer sought in the Summons herein as the same were kept in abeyance awaiting the determination of the validity of the will.

C. Beneficiary's Submissions

10. She submitted that the applicants' summons sought similar orders as those in a previous application dated 25th July 2012 and consequently the matter was res judicata.

D. Respondent's Submissions

11. It was the respondent's submission that the summons by the applicants was res judicata. He relied Section 7 of the Civil Procedure Act as well as the cases of **Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd [2017] eKLR**, **E.T v Attorney General & Another [2012] eKLR** and the case **Henderson v Henderson (1843-60) ALL E.R. 378.**

12. Consequently, the respondent submitted that the summons by the applicants lacked merit and ought to be dismissed.

E. Applicants' Submissions in Reply

13. The applicants submitted the issues it had raised in its summons were not res judicata as Section 7 of the Civil Procedure Act does not apply in probate proceedings. They quoted section 2 (1) of the Law of Succession and Rule 63 (1) of the Probate and administration rules.

F. The Determination

14. Before embarking on the determination of any issue in this matter, this court is under a duty to first establish whether it has locus standi. In **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR**, the Court of Appeal held: -

"In our view, issues of locus standi and jurisdiction are critical preliminary issues which ought to have been settled before dwelling into other substantive issues".

15. This court is a probate court sitting on a succession cause. However, the doctrine of *res judicata* which is a universal doctrine is applicable in this application as set out under Section 7 of the Civil Procedure Act. It is a universal principle of law that litigation must come to end. See the cases of **Michael Muthike Ndegwa v Barnabas Ndonga & 2 others Interested Party C.W.A. Mwea Catholic Parish and In re Estate of M N J (Deceased) [2018] eKLR.**

16. Section 7 of the Civil Procedure Act Cap. 21 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."

17. The first issue before this court in this application is whether the issues raised in this application can be regarded as issues already heard and finally determined in an earlier application. In the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR**, the Court of Appeal held: -

“In order to rely on the defence of res judicata, there must be:

- i. a previous suit in which the matter was in issue;***
- ii. the parties were the same or litigating under the same title;***
- iii. competent court heard the matter in issue;***
- iv. the issue has been raised once again in a fresh suit.***

18. The effect of Section 7 of the Civil Procedure Act is that litigation must come to an end. For this court to establish whether a suit or an application is *res judicata*, it must take into consideration whether the parties in the previous proceedings were the same, whether the issues are the same in both proceedings and whether the issues were ever determined.

19. The judge who heard the previous application dated 25/07/2012 made the following observations/orders: -

i. The respondent had admitted being in possession of the title deeds demanded for by the applicants. Since there is a dispute over these properties, this Court must ensure the said properties are preserved even though this was not asked for

ii. I therefore order that an inhibition issues against all the lands mentioned in prayer (b) of the application dated 25/07/2012.

iii. The other prayers cannot issue in view of the fact that the validity of the WILL has yet to be established. Such determination can only be done in Embu High Court Succession Cause No. 200 of 2010 and not the No. 315 of 2010. Once the above determination is made it will be known if the grant issued herein will proceed to confirmation or not.

20. The court on its own motion issued orders of inhibition to preserve the assets of the deceased in respect of which the respondent Robert Njoka Muthara admitted holding the title deeds of the parcels. I believe this was a well thought move by the court to preserve the assets pending disposal of the two succession causes which were consolidated.

21. The reasons for not dealing with the prayers in the application were explained mainly that there is a disputed will of the deceased which the respondent was relying on and arguing that it should guide the distribution of the estate. The court rightly directed that the validity of the disputed will be determined first.

22. It is well within the knowledge of the parties that the validity of the will is yet to be determined. As such the directions of the court given on 19th April 2014 are still valid that all the issues in the previous application which have been duplicated in this application dated 19th June 2018 must be held in abeyance until the validity of the will is determined.

23. The delay in hearing this case has been caused by the respondent who has not cleared the loan secured using several securities that form part of the deceased's estate. He has held the rest of the family in abeyance for about eight (8) years since the deceased died. The administratrixes are the widows of the deceased who are said to be sickly and of advanced age. The estate cannot be distributed until the respondent has released the securities for the loan. This is not fair to the rest of the family who are all disputing the will. In my view, the respondent ought to be penalized by way of costs for causing undue delay in the determination of the two succession cases.

24. I find that the parties in both applications are the same as those in the application dated 27/05/2012 and so are the issues raised in both proceedings. I therefore reach a conclusion that this application dated 19th July 2018 is *res judicata* and is hereby dismissed.

25. The respondent will meet the costs of this application.

26. In the interest of justice, I direct that this case be mentioned after 60 days for the respondent to report the progress in the outstanding loan clearance with a view of releasing the securities for purposes of determining the probate issues.

27. The respondent will meet the costs of the mentions.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

in the presence of: -

