



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 128 OF 2015.

IN THE MATTER OF THE ESTATE OF ERASTO NGAGA- (DECEASED)

BETWEEN

OLIVER ONSERIO NYANDUCHA.....PETITIONER

AND

JOSEPHINE NYANCHERA.....OBJECTOR

RULING

1. On 26th March, 2015, the Petitioner herein OLIVER ONSERIO NYANDUCHA, petitioned this court for grant of Letters of administration in respect to the estate of one ERASTO NGANGA (hereinafter “the deceased”), in his capacity as the grandson of the deceased.
2. On 30th June, 2015, the objector herein, JOSEPHINE NYANCHERA, filed a notice of objection to making of grant under Section 68 of the Law of Succession Act Cap 160 Laws of Kenya (hereinafter “the Act”).
3. The objector’s said objection was mainly founded on the grounds that the estate of the deceased had already been distributed in an earlier succession case being **Kisii HC Succ. Cause No. 155 of 2005**(hereinafter "the earlier succession cause") and as such, there was no estate left to be dealt with in another succession cause.
4. When the objection came up for hearing before me on 18th October 2016, Mr. Ondari for the objector stated that the petition was *res judicata* in view of the fact that the estate of the deceased had already been distributed way back in the year 2009 in Kisii H.C. Succ. Cause No. 155 of 2005. The objector therefore sought for the striking out of the instant succession cause with costs for being an abuse of the due process of court.
5. The petitioner, through his advocates Mr. Sagwe, opposed the preliminary objection while stating that the objector had not complied with the provisions of **Section 68 and rule 17 (5) of the Act and Probate and Administration Rules** respectively. he petitioner contended that Kisii Hc. Succ cause NO. 155 of 2005 was not heard to its conclusion because the petitioner in that succession cause died before its conclusion and that she had not been substituted. According to the petitioner, the grant issued in Kisii Succ. Cause No. 155 of 2005 (hereinafter, “**the earlier succession cause**”) became inoperative following the death of the petitioner in that succession cause. The petitioner submitted that the preliminary objection was not merited and prayed for its dismissal.

6. In the instant case, the preliminary objection focuses on the doctrine of *res judicata* as the objector states that the estate of the deceased had already been distributed in the earlier succession cause no. 155 of 2005.

7. It is now a well-settled principle that a preliminary objection consists of a point of law which should be straight forward, and with the potential of determining the entire case or application. In this regard, points which will require the probing of evidence in order to prove is not a true preliminary objection as such an issue should be tried at the hearing. Ojwang J. (as he then was), simplified the definition of preliminary objection in the case of **Oraro Vs. Mbaja [2005] 1 KLR 141** when he expressed himself as follows:

“...The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence”.

8. The origins of this principle as was set out in the case of **Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited [1969] E.A. 696** by Law J.A. (as he then was) as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

9. Sir Charles Newbold, President of the Court at the time stated in the same case as follows:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

10. Applying the above test to the instant case, it is clear that the gist of the objector’s Preliminary Objection is that the estate of the deceased had already been dealt with and distributed in an earlier succession cause being Kisii High Court Succ. Cause No. 155 of 2005. . In support of the said position, the objector attached a certificate of confirmation of grant to her replying affidavit as anenxture “**JNN-01**”. I have perused the said certificate of confirmation of grant and I note that the same was issued to RAEI NYABOKE NGANGA on 11th July 2008. I also note that the assets of the deceased were in the said certificate of confirmation of grant listed as **LR. NOS. BASSI/MASIGE/1530** and **BASSI/MASIGE/1503**. Similarly, in the instant case, the petitioner has listed the assets of the deceased as **LR NOS BASSI/MASIGE/1530** and **1503**. Clearly therefore, the estate of the deceased is the same in both succession cases.

11. It is not in dispute that the Grant of Letters of Administration issued in respect to the estate of Erasto Nganga in the earlier succession cause was confirmed on 11th July, 2008 when this court, (differently constituted) distributed the estate of the deceased as follows as follows:

<u>Schedule</u>	<u>Description of property</u>	<u>share</u>
1. RAEI NYABOKE NGAGA	L.P. PASSI/MASIGE/1530	1.33Ha
2. JELIA NYANDUCHA	L.P. PASSI/MASIGE/1530	2.63Ha
3. CHIEF’S OFFICE MASIGE	L.P. PASSI/MASIGE/1530	0.04Ha
4. RICHARD ONSERIO	L.P. PASSI/1503	
5. IBRAHIM OBUGA, MAXWELL OMBESE, ENOCK OBANDA, CLEOPHAS ONYINKWA		

& RAE L NYABOKE NGAGA EACH TO GET EQUAL SHARE 2.18HA

HARON MACHOKA L.P BASSI/MASIGE/1503 TO GET 1.62Ha.

12. In the case of **Willie vs Muchuki & 2 Others [2004] 2 KLR 357** the application of the doctrine of *res judicata* in succession cases was discussed. My view is that, in succession cases, a court of law is clothed with wide discretion to ensure that justice is done in the matter. However, this does not mean that parties should apply for numerous grants of letters of administration over the same estate. I draw comfort from the point of view the court should invoke its inherent powers to prevent abuse of its process. Abuse of process has been urged here and I should be guided by the circumstances of this case to see whether the present petition is an attempt to revisit case which had been concluded as such conduct would violate public policy that litigation must come to an end and a party should not be vexed twice on same litigation without good cause.

13. The petitioner has argued that the initial succession case was not concluded because the original petitioner had died and that the initial grant became inoperative following the said death. I find the petitioner's argument to be misconceived and contrary to the legal position regarding the death of a party in a succession cause which is that such death does not mark the end of the case as the deceased party can be substituted by any party wishing to pursue the case. In my humble view, substitution is what the petitioner ought to have done instead of filing the instant cause which is over a subject matter that had already been determined by a court of competent jurisdiction.

14. Again, it is not in dispute that this court presided over by Musinga J. (as he then was) on 11th July 2008 distributed the two parcels of land comprising the Estate of the deceased. The said distribution has not been challenged by the petitioner herein whose mother, Jelia Nyanducha, was listed as a beneficiary of a substantial portion of the deceased land parcel no. . **BASII/MASIGE/1530** measuring 2.63 ha. The proper cause of action would have been for the petitioner to seek for a revocation of the earlier grant if he disputed any aspect of administration of the estate or the distribution thereof. It was not open for the petitioner to institute a new succession cause over an estate that had already been fully and finally determined by a court of competent jurisdiction.

15. The test of determining whether a matter is *res judicata* was also stated in the case of **Benard Mugo Ndegwa vs James Nderitu Githae & 2 others [2010] eKLR** as follows:

1. That the matter in issue is identical in both suits.

2. The parties in the suit are the same.

3. Sameness of the title/claim.

4. Concurrence of jurisdiction and

5. Finality of the previous decision.

16. Applying the above test to the instant case, I should also state that the earlier cause was filed in 2005 and concluded in 2008, the cause of action was the same estate of the deceased as in this case and the parties are the same members of the deceased's family. I do not think it will be in the interest of justice to sustain a fresh petition for grant which application I find to be *res judicata* and an abuse of process of court. The petitioner should not be allowed to litigate forever unless he does so in the right forum as a way of showing he is in pursuit of legitimate cause. If he desires to pursue the matter, he ought to engage the appellate gear. I think this court is now *functus officio* and I refuse to re-open a fresh succession cause over the same subject matter. For the above reasons, I find that the objection is based on a pure point of law and its determination will have the effect of finally determining the issues between the parties in this case.

17. I find the objectors preliminary objection is merited and I uphold it with the consequence that this

succession cause is hereby struck out

18. I award costs to the objector for she is the successful party who should be recompensed for the expenses she has had to incur in appearing in and defending a fresh succession cause over an estate that had long been distributed.

19. It is so ordered.

Dated, signed and delivered in open court this 13th day of December, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

Mr. Moseki Ondari for the Objector

Mr. Moracha for Sagwe for the Respondent

Omwoyo: court clerk