



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Samwel Obite Getabu alias Obite Getabu (Deceased) (Succession Cause 537 of 2015) [2024] KEHC 1381 (KLR) (18 January 2024) (Ruling)

Neutral citation: [2024] KEHC 1381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE 537 OF 2015
TA ODERA, J
JANUARY 18, 2024**

BETWEEN

ZACHARIA NYAKUNDI APPLICANT

AND

HAGGAI OGOTI 1ST RESPONDENT

KENNEDY OSORO 2ND RESPONDENT

RULING

1. By a Summons for Confirmation of Grant dated 5th September 2019 and filed by the firm of Momanyi Aunga & Co. Advocates, one of the Administrators, Haggai Ogoti, sought the following orders:
 - a. That the grant of letters of representation issued to Haggai Ogoti and Zacharia Nyakundi on 2nd July 2019 be confirmed.
 - b. That the costs of this application be in the cause.
2. The application was supported by an affidavit sworn by Haggai Ogoti on 5th September 2019. He deponed that vide the Court's Ruling delivered on 2nd July 2019, he and Zachary Nyakundi were appointed as the Administrators of the Estate of the Late Samwel Getabu Obite. The Court further directed that they file an application for confirmation of grant within 45 days. He proposed that the Estate be distributed in the following manner.
 - a. Zacharia Nyakundi- 0.70 Ha to hold in trust for all his family members.
 - b. Haggai Kondo Ogoti- 0.70 Ha to hold in trust for all his family members.
3. Zachary Nyakundi and Levis Mageto Obite filed a Protest dated 23.2.2023. They stated that Haggai Ogoti was not a beneficiary of the Estate of the Deceased and that they had their own parcel of land Nyaribari Masaba/Bonyamasicho 1/298. They urged the Court to confirm them as the legal



beneficiaries of the estate. They urged the Court to issue them with a grant. They stated that their married sisters had no claim to the estate and urged the Court to allow that the estate be divided equally amongst them.

Determination

4. I have considered the Application, the Protest and the law.
5. A brief background of this matter is important as shall be noted from the outcome of this Ruling. The Deceased died intestate on 7.12.2011. Zachary Nyakundi solely applied for Grant of Letters of Administration Intestate and it would appear that he was appointed as such vide a Grant issued on 14.11.2016. However, I am unable to trace the said Grant in the Court file. Vide an Application dated 15.12.2016, the Respondents herein Haggai Ogoti and Kennedy Osoro applied for revocation of the grant on the grounds that they were beneficiaries and that the Deceased held the suit property in trust for himself and his mentally challenged brother, Osoro Mokuu, who is their biological father. On 2.7.2019, Hon Lady Justice Ougo delivered a Ruling on the objection and ordered as follows:
 - i. The Revocation of the Grant issued on 14.11.2016;
 - ii. That a fresh grant issue in the names of Haggai Ogoti and Zachary Nyakundi as Administrators of the Estate of the Deceased; and
 - iii. The 2 administrators to file an application for confirmation of the grant within 45 days of the date of the Ruling.
6. The applicant proposed that the based on the ruling by justice Ougo dated 2.7.19, the estate be shared as follows:
 - a. Zacharia Nyakundi- 0.70 Ha to hold in trust for all his family members.
 - b. Haggai Kondo Ogoti- 0.70 Ha to hold in trust for all his family members.
7. The protestors proposed that the estate to wholly devolve to Zacharia Nyakundi and Levis Mageto Obite in equal shares as Osoro Mokuu the father to the applicant was given land no. Nyaribari Masaba/Bonyamasicho 1/298 their grandfather.
6. I have carefully perused the ruling dated 2.7.19 delivered by Justice Ougo in this matter which categorically held that the Petitioner ought to have included Osoro's family as beneficiaries of Parcel No. 299 and the protest.
7. I have noted the issues raised in the Petitioner's Objection. First, he claims that this Court, differently constituted, distributed the Estate. Nothing can be further from the truth. The Ruling of 2.7.2019 did not distribute the estate but made a finding on the objection which was placed before it that Osoro was entitled to half of land parcel no .299 which is the estate of deceased herein and directed the 2 administrators to file application for confirmation of the Grant.

Vide the objection, the Petitioner decried that the Objectors are not beneficiaries of the Deceased's Estate. With a lot of respect, that issue was subject of the objection proceedings handled by my predecessor vide the Ruling delivered on 2.7.2019. Section 7 of the *Civil Procedure Act* on res judicata, reads as follows:

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.

The Court of Appeal in the case of the *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), while dealing with the issue of Resjudicata that:

[F] or 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.

35. The Court went on to state on the role of the doctrine:

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.”

The issues raised by the protestors herein are the same issues raised by them in the objection proceedings herein which were determined on 2.7.19. In any event, Zakaria’s application for leave to appeal against the ruling dated 2.7.19 out of time was thrown out by the Court of Appeal in Kisumu Court of Appeal Civil Application No 95 of 2020 Zacharia Nyakundi v Haggai Ogoti and Kennedy Osoro, a fact which is well within his known for which he is well-aware of. This is an attempt by the protestors to re-litigate on issues which were already determined by a court of competent jurisdiction between the same parties and over the same subject matter. The issue of the interest of Osoro Mokua in the estate of the deceased herein is clearly Res judicata and thus an abuse of court process.

8. In the end, I dismiss the Protest dated 23rd February 2023 for being Resjudicata and incompetent.
9. I proceed to confirm the grant on Summons for Confirmation of Grant dated 5.9.2019 as follows in the interest of justice:

Land parcel no Nyaribari Masaba/Bonyamasicho /299 be distributed as follows;

- a. That Zackary Nyakundi and Levis Mageto Obite to get 0.70 HA in equal shares.
- b. Haggai Kondo Ogoti to hold 0.70 HA on behalf of the family of Osoro Mokua



1. There shall be no order as to costs.

DATED, DELIVERED AND SIGNED AT KISII THIS 18TH DAY OF JANUARY 2024.

TERESA ODERA

JUDGE

In the presence of:

Mr. Momanyi Aunga for the Applicant/Administrator

Mr. Zachary Nyakundi -Petitioner

Court Assistant – Alex Oigo

