



**Muchanga Investments Limited v Habenga Holdings Limited & 8 others; Joseph Kangethe Wanyoike (suing and being sued as the Executors of the Will of Carmelina Ngami Mburu (Applicant); Barclays Bank of Kenya Ltd (Interested Party) (Environment and Land Case Civil Suit 1180 of 2014) [2022] KEELC 3120 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3120 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 1180 OF 2014**

**OA ANGOTE, J**

**JUNE 9, 2022**

**BETWEEN**

**MUCHANGA INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**HABENGA HOLDINGS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JINA ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**TELESOURCE COM LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**DIRECTOR OF SURVEYS ..... 4<sup>TH</sup> DEFENDANT**

**DIRECTOR OF PHYSICAL PLANNING ..... 5<sup>TH</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 6<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 7<sup>TH</sup> DEFENDANT**

**JOHN MUGO KAMAU ..... 8<sup>TH</sup> DEFENDANT**

**CATHERINE NJERI NGANGA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CARMELINA NGAMI MBURU (DECEASED) ..... 9<sup>TH</sup> DEFENDANT**

**AND**

**JOSEPH KANGETHE WANYOIKE (SUING AND BEING SUED AS THE EXECUTORS OF THE WILL OF CARMELINA NGAMI MBURU .. APPLICANT**

**AND**

**BARCLAYS BANK OF KENYA LTD ..... INTERESTED PARTY**



## RULING

### Background

1. Vide a Notice of Motion application dated November 22, 2021, the Applicant is seeking for the following orders;
  - a. That this Honourable Court be pleased to substitute the 9<sup>th</sup> Defendant with Joseph Kangethe Wanyoike suing as the Executor of the Estate of Carmelina Ngami Mburu.
  - b. That this Honourable Court be pleased to expunge all pleadings and documents filed by Catherine Njeri Nganga after the death of Carmelina Ngami Mburu on October 24, 2017 and witnesses handled by Catherine Njeri Nganga and her advocate be recalled for cross-examination.
  - c. That this Honourable Court be pleased to grant leave to the Applicant herein to put in documents and pleadings if necessary.
  - d. That the Honourable Court be pleased to issue any consequential orders that it deems necessary to serve the cause of justice.
  - e. That the costs of this Application be in the cause.
2. The application is premised on the grounds on the face of the Motion and supported by the Affidavit of Joseph Kangethe Wanyoike (the Applicant) who deponed that he is one of the Executors of the last Will and of the Estate of Carmelina Ngami Mburu and holds a Limited Grant *Ad litem* to prosecute/defend the Estate of the deceased.
3. It was deponed by the Applicant that the 9<sup>th</sup> Defendant came on record as a holder of a Power of Attorney donated to her by Carmelina Ngami Mburu on March 13, , 2014; that Carmelina Ngami Mburu died on October 24, 2017 thus terminating the Power of Attorney and that upon her demise, Carmelina Ngami left behind a valid Will appointing him and one Lewis Wanyoike as Executors of her Estate.
4. The Applicant deponed that sometimes in 2019, Catherine Ng'ang'a irregularly procured Grant of Letters of Administration *Ad litem* for the Estate of Carmelina Ngami; that upon realizing the aforesaid, he filed an application for revocation of the Grant vide Succession Cause No 1130 of 2018 and that by its Ruling of October 25, 2021, the court found the Grant held by Catherine Ng'ang'a to have been irregularly procured and revoked the same. It is the Applicant's case that the interests of justice dictates that he be substituted in place of the 9<sup>th</sup> Defendant.
5. In response to the application, the Plaintiff through its General Manager, Dimitri Da Gama Rose, filed a Replying Affidavit and deponed that the 9<sup>th</sup> Defendant was joined in the suit in her personal capacity pursuant to a Power of Attorney granted to her on March 13, 2014 and that all pleadings filed on behalf of Carmelina Ngami Mburu during the life of the Power of Attorney are valid.
6. It was deponed that upon her demise, counsel for the 9<sup>th</sup> Defendant excused themselves from the proceedings until her locus thereon was regularized; that in 2019, the 9<sup>th</sup> Defendant was re-admitted into the proceedings pursuant to a Grant of Letters of Administration *Ad litem* issued to her on January 15, 2019 and that the same was valid until its revocation on October 25, 2021.



7. It was deponed by the Plaintiff's General Manager that there is subsequently no basis for expunging all pleadings and documents filed by the 9<sup>th</sup> Defendant during the lifetime of the Power of Attorney and prior to the revocation of the grant and that Carmelina Ngami Mburu having died on October 24, 2017, no reason has been advanced as to why the Applicant only filed for summons for Grant of Letters of Administration on March 9, 2021 having been aware of the suit since its inception.
8. According to the Plaintiff, Carmelina Ngami Mburu has in any event never been party to this suit and the Administrators of her estate can therefore not be joined as parties; that it is the 9<sup>th</sup> Defendants' case that the suit property belonged to one John Godhard Mburu and does not form part of her estate and that her Estate does not have any interest to be protected by law.
9. It was deponed on behalf of the Plaintiff that the Administrator of the Estate of John Godhard is the Public Trustee and subsequently the Applicant herein has no locus and that the application is *res judicata* the issues having already been determined vide the Application of June 3, 2021 which was dismissed on June 14, 2021.
10. The 3<sup>rd</sup> Defendant responded by way of Grounds of Opposition in which it averred that the application intends to delay the further hearing of the case by bringing issues outside this court's jurisdiction; that the court is functus officio and the issues herein *res judicata* having been determined vide the Ruling of June 14, 2021 and that any attempt to expunge the pleadings by the 9<sup>th</sup> Defendant and grant leave to the Applicant to file new documents will constitute an affront to justice.
11. The 3<sup>rd</sup> Defendant finally averred that the Applicant has not sufficiently demonstrated why the documents filed by the 9<sup>th</sup> Defendant should be expunged and why the witnesses should be recalled for cross-examination and that the application constitutes an abuse of court process and should be struck out.
12. The 9<sup>th</sup> Respondent deponed that she has been a party to the present litigation since 2014; that vide a Ruling in Succession cause No 1130 of 2018, her Grant of Letters of Administration *Ad Litem* were revoked; that she has filed an appeal against the aforesaid orders as well as an application seeking to stay the present proceedings and that a Ruling on the application for stay is scheduled for April 1, 2022.
13. According to the 9<sup>th</sup> Defendant, she has an interest in the suit having been granted an irrevocable Power of Attorney by the deceased Carmelina Ngami Mburu, which power authorized her to pursue and defend litigation over Land Reference Numbers 3586/3; that this court is vested with jurisdiction to preserve the subject matter pending the conclusion of the Appeal at the Court of Appeal; that the Court of Appeal may well reverse the decision of the Family Court and that the intended substitution is premature at this stage.

### **Submissions**

14. The Applicant's counsel submitted that the Applicant is the executor and a beneficiary in the Will of Carmelina Ngami Mburu (deceased) and seized of a limited Grant of Letter of Administration *Ad Litem* granting him power to protect the interest of the Estate aforesaid.
15. Counsel submitted that after the death of Carmelina, the 9<sup>th</sup> Defendant proceeded and obtained a Limited Grant on the basis of which she was allowed to continue participating in the instant proceedings; that vide a Ruling of October 25, 2021 in Succession Cause No 1130 of 2018, the limited Grant held by the 9<sup>th</sup> Defendant was revoked and that an attempt by Catherine to have the Court of Appeal stay proceedings in this matter, and the implementation of the decision of Muchelule J in the interim was declined.



16. The Applicant’s counsel submitted that the limited Grant held by Catherine Ng’ang’a Njeri, having been revoked, it follows that all deeds and acts undertaken by her or her agent(s) flowing from the purported Grant are null and void *ab initio* and that consequently, all the proceedings advanced by Catherine in this matter after the death of the deceased should be expunged from the record and appropriate directions given by the court.
17. The 9<sup>th</sup> Defendant’s counsel submitted that having appealed against the decision of the Family Court to revoke her Grant of letters of administration, it is only just that this court preserves the subject matter pending the outcome of the Appeal and that the grounds raised in the Appeal are arguable.
18. Counsel submitted that the application for substitution is premature at this stage; that as the Appeal is still pending before the Court of Appeal, the doctrine of *Lis Pendens* applies so as to preserve the case and that the 9<sup>th</sup> Defendant will suffer irreparable harm if the orders sought are granted. The Plaintiff and the 3<sup>rd</sup> Defendant did not file submissions.

### Analysis and Determination

19. Having considered the application, the Affidavits in support and in opposition thereto, and the submissions, the issues that arise for determination are;
  - i. Whether the court is *functus officio* and/or whether the present application is *res judicata*?
  - ii. Whether the Applicant is entitled to the orders sought in the application?
20. The Plaintiff and the 3<sup>rd</sup> Defendant have averred that this court is *functus officio* and/or the present application is *res judicata*. As these are issues that could potentially oust the court’s jurisdiction, they will be determined first. As appreciated by the Court of Appeal in *Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd* [1989] eKLR;
 

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.”
21. The *Black’s Law Dictionary*, Ninth Edition, defines *functus officio* as: -
 

“having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”
22. In discussing the concept of *functus officio*, the Supreme Court in *Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR, cited with approval a passage in an article by Daniel Mala Pretorius entitled “*The Origins of the functus officio Doctrine, with Special Reference to its Application in Administrative Law*”, in South African Law Journal, (2005) 122 SALJ 832, where the concept was discussed in the following terms:
 

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter....The [principle] is that once such a decision has been taken, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision-maker.”



23. From the foregoing, it is clear that the doctrine of *functus officio* prevents a court from revisiting a matter on a merit-based re-engagement once it has already determined the same.

24. As regards *res judicata*, the substantive law on the same is found in Section 7 of the [Civil Procedure Act](#) which 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”.

25. The Court of Appeal in the case of The [Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others](#), Nairobi CA Civil Appeal No 105 of 2017 [2017] eKLR, held that:

“... for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

26. In outlining the rationale behind the doctrine of *res judicata*, the Court of Appeal in [John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others](#) (2015) eKLR stated thus;

“the rationale behind *res judicata* is based on the public interest that there should be an end to litigation over the same matter. *Res judicata* ensures the economic use of the court’s limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in



the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.”

27. In essence therefore, for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same must have been determined on merits by a court of competent jurisdiction.
28. It is apparent that both the principles of *functus officio* and *res judicata* seek to prevent instances where parties attempt to re-litigate issues already determined by the court. In the present case, the basis for the claim for *res judicata* and *functus officio* arise from this court’s Ruling of June 14, 2021. The application giving rise to the aforesaid Ruling was by filed by the Applicant herein together with his co-executor in which they sought to be joined in these proceedings as interested parties.
29. In the application, the Applicant together with his co-executor, contended that they are the Executors of the Estate of the late Carmelina Ngami Mburu (deceased) having obtained a Grant of Letters of Administration *Ad litem* and that the 9<sup>th</sup> Defendant had no authority to continue representing the estate of the deceased.
30. The court in declining to grant the prayers sought stated as follows:

“There is no doubt that there are two grants issued in respect of the estate of the deceased. This court has no jurisdiction to address the issue of which grant should prevail. This is a preserve of the Family Division of the High Court. This court cannot also comment on the validity or otherwise of the will which is alleged to have been executed by the deceased. It is therefore clear that unless the issue of which grant should prevail is determined by the court with jurisdiction to hear the same, there is no basis upon which I will allow the joinder of the Applicants as interested parties.”
31. It is clear from the above narration that this court declined to entertain any arguments as to the question of representation for lack of jurisdiction and referred the parties to the Family Court.
32. In the present application, the Applicant seeks to be substituted in place of the 9<sup>th</sup> Defendant. His basis for seeking this substitution is the revocation of the 9<sup>th</sup> Defendant’s grant by the Family Court. The present application is essentially seeking to actualize the decision of the Family Courts. In view of the foregoing, it is the finding of the court that it is neither *functus officio* nor is this application *res judicata* the application of November 10, 2021.
33. The Applicant is seeking to be substituted with the 9<sup>th</sup> Defendant in respect of the Estate of Carmelina Ngami Mburu. It is his case that he is the Executor of the Will of the deceased and has obtained Grant of Letters *Ad Litem* for purposes of these and any other proceedings by or against the Estate.
34. According to the Applicant, the 9<sup>th</sup> Defendant has no rights to represent the Estate of Carmelina Ngami as the Grant of Letters *Ad litem* issued to her were revoked by the Court in Succession Cause No 1130 of 2018. On her part, the 9<sup>th</sup> Defendant does not dispute the revocation of the Grant that she held. It is her contention that she has filed an Appeal against the revocation of the Grant as well as orders seeking the stay of these proceedings in the Court of Appeal. According to her, the application to have her substituted is premature.
35. On its part, the Plaintiff has argued that Carmelina Ngami Mburu has never been a party to this suit and the Administrators of her estate can therefore not be joined as parties; that it is the 9<sup>th</sup> Defendants’ case that the suit property belonged to one John Godhard Mburu and does not form part of her estate and that consequently, the Estate of Carmelina does not have any interest to be protected by law.



36. It is not disputed that the 9<sup>th</sup> Defendant came on record as a holder of a Power of Attorney donated to her by Carmelina Ngami Mburu on March 13, 2014. When Carmelina Ngami Mburu died on October 24, 2017 thus terminating the Power of Attorney, the 9<sup>th</sup> Defendant continued representing her Estate on the basis of a Limited Grant which has since been revoked by the Family Division court.
37. It is trite that the estate of a deceased vests in his/her personal representatives who have the capacity to file or defend a suit, as the case may be. Such persons must be appointed by the court either through probate or grant in the case of intestate succession. As expressed by the Court of Appeal in *Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama* [2014] eKLR;
- “...A litigant is clothed with *locus standi* upon obtaining a limited or full letters of administration in cases of intestate succession...”
38. The Applicant has adduced in evidence a copy of the Limited Grant of Letters of Administration *Ad-Litem* issued to him on January 27, 2021. Pursuant to the Ruling of the Court in Succession Cause No 1130 of 2018, the Grant of Letters *Ad litem* held by the 9<sup>th</sup> Defendant was revoked. This therefore means that even in the absence of orders seeking substitution, the 9<sup>th</sup> Defendant has no locus and cannot purport to further represent the Estate of Carmelina Ngami in these proceedings.
39. As to the 9<sup>th</sup> Defendant’s assertions that she has filed an Appeal against the revocation of the grant, it is the view of this court that the mere filing of an Appeal cannot in itself constitute sufficient grounds to decline the issuance of the orders sought. This position is fortified by the decision in the case of *Equity Bank Limited vs West Link Mbo Limited* [2013] eKLR where it was held as follows:
- “As a general principle of law an appeal being a totally distinct proceeding from the original or appellate proceedings appealed from, the institution of an appeal does not operate as a bar to execution of a sentence in criminal matters or execution of decree, in civil matters unless otherwise expressly so provided.”
40. Whereas the 9<sup>th</sup> Defendant implores that this court preserves the subject matter of the suit, it is unclear how if at all the same is in any danger. The substitution merely replaces one Administrator with another and it is to be assumed that the interests of the Estate remain paramount at all times.
41. The Applicant equally seeks to have all the documents filed after the death of Carmelina Ngami on October 24, 2017 expunged from the record and the witnesses handled by Catherine Njeri Nganga and her advocate recalled for cross-examination. It has been asserted in opposition that there is no basis for the orders seeking to expunge the documents and that the Estate has no interest in the property.
42. Having sued the 9<sup>th</sup> Defendant and indeed maintained a suit against her throughout these proceedings, and even after her death and representation by Caroline Nga’nga, the Plaintiff cannot be heard to say that the 9<sup>th</sup> Defendants Estate has no interest in the suit, at least not at this stage.
43. While the court appreciates that this is an old matter and the hearing had already begun, the effect of the revocation of the grant issued to the 9<sup>th</sup> Defendant on January 15, 2019 is that any action undertaken on the strength of the nullified grant is itself a nullity. It therefore follows that any documents filed within the lifetime of the revoked Grant are liable to be expunged from the record.
44. The upshot of the foregoing is that the application dated November 22, 2021 is merited and is allowed on the following terms;
- a. The 9<sup>th</sup> Defendant is hereby substituted with Joseph Kangethe Wanyoike sued as the Executor of the Estate of Carmelina Ngami Mburu.



- b. All pleadings and documents filed by Catherine Njeri Nganga after the death of Carmelina Ngami Mburu on October 24, 2017 be and are hereby expunged.
- c. The Applicant and his counsel are at liberty to cross-examine witnesses handled by Catherine Njeri Nganga and her Advocate after the death of Carmelina Ngami Mburu.
- d. The issue of additional documents to be filed by the applicant, if any, to be determined in a separate application.
- e. Each party will bear its/his/her own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9<sup>TH</sup> DAY OF JUNE, 2022.**

**O A ANGOTE**

**JUDGE**

**In the presence of;**

**Mr Miller and Weda for the Plaintiff**

**Mr Musyoka for 3<sup>rd</sup> Defendant**

**Mr Allan Kamau for 4<sup>th</sup> -7<sup>th</sup> Defendants**

**Mr Waiganjo for intended Interested Party**

**Mr Arusei for 9<sup>th</sup> Defendant**

**Mr Amuyunzu h/b for Waweru Kihara for the Applicant**

**Court Assistant – June Nafula**

