



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 1227 OF 1999**

**IN THE MATTER OF THE ESTATE OF JANE MUNJAGI MUKAI (DECEASED)**

**WANJIKU KAMAU..... 1<sup>ST</sup> APPLICANT**

**WAKONYO MUKAI .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**WAMBUI MUKAI .....1<sup>ST</sup> RESPONDENT**

**MUTAHI SUO.....2<sup>ND</sup> RESPONDENT**

**RULING**

[1] These succession proceedings relate to the late Jane Wanjagi Ngugi alias Munjagi Mukai who died on 17<sup>th</sup> April 1994. Mutahi Suo the deceased's husband's brother petitioned for probate of Oral will for grant of letters of administration and was issued with the same on 5<sup>th</sup> August 1999 and was subsequently confirmed on 5<sup>th</sup> May 2000. Wanjiku Kamau and Wakonyo Mukai filed summons dated 27<sup>th</sup> September 2007 seeking annulment of grant, enjoinder of Wambui Mukai, a temporary injunction restraining the respondents from selling, transferring, alienating or otherwise dealing with properties comprising the deceased's estate among them **L. R. No. 7785/433** and **L.R. 7785/424** and shares or dividends in Muringa Company Limited. Their application was based on grounds that the grant was obtained fraudulently by making a false statement of existence of oral will by the deceased and concealment that the deceased had 4 daughters and their children who were dependants of the deceased's estate who are entitled to a share of the estate in equal proportions. That the respondents acted in collusion to deny the applicants and Maria Wanjiku Kimani of their inheritance.

[2] On 9<sup>th</sup> April 2008 Justice Onyancha ordered, Wambui Mukai be joined in the cause as the 2<sup>nd</sup> Respondent and that a temporary injunction do issue as against the deceased's properties **L. R. No. 7785/433** and **L.R. 7785/424** and shares or dividends in Muringa Company Limited. Parties were also urged to file and serve their replying affidavit and further affidavits if need be. Mutahi Suo filed his replying affidavit on 17<sup>th</sup> May 2008 and a further affidavit by Wanjiku Kamau filed on 12<sup>th</sup> June 2008.

[3] The objectors /applicants filed the summons dated 27<sup>th</sup> September 2007 seeking an injunction against the respondent from selling, transferring, alienating or otherwise dealing with the properties comprising the deceased's estate among them **L.R. NO. 7785/433 and L.R. No.7785/424**. Justice Rawal upon consideration of the parties affidavits made her ruling on 10<sup>th</sup> February 2009 in dismissing the summons dated 27<sup>th</sup> September 2007 she held that the 2<sup>nd</sup> cause was filed after the conclusion of the first cause. The learned judge took issue with the inordinate delay by the applicants to file the said summons as they

came to court after the conclusion of the succession cause and for filing another succession cause for the same deceased. Further, that they did not adduced any evidence to invalidate the oral will.

[4] The applicant's application for stay of Justice Rawal's (as she then was) ruling dated 10th February 2009 came before Justice Luka Kimaru who held that the applicants had inordinately delayed in filing the same 7 years after the delivery of the said ruling. Further, that since the extension of leave by Justice GBM Kariuki to file the said appeal the applicants had made no efforts to prepare the record of appeal. That the property in question had already been transferred to third parties and as such there was nothing to be stayed.

[5] This is what prompted Wanjiku Kamau and Wakonyo Mukai to file the summons dated 4<sup>th</sup> November 2015 seeking orders that;

(i) That the respondent by themselves, servants and agents be restrained by way of an injunction from destroying, demolishing, evicting interfering with the farm produce and homes of the applicants respective family members, agents and servants from **L.R. No.7784/424** pending hearing and determination of this application.

(ii) That the respondents by themselves, servants and agents be restrained by way of an injunction from destroying, demolishing, evicting, interfering with the farm produce and homes of the applicant's respective family's members, agents and servants from **L.R. No.7784/424** pending hearing and determination.

(iii) That all the orders made on 5<sup>th</sup> May 2000 and all other consequential orders therein be set aside/reviewed and discharged. That this honorable court be pleased to review and set aside its orders dated 14<sup>th</sup> April 2010 and revoke the grant issued on 29<sup>th</sup> April 2003.

(iv) That there be a stay of execution of orders issued herein in this matter in favor of the respondents and or enforcement of the same pending review.

(v) That the grant orders herein and proceedings be reviewed and an order do issue that the shares and interest of Mukai Thuo (deceased) in property **L.R. No. 7785/433 Original No. 7785/8/66** called Munyagi Company Limited held in called Munyagio Company Limited does not belong to this estate.

(vi) That a prohibition order do issue against the respondents from selling disposing and dealing with L.R. No. 7785/424 to the detriment of the applicants herein and all beneficiaries of Mukai Thuo.

(vii) That the respondents be barred from intermeddling with the shareholding and interest of Mukai Thuo (deceased) in the property L.R. NO. 7785/433 called Munyagi Company be restrained.

(viii) That proceeds of the sale of the shareholding and interest of Mukai Thuo deceased in the property **L.R.7785/433 Original 7785/8/66** not to be released in the respondents 's agent or servants until the hearing and determination of this application.

(ix) That the honorable court do issue any orders it deems fit to grant in the interest of justice.

[6] The application is based on grounds;

(i) That substantial loss and embarrassment may result to the applicants and their families unless the order for stay is granted as they purported to allegedly administer the estate of Mukai Thuo.

(ii) That the application has been made without undue delay. That there is an error on the face of the record. That there is sufficient reason to review the order on the merits of the case and as a matter of public policy to avoid perpetuating an illegality.

(iii) That there is a mistake and error on apparent on the face of the record since no party herein pointed out that the deceased herein was not the owner of the property she actually gave by way of will to one party of her daughter s to the exclusion of the other daughters.

(iv) That the properties contained in the deceased's will belonged to her husband and she had no absolute. That the properties distributed by the way of a will herein and had been allocated to the beneficiaries of the deceased in the year 1979 by their father i.e. long before the deceased purported to make a will.

(v) That substantial loss and embarrassment may result to the applicants unless the order for stay is granted. That they had no valid and enforceable will or other form of testate document binding the applicants if the rules of natural justice are adhered to and stay should therefore be unconditional.

(vi) In their affidavit in support of the said application they aver that the respondents are purporting to administer the estate of the deceased and have indicated their intentions to keep the proceeds of the sale of **L.R. 7785/433** and a copy of title and memorandum of agreement is in the applicants custody to be executed by them purporting to be the administrators of the estate.

(vii) That the respondents were appointed administrators of the estate and seemingly that the deceased had no property of her own as she inherited her husband's property and that by dint of the said letters of administration the respondents have purported to inherit the properties of another person (husband of the deceased) herein Mukai Thuo held in a limited company called Munyangi Company Limited without first obtaining letters of administration.

(viii) That the deceased caused the company distributed to their shareholders the deceased herein caused the same to be transferred into herself as the wife of the deceased.

(ix) That the applicants are aware that the Company Munyangi Company Limited is selling a property **L.R. No. 7785/433** and the shares of the deceased's which are bound to be transferred to the deceased herein. That the share of **L.R. No. 7785/433** does not belong to the deceased herein absolutely nor was it part of the administered estate.

(x) That the respondents cannot claim to administer the estate of the deceased without letters of administration.

(xi) That they are aggrieved by the ruling and have instructed their advocate on record to appeal and seek a review on the same and have since asked for certified proceedings and ruling but the same has not been typed.

(xii) That since the change of advocates they were made aware that there is an error on the face of the record and have applied for review.

(xiii) That the property willed away by the deceased herein belonged to the husband of the deceased Mukai Thuo which has been distributed expressly during the lifetime of the deceased herein husband to his children, before his death.

(xiv) That all the properties in the cause did not belong to the deceased husband, that the court failed to note that the deceased but her deceased husband (Mukai Thuo). The court failed to note that the deceased herein was a wife i.e. held property in trust for the children) and as such she had a life interest only on the properties and held all the properties of her husband in trust for their children.

(xv) That the properties the deceased purported to distribute she also caused the same to be transferred from her husband after he died and she can only have held them for the beneficiaries, since they had been allocated to the beneficiaries, since they had been allocated to the beneficiaries during the lifetime of her husband.

(xvi) That Mukai's name was entered in Muringa's Company inheriting her husband's name. That they learnt from the director of the said company that the property willed by the deceased did not belong to her but she caused the same to be transferred to her name after the death of her husband.

(xvii) That the deceased could not distribute the estate singly since they had been allocated the properties during the lifetime of the deceased's husband sometime in 1978 at the said time all beneficiaries occupied their respective portions.

(xviii) That the will by the deceased made was done so erroneously mischievously and or fraudulently believing that the said properties were hers.

**[7]** Wambui Mukai and Mutahi Suo subsequently filed the Preliminary Objection dated 26/1/2016. The same was based on grounds that the issues raised are res judicata having been canvassed before Justice Rawal in her Ruling dated 4<sup>th</sup> November 2013. Further that the application is incurably incompetent and should be struck out in limine.

**[8]** It was argued that there were summons for annulment of grant dated 27/9/2007 supported by the applicant's affidavit sworn by Wanjiku Kamau dated 27/9/2007 and the prayers in application dated 4/11/2015 and the application dated 27/9/2007 are similar. That the facts alleged fraud misrepresentation and the shares in Muringa and Company limited were the same facts before this court. That looking at the ruling of Justice Rawal (as she then was) dated 10/2/2009 she found that there had been an application in Succession cause no. 2484/02 and when you look at the facts and prayers the same are similar. That looking at the 3<sup>rd</sup> prayer in the applicant's application the applicant sought an injunction against transfer and a benefit from the shares in Muringa Company Limited facts which he argues were before the court. That during the confirmation of the will and the subsequent application for annulment there was no mention of the distribution of the estate to the applicants and the court confirmed the oral will as translated in court dated 8/6/1999. That there was an application seeking to appeal Justice Rawal's Ruling which appeal was not filed and that Justice Luka Kimaru's decision dated 1/11/2013 found that the applicants indolent in pursuing any cause in the present matter.

**[9]** On the 2<sup>nd</sup> limb on rectification, cancellation and confirmation of the grant brought under Section 47 and 74 it was argued that the functional input of the application is either revocation or annulment which should have been premised under section 76 of the Law of succession Act Cap 160. That the error might have been intentional noting that there had been an application to amend the grant in 2007.

**[10]** Mr. Kairu for the applicants argued that the PO ought to be dismissed. He argued that the issue of res judicata is an issue of pleadings and not of law. The pleadings bearing the Ruling of Justice Rawal of 10/2/2009 were actually an application to revoke the grant on issue of fact whilst the Ruling by Justice Luka Kimaru on 1/11/2013 was an application for leave to appeal and stay pending hearing on appeal. The application before the court dated 4/11/2015 isn't seeking to reargue the applications. The application merely seeks a review on the basis that the estate willed away by the deceased belonged to her husband. Therefore as an administrator of her husband she couldn't have willed the estate to the exclusion of other beneficiaries there is an error on the face of the record and new evidence important which was not brought to the attention of the court. That the respondents haven't challenged that evidence. That there are minutes of Muringa that show that the shares were of the deceased husband and she could not will that properly. Further that the doctrine of res judicata bars a fresh trial of concluded matter whilst the applicants aren't seeking a fresh trial.

**[11]** On the second issue, it was argued that if there is noncompliance with the law Section 47 gives the court inherent powers to hear matters under Law of succession, Cap 160 and the lack of mention of section 76 does not prejudice the respondent as the respondent are seeking rectification, cancellation premised under section 76. He argued that review is a unique provision of the law which the law of succession act borrows from civil procedure. The preliminary objection has no merit and seek it to be dismissed as the facts speak for themselves.

**[12]** Mr. Wakoko in reply stated that after the confirmation of grant there were applications for annulment

and rectification and the same facts therefore that the matter is res judicata. That Section 47 of Chapter 160 gives the court inherent powers to handle succession matters but that does not give the applicant another way to abuse the court process by making applications on facts already determined by the court on the first instance where the parties are given a chance to seek review or appeal within the prescribed time. It was their submission that the application was res judicata.

[13] This court has considered the summons, affidavits and oral submissions made by the parties respective advocates in this matter and make the following findings. The amended summons filed on 19<sup>th</sup> November 2012 sought an injunction as against the respondents from laying foundation of houses or cultivating or interfering with the applicants' possession of the portion of land **L.R. 7785/424** pending filing of an appeal against the ruling by Justice Rawal dated 10<sup>th</sup> February 2009. There is an application by one Muringu Kimani Mwaniki dated 17<sup>th</sup> December 2014. In the said application the applicants sought the same order as aforementioned. The applicant in the said application also sought review of the orders dated 14<sup>th</sup> April 2010 and revocation of the grant so confirmed. Further, that this court makes a declaration that the deceased held the said properties in trust for her children and that there was no property that could have been willed away in the instant. The application came up for hearing on 16/3/2015 and there is no further mention of the said application. The applicants filed the current application dated 4<sup>th</sup> November 2011, which from perusal of the same is similar to the application dated 14<sup>th</sup> April 2010 and orders sought are also similar to application dated 27<sup>th</sup> September 2007. In essence the applicants are seeking an injunction against the respondents in regards to possession and eviction from **L.R. 7785/424** and a prohibition order prohibiting the respondent from selling the said parcel of land and annulment of grant. These were matters already raised and determined in the summons earlier decided by Justice Rawal and the same lies as a matter of appeal in the court of appeal and cannot be re-litigated again in this court as the same is res judicata. Further, I find that the issue of Stay of execution has been ably dealt with by Justice Kimaru in his ruling dated 1/11/2013 and as such I will the same cannot be re-litigated in this court and only lies as a matter of appeal to the Court of appeal.

**Section 7** of the Civil Procedure Act, 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. 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.”***

[14] The only new prayer the applicants seek is one for review of Justice Rawal's orders dated 10<sup>th</sup> February 2010. The applicants are represented by counsel and he should advise his clients appropriately.

**Section 80** provides that, ***“Any person who considers himself aggrieved—***

***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”***

Going by the numerous applications on the same issue by the applicants/objector it is clear that they are clutching at straws. The said ruling they claim they intend to appeal against was delivered way back in 2009 on various occasions they have sought to extend time to file the said appeal but are yet to do so. Noting that the same has been overly delay they are trying to wriggle out of the said orders through the back door. I find that the review application is not merited and dismiss the same. The summons filled by the applicant in this court is not merited and is dismissed with costs. It is unfortunate that despite being represented by able counsel the applicants have inordinately delayed in executing this matter. It is so ordered.

**Dated, signed and delivered this 19<sup>th</sup> day of *August* 2016.**

**R. E. OUGO**

**JUDGE**

In the presence of;

**.....For the Applicant**

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

**MS. Charity**

**Court Clerk**