In re the Estate of the Late Tuptubor arap Chirchir (Deceased) (Miscellaneous Succession Cause 754 of 2008) [2024] KEHC 10036 (KLR) (9 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10036 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS SUCCESSION CAUSE 754 OF 2008

RN NYAKUNDI, J

AUGUST 9, 2024

BETWEEN

ELIZABETH JEPNGETICH ..... APPLICANT

SUING AS A REPRESENTATIVE OF THE ESTATE OF JERUS BITO DECEASED

AND

DAVID MRITIM ROTUK ..... 1ST RESPONDENT

PETRONILA CHEPKURGAT KEBENEI ..... 2ND RESPONDENT

RULING

1. The deceased herein, TUPTUBOR ARAP CHICHIR, died intestate on 21st January, 1983. The deceased had (3) wives; Jepkemboi Bot Cherus, Sigei Taprandich and Jepsongok Cheruiyot. The first house had children (8) children, the second house two (2) while the last house had one (1).

2. The Application now before the Court for determination is the Applicant's Summons dated 19/6/2024 which seeks the following orders:

    1. Spent.

    2. That the Certificate of Confirmation of Grant issued over the non-existence estates Nandi/ndalat/260 be revoked and or annulled.

    3. That the costs of this application be provided for.

    4. That the petitioners to proceed and distribute the correct estate Nandi/ndalat/743 belonging to the deceased herein.

    5. That any other relief that this Honourable Court deems fit to award.

3. The application is premised on the grounds that;

a. The proceedings to obtain grant were defective in the subject.

b. The grant was confirmed without due regard to some material facts and core to the issuance herein.

c. The grant was obtained without due regard to the fact that title Nandi/ndalat/260 ceased to exist when the same was sub-divided into two portions of Nandi/ndalat/742 and Nandi/ndalat/743.

d. The resultant sub-division of Nandi/ndalat/742 has since mutated into various numbers of Nandi/ndalat/823, 824, 825, 826 and 827.

e. The current Certificate of Confirmed Grant does not disclose the fact that Nandi/ndalat/ 260 ceased to exist way back before the succession proceedings herein were filed.

f. It is apparent that the Certificate of Confirmed Grant shall bear no fruits on its implementation since the land the subject of distribution ought to be Nandi/ndalat/743 registered in the name of the deceased herein as opposed to Nandi/ndalat/260 which ceased to exist.

g. It is in the interest of justice that this application be allowed.

h. That this application shall not prejudice the Respondent/beneficiaries in anyway as the same is meant to guide the Court into doing the right thing by distributing the correct estate of the deceased.

i. This application has been brought timely and in good faith.

4. The application is further Supported by the Affidavit sworn by the Applicant on the same.

Response

5. In response to the Application, the Respondents raised a Preliminary Objection dated 9/72024 on the following grounds;

1. That this application is premised on Article 159 of the Kenya Constitution 2020, is fatally defective and the same should be dismissed by thus Court as soon as possible.

2. That this application is premised on Sections 47, 48 and 76 of the *Law of Succession Act* and Order 45 of the Civil Procedure Rules is res-judicata and an abuse of the process of this Court since the appeal regarding the same was dismissed in 2019 and a similar application dated 30/3/2021 was dismissed by this Court on 12/4/2024.

3. That this Court ordered on 17/3/2009 that Nandi/ndalat/742 issued to Cherus Bitok be surrendered to this Court and also issued a judgment on 22/1/2015 cancelling Nandi/ndala/742 and Nandi/ndalat/743 and 9 years since then, no application to cancel Nandi/ndalat/260 has been filed.

4. That this Court ordered to be arrested one Jepsongok Cheruiyot and Kirwa Tarus who still held the title for land reference number Nandi/ndalat/743 on 14/1/2009.

5. That an appeal was filed in Court in 2015 challenging the decision of this Court but the Court of Appeal upheld the decision of this Court on 17/10/2019.

6. That the Applicant, being dissatisfied with the Court's finding, filed another application dated 30/3/2021 praying inter alia for the revocation of the Confirmed Grant together with other 5 parties but the Court dismissed their application as vexatious and poorly pleaded.

7. That the current application is an antitype of the application dated 30/3/2021 where the Applicant was a party and authorized one Priscillah Chelimo to swear the Supporting Affidavit on her behalf.

8. That the application dated 30/3/2021 was struck out with its roots on 12/4/2024 and two months later the Applicant has filed the same application.

9. That there is no ruling, decree, judgment or order that has been pronounced by this Court or nay other Court that has unchallenged the cancelling of land parcel Nandi/ndalat/260 and consequently upholding its subsequent sub-divisions.

10. That the Applicant herein and her Advocates on record are ignorant in the face of this Court's own records.

11. That the Applicant's Application is mischievous, frivolous, vexatious and malafides as it seeks revocation of the Confirmation of Grant to which she seeks confirmation of the purported grant issued at Kabiyet Magistrate Court.

12. That the Applicant prayers fly on the face of the grounds raised.

Determination

6. Before discussing the merits of this application, I will first respond to the notice of preliminary objection that the Respondents have raised because should the primary objection be accepted, then it might end the lawsuit altogether .

7. The Supreme Court in Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others cited the leading decision on Preliminary Objections, Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696, where the Court held as follows:

> " 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... 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".

8. The Supreme Court in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR made the following observation as relates to Preliminary Objections:

> " ... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

9. Ojwang, J (as he then was) expressed himself as follows in Oraro vs. Mbaja [2005] 1 KLR 141: -

> " 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.... 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion....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. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from information, which stands to be tested by normal rules of evidence. ...."

10. The gist of the Respondent's Preliminary Objection is premised on the doctrine of res-judicata. The issue that crystalizes for determination is whether the application is res judicata.

11. The Supreme Court had earlier expressed itself on the doctrine of res judicata in Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR where it delimited the operation of the doctrine of res-judicata in the following terms;

> (317) The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes.
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> (318) This concept is incorporated in Section 7 of the *Civil Procedure Act* (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:
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> > 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.
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> (319) There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit

between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89.

(320) So, in the instant case, the argument concerning res judicata can only succeed when it is established that the issue brought before a Court is essentially the same as another one already satisfactorily decided, before a competent court.

(333) We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route" (Workers' Compensation Board v. Figliola [2011] 3 S.C.R. 422, 438 (paragraph 28)).

(334) Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the Courts on guard, against litigants attempting to sidestep the doctrine of "issue estoppel", by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In Omondi v. National Bank of Kenya Ltd. & Others, [2001] EA 177 the Court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit."

(352) The Judicial Committee of the Privy Council, in Thomas v. The Attorney-General of Trinidad and Tobago, [1991] LRC (Const.) 1001 held that "when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules." That court relied on a case decided by the Supreme Court of India, Daryao & Others v. The State of UP & Others, (1961) 1 SCR 574 to find that the existence of a constitutional remedy does not affect the application of the principle of res judicata. The Indian Court also rejected the notion that res judicata could not apply to petitions seeking redress with respect to an infringement of fundamental rights. Gajendragadkar J stated:

> But is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law, then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now the rule of res judicata...has no doubt some technical aspects...but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32.

(353) Kenya's High Court recently pronounced itself on the issue of the applicability of res judicata in constitutional claims. In Okiya Omtatah Okoiti & Another v. Attorney General & 6 Others, High Court Const. and Human Rights Division, Petition No. 593 of 2013 [2014] eKLR, Lenaola J. (at paragraph 64) thus stated:

> Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.

(354) On the basis of such principles evolved in case law, it is plain to us that the 1st, 2nd and 3rd respondents were relitigating the denial to them of a BSD licence, and were asking the High Court to redetermine this issue.

(355) However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that *the Constitution* of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of Articles 22 and 23 of *the Constitution*.

12. The key elements that would give rise to res judicata were identified in the case of Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR to include;

    a. the former judgment or order must be final;

    b. the judgment or order must be on merits;

    c. it must have been rendered by a court having jurisdiction over the subject matter and the parties; and

    d. there must be between the first and the second action identity of parties, of subject matter and cause of action."

13. Has this cause been determined on merits? I must agree with the Respondents' preliminary objection that his cause of action has been determined. Looking at the record it is worth noting that the dispute surrounding the distribution of the estate herein has been in Court since 2008, 16 years now have passed since the grant herein was first petitioner. The matter herein has been previously litigated at the Kapsabet Magistrate's Court, then to the High Court and finally to the Court of Appeal touching matters surrounding the distribution of parcel of land known as Nandi/ndalat/260. It is also worth noting that this Court on 22/1/2015, rendered a judgment regarding the distribution of the estate herein with regard to the parcel of land known as Nandi/ndalat/260 and later on 9/2/2015, it issued a Certificate confirming the said grant. the Aggrieved by the said judgment, the Appellants therein filed an appeal being Eldoret Appeal No. 61 of 2015, against the said decision. Upon hearing the parties, the Court of Appeal then rendered its judgment on 17/10/2019, upholding this Court's judgment and dismissing the said appeal. Aggrieved by the Court of Appeal's decision, the Appellants in a new

turn of events then filed an application dated 20/9/2023 seeking to set aside this Court's judgment that was rendered on 9/2/2015 and the Court herein dismissed the said Motion on grounds that the issues raised therein had already been finally and conclusively determined by the Court of appeal and that there unexplained inordinate delay in bringing the said application.

14. In view of the foregoing, it is my finding that the issues raised herein by the Applicant, were long settled and the same issues cannot be relitigated in the application before this Court. The application before this Court is thus res-judicata, this Court finds that there is no any other basis for sustaining the Application herein.

15. Before I put down my pen, I take judicial notice that this is an old matter and I hereby remind parties that litigation must always come to an end.

16. With that said, the Respondents' Preliminary Objection dated 9/7/2024, hereby succeeds while the Applicant's Application dated and filed on 19/6/2024 is hereby dismissed with costs to the Respondents.

17. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST, 2024

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R. NYAKUNDI

JUDGE