



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 186 OF 2009

IN THE MATTER OF THE ESTATE OF DANIEL MURANGO NDERI (DECEASED)

JAMES MUTHIKE MURANGO.....1ST APPLICANT

JACKSON MUTHEE MURANGO.....2ND APPLICANT

MURIUKI MURANGO.....3RD APPLICANT

SARAH WANJIRU WANJOHI.....4TH APPLICANT

LUCY WAMBURA MURANGO.....5TH APPLICANT

VERSUS

CESILY WAMBUI KARANGI.....1ST RESPONDENT

WAMWIRUA MURAGA GATURU.....2ND RESPONDENT

R U L I N G

A. Introduction

1. The respondents petitioned for letters of administration intestate which grant was issued and confirmed on 11/07/2013.
2. The application for revocation of grant dated 8/10/2018 was filed by the five applicants who all claim to be children of the deceased based on the following grounds: -

a) That the applicants are beneficiaries to the estate of DANIEL MURANGO NDERI, the deceased

b) That the proceedings to obtain the grant by the respondent herein, the subsequent confirmation and the distribution of the estate of the deceased were fraudulent and false as the respondents secretly filled this succession and denied the applicants right to give consent

c) The distribution of the deceased was irregularly done and denied their mother to be part of the administration

d) The parcel of land MUTIRA/KANYEI/237 was marked for subdivision not involving the applicants

e) That the applicants will suffer the irreparable and loses if the grant is not revoked

3. The respondents filed a notice of preliminary objection dated 23rd October 2018 against the applicant's summons on grounds that the same were incompetent. The respondents also filed a replying affidavit dated 23rd October 2018.

4. The applicants opposed the respondents notice of preliminary objection.

B. The Respondent's Case

5. The respondents deposed that the summons dated 8th October 2018 was *res judicata* as the same issues had been heard and determined on the 7th August 2013 by this court.

6. The respondent further deposed that contrary to allegations by the applicants in their summons, the parties herein were beneficiaries of equal status with the respondent and any of them had capacity to commence succession proceedings.

7. The respondent further deposed that the succession proceedings leading to the grant being challenged by the applicants aforementioned summons were progressed with the knowledge of all the parties herein.

8. The respondent further deposed that the applicant's herein neglected court summons to appear in court despite constant notice by the respondent herein.

C. The Determination

9. Before embarking on the determination of any issue in this matter, this court is under a duty to first establish whether it has jurisdiction to deal with the matter and whether the application is properly before the court.

10. The respondents contended that the summons for revocation of grant is in contravention of the doctrine of *res judicata* as the same issues raised therein had been addressed by the probate court prior to confirmation of the grant.

11. The law on *res judicata* is enshrined in **Section 7 of the Civil Procedure Act**. This court despite being a probate court is still a civil court guided by the **Civil Procedure Act**.

12. **Section 7 of the Civil Procedure Act Cap. 21** provides: -

“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 question is whether the issues raised in this application can be regarded as issues already heard and finally determined. 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) a competent court heard the matter in issue;

iv) the issue has been raised once again in a fresh suit.

14. It is noteworthy that the proceedings referred to by the respondents were probate proceedings in the deceased estate that culminated in confirmation of grant. The applicants have subsequently filed summons to revoke the grant issued. These are totally different proceedings. The relevant rule under the Probate and Administration Rules for seeking revocation of grant is **Rule 44 and Section 76 of the Law of Succession Act**.

15. These provisions of the law give the applicants the right to bring this application and confers upon this court the requisite jurisdiction to determine the summons.

16. In my considered view, the preliminary objection is misplaced and lacks merit. I find that the summons for revocation dated 8/10/2018 is not *res judicata* as claimed and that it is properly before the court.

17. The objection is dismissed for lack of merit.

18. I hereby direct that the parties to fix the matter for directions on the summons for revocation dated 8/10/2018 before the Deputy Registrar.

19. Each party to meet their own costs.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence on: -

1st, 2nd, 3rd and 4th Applicants

Respondent present