



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 281 OF 2010**

**IN THE MATTER OF THE ESTATE OF GEORGE MUTHANJI WANGINGI (DECEASED)**

**RULING**

1. The applicants in their application dated 13<sup>th</sup> April 2011 seeks;
  - i. Temporary order staying distribution of the deceased's estate as per the certificate of confirmation of grant dated 28th February 2011.
  - ii. That the respondents be restrained either by themselves. Their agents and or servants from dealing, alienating, selling and or dealing in any manner conceivable disposing of any asset of the deceased and particularly land parcel no. *L.R. Kabete/Kibichiku/208* until final determination of this summons for revocation of grant
  - iii. That the letters of administration intestate made on 30th July 2010 and confirmed on 28th February 2011 be revoked and annulled.
  - iv. That all steps if any taken by the respondents pursuant to the said order granting letters of administration and which may have changed the state of the subject matter of this application be set aside.
2. The applicant in their application dated 12/12/2016 raised a preliminary objection arguing that the application dated 13/4/11 is res judicata and contradicts section 7 and 8 of the Civil Procedure Code.

The background of this matter is as follows;

3. The parcel in contention **Kabete/Kibichiku/208** is registered in the names of Joseph Gachuhi Muthanji & James Mbugua Muthanji who are representatives of the late George Muthanji Wangigi. The late George Muthanji Wangigi was the youngest brother to Nyoro Wangingi and Mbugua Wangingi both are deceased and are represented by Mary Wambui Njunguna and Nancy wanjiru Njuguna. It is alleged that in good faith George Muthanji Wangigi allowed his two brothers Nyoro Wangingi and Mbugua Wangingi to temporarily build their dwelling houses in the said parcel of land. The said parcel of land was initially registered on 28/12/1956 in the names of George Muthanji Wangigi. However, in 23/08/1974 Nyoro Wangingi and Mbugua Wangingi registered a caution on the said parcel of land claiming beneficiary interest on the said parcel of land and in civil suit no. 150 of 1974 sought to be recognized as co-owners of the suit property. The two brothers claim to be beneficiaries of the suit parcel of land under adverse possession and also claimed that the late George Muthanji Wangigi had held the suit parcel of land in trust for them and others. The defendant however denied the said claims. On 27th July 1981, Justice Mathew Muli ordered that the matter be adjudicated by four elders and an award filed. The said award was filed on 27/7/1981. George Muthanji Wangigi was dissatisfied with the award, sought to have the same set aside, and sought a stay of execution. The award was set aside January 1991 and matter referred

to arbitration by consent with an award to be filed within 150 days. By consent on 3rd May 1992, matter was referred back to arbitration under the chairmanship of the District officer Kiambu. The award was read in open court on 13/03/1995 by Justice Mary Angawa as she then was. On 28th September 1995 the said award was set aside. In 1998 the 2nd plaintiff passed away. On 28th February 2011 Justice J. K. Sergon granted prayers to substitute the 2nd plaintiff. The said decision was appealed in Nyeri 34 of 2015 and the substitution was overruled adding that the case had abated. On 11th February 2014 the administrators filed an application seeking a declaration that the suit had abated and was no longer legally tenable. On 4th March 2015 Mary Wambui Njunguna and Nancy Wanjiru Njuguna sought to be substituted with the deceased plaintiff. Justice L.N. Waithaka on 18th June 2015 held that the issue of substitution had been dealt with by the court of appeal and as such had been finalized and the said decision was binding on the court. The applicant dissatisfied filed an application to have a restriction, which the court granted. The applicants have yet again made an application seeking to vacate the restrictions on suit parcel **Kabete/Kibichiku/208**.

4. Nancy Wanjiru Njuguna a wife to the late Mbugua Wangige in her witness statement reiterated the background as set out above adding that the suit parcel of land was subdivided into three equal portions by elders in 1970's after the demise of Wangige Kimotho. Each of the three brothers got a portion, settled there, and have lived there as a family without any interruptions all along and are entitled to a share of the same as it was held in trust by George Muthanji Wangige. That prior to their demise the Nyoro Wangingi and Mbugua Wangingi had litigated under Civil Case no. 150 of 1974 and the suit is still pending. That unknown to them letters of administration were issued to Joseph Gachuhi and James Mbugua Muthanji (sons of the late George Muthanji Wangige) on 3rd July 2010 and subsequently confirmed on 28/02/2011. That by failing to involve the other beneficiaries of the estate the said grant was fraudulently misrepresented as it concealed the other beneficiaries of the estate of the deceased. The interest of the other dependants was not canvassed or mentioned and the same will result into the parties being disinherited and evicted should the court not intervene.

5. Moses Muturi Mbugua in his statement claimed to know the three brothers and their mother Wairimu Wangingi. He states that the suit parcel of land was subdivided into three equal portions by elders in 1970 each of the brothers got a portion. He listed the said elders as follows;

- i. Mwathi Wangigi
- ii. Gikaru Wangingi
- iii. Samuel Wangingi
- iv. Maina Gathungu and
- v. Mbugua Nyaburura

6. Parties filed written submissions. The applicants submit that the respondents have relied on the Civil Procedure section 7,8,9 Order 24 rule 7(11) whilst the matter in issue is a succession issue before the Family division and the same falls under the ambit of the Succession Act, Cap 160. It was submitted that a preliminary objection must be raised purely on a point of law that flows from pleadings and will not need to be factually investigated or relate to exercise of judicial discretion as was held in the case of **Mukhisa Biscuit Manufacturing vs West End Distributors (1969) E. A. 696**.

7. It was submitted that for a plea of res judicata to succeed the case must have been decided on merit as was held in the case of **Kenarchard vs Jan Mohammed (1999-1921)EACA 64**. Adding that where a case has been dismissed on a preliminary point the plaintiff has not been heard on merit. That the parties that litigated ought to have been the same. The applicants argue that they were not the same parties that in Nyeri case and the parties were not litigating under the same capacity. That the case abated on the death of both plaintiffs as their representatives did not revive or substitute the deceased in their quest to pursue the matter. That in the Nyeri case the issue for determination was determination on trusteeship in regards to a particular parcel of land. Whilst the current proceedings relate to

administration and distribution of a parcel of land which boils down to beneficial interest.

8. The respondents submitted that *res judicata* restricts a court in exercising their jurisdiction if the matter in the new issue was heard and finally determined by a competent court. The doctrine operates where the dispute is between the same parties and involving same cause of action as a previous matter previously adjudicated by a competent court. On this, they relied on the case of ***Saleh Bin Kombo vs Administration General Zanzibar [1957] 1957 EA 1917***, where a plaintiff lost a case to the deceased and when he subsequently sued, the administrator of the deceased's estate a plea of *res judicata* was raised. *It was held that the defendant contention as to res judicata must fail as although in each of the two cases the plaintiff was a party he was not in both cases litigating under the same title.*

9. It was submitted that the doctrine of *res-judicata* were authoritatively laid down in the case of ***Willie v Michuki & 2 Others*** where the court held that, for the doctrine of *res judicata* to apply three basic requirements must be satisfied. The party relying on it must show; there was a former suit or proceeding in which the same parties had litigated. The matter in issue in the latter suit must have been directly and substantially been in issue in the former suit. That a court of competent to try it had heard and finally determined the matter in controversy between the parties. Further that section 7 of the Civil Procedure 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 one of them claim, litigating under the same title, in a court competent to try such subsequent suit which such issue has been subsequently raised and has been heard and finally decided by such court.”*

It was submitted that the said section avoids a scenario where a party is vexed twice for the same cause. In addition, there needs to be an end to litigation.

10. Further, that section 8 provides, **“where a plaintiff is precluded by rules from instituting a further suit in respect of that cause of action. This section further strengthened by Order 24 rule 7(1) of the Civil procedure rules which states that, where a suit abates or is dismissed under this order no fresh suit shall be brought for the same cause of action.**

### **Determination**

11. The issue the applicants intend to raise is that of ownership and their entitlement to the suit parcel of land ***Kabete/Kibichiku/208***. They argue that their late husbands were entitled to a share of the same as the late George Muthanji Wangige had held the same in trust for his brothers. From the background, this is a long protracted matter going far back to the 50's. The court in an attempt to settle to issue between the parties had referred parties for arbitration with elders and awards that resulted therefrom were set aside severally.

12. I find that the applicants who represent their late husbands had taken on the cause from their late husbands as such they fit in their late husband's shoes. About parties litigating, I find that representatives are same parties as were litigating before. The issue in contention is on the ownership of suit parcel of land ***Kabete/Kibichiku/208*** this then means that the parties are litigating on the same cause of action. The parties herein litigated before the High Court and even proceeded to Court of Appeal where the suit abated as such I find the matter had been determined by a competent court. From the fore going it is clear that the issues the parties intend to raise is *res judicata* as it has met the thresh hold set in the case of ***Willie v Michuki & 2 Others [supra]***. I find that the preliminary objection has merit and uphold the same the applicant's application dated 13/4/11 is struck out with costs as it is *res judicata*. It is so ordered.

Dated, signed and delivered this **24<sup>TH</sup>** day of **March** 2017.

**R. E. OUGO**

**JUDGE**

In the presence of;

**Absent .....For the Applicants**

**Absent .....For the Respondents**

**MS. Charity**

**Court Clerk**