



REPUBLIC OF KENYA



**In re Estate of Johanna Kipruto Mosonik - (Deceased) (Probate & Administration  
348 of 2013) [2024] KEHC 12241 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12241 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
PROBATE & ADMINISTRATION 348 OF 2013  
RN NYAKUNDI, J  
OCTOBER 11, 2024**

**IN THE MATTER OF THE ESTATE OF JOHANNA KIPRUTO MOSONIK - (DECEASED)**

**BETWEEN**

**SARAH JEPKEMBOI MOSONIK ..... PETITIONER**

**AND**

**ISAIAH RUTTOH MOSONIK ..... OBJECTOR**

**RULING**

1. This Ruling determines the Objector's application dated 1<sup>st</sup> July, 2024 expressed to be brought under the provisions of section 1A, 1B, 3, 3A of the *Civil Procedure Act* and Order 51 Rule 51 of the *Civil Procedure Rules*. The application seeks reliefs as hereunder:
  - a. Spent
  - b. That this Honourable Court be pleased to grant the firm of Kipkorir, Kipkorir CK & Co. Advocates leave to come on record.
  - c. That pending the hearing and determination of this application, this Honourable court be pleased to order stay of implementation of the Grant confirmed on the 11<sup>th</sup> day of April, 2024.
  - d. That this Honourable court be pleased to enlarge time for the applicant/objector to file an affidavit of protest
2. The application was supported by an affidavit sworn by Isaiah Ruttoh Mosonik and the grounds fronted were as follows:
  - a. That the order issued on 11<sup>th</sup> April, 2024 is misleading and cannot be executed.



- b. That in seeking for the orders, the Petitioner failed and/or neglected to disclose to this court all the properties of the deceased which includes Land Parcel Number Moi's Bridge/Ziwa Block 16(Chebarus)1453 and Moi's Bridge/Ziwa Block 16(Chebarus)/1546.
- c. That land parcels number Moi's Bridge/Ziwa Block 16(Chebarus)1453 and Moi's Bridge/Ziwa Block 16(Chebarus)/1546 were properties of the deceased (family property) that the Petitioner caused to be registered in her name to the detriment of other family members.
- d. That the Petitioner/Respondent herein commenced succession proceedings under Succession Cause No. 348 of 2013 and failed to include land parcel Moi's Bridge/Ziwa Block 16(Chebarus)1453 and Moi's Bridge/Ziwa Block 16(Chebarus)/1546 as the assets of the deceased.
- e. That the orders sought were granted based on concealment of material facts.
- f. That the applicant has a constitutional right to be heard in matters affecting his welfare/inheritance.
- g. That the applicant and other beneficiaries are now on the verge of being disinherited of their rightful share out of the estate of the deceased.

### Response

3. The Respondent in opposition to the application filed a replying affidavit dated 16<sup>th</sup> July, 2024. According to the Respondent, the application is frivolous and an abuse of the court process. She averred that the application is *Res judicata* as the issues being raised therein are similar to the issues that were raised in the application dated 6<sup>th</sup> May, 2015 which this court already dealt with.
4. The Respondent further stated that the said parcels of land do not form part of the deceased's estate as is being alleged and the same cannot be subjected to this cause as the parcels belong to her. The respondent deposed that she acted in honesty and disclosed to the court the assets forming part of the deceased's estate and the distribution was done fairly, justly and equally.
5. That the prayer to halt execution has no basis but is rather one that is meant to delay this cause to the detriment of the beneficiaries of the estate and that the process of distribution should continue in terms of the Certificate of Confirmation issued on the 11<sup>th</sup> April, 2024.
6. The Petitioner/Respondent filed submissions dated 5<sup>th</sup> August, 2024, which addresses two issues; Whether the application is *Res-judicata* and whether the court has jurisdiction to determine the application.
7. On the question of *Res judicata*, learned counsel Mr. Osewe submitted that a similar application was filed by David Ruto Mosonik, a brother to the present applicant and the said application was dealt with by this court. That the application dated 6<sup>th</sup> May, 2015 was on several occasions fixed for hearing and even referred to court annexed mediation before it was finally dismissed by the court on 18<sup>th</sup> September, 2023. Further that since its dismissal, there is no application for review and/or setting aside of the order has been filed neither has there been an appeal challenging the said order. He concluded that for that reason the application is *res judicata*. In support of the same counsel cited the decisions in *John Florence Maritime Services Limited & another versus Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) and *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* (2017) eKLR



8. As to jurisdiction, learned counsel submitted that this being a Probate and Administration court, this court has no jurisdiction to hear and determine issues to do with ownership of parcels of land. On this he relied on the case of In *Re Estate of Col. Mesback Kiptoo Birgen – (deceased)* (2021) eKLR and *Re Estate of Mbai Wainaina (deceased)* (2015) eKLR. He further submitted that once this court issued a Certificate of Confirmation of Grant, it became functus officio.

#### **Determination.**

9. Having considered the instant application, the sole issue for determination by this court is whether the Objector’s application should be allowed and from the onset, my answer is in the negative. On 11<sup>th</sup> April, 2024, this court issued a Certificate of Confirmation of Grant, which in essence brought this matter to an end. Earlier on, as can be deduced from the proceedings, on 18<sup>th</sup> September, 2023 this court dismissed an application dated 6<sup>th</sup> May, 2015 for want of prosecution, which application sought reliefs similar to the instant application. As rightly pointed out by the Petitioner/Respondent, there is no step taken to review or set aside the said order.
10. In my opinion, the applicant had the opportunity to mount an objection against the succession proceedings before the Grant was confirmed. This Court handled this matter while sitting as a probate court. Its remit as such is limited, to distribution of the assets of the estate. The estate was distributed properly so pursuant to the Ruling dated 11<sup>th</sup> April, 2024. Once a grant is confirmed, the work or role of the probate court would largely be at an end. (see In *re Estate of Daniel Khasievera Anusu (Deceased)* [2022] eKLR)
11. Without a doubt, the applicant has been aware of the proceedings all along. There is no indication that he was left out even on distribution. According to the schedule of distribution, he has received an equal share as the other beneficiaries. He therefore had the opportunity to lodge a protest or objection against the succession proceedings before the grant was confirmed. In any case, this court upon issuance of the Certificate of Confirmation of Grant became functus officio unless the applicants comes on review.
12. I agree with the Petitioner/Respondent that the instant application is *Res judicata*. The Supreme Court 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 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> 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.
- (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:
- 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.

[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.

13. Given that an application of similar nature was brought before this court and was never diligently pursued, it is reasonable to presume that the parties were in agreement with the properties forming part of the estate. As I have stated elsewhere in this ruling, this court dismissed the initial application as this for want of prosecution. In my view the instant application has been morphed in an attempt to revive the dismissed application, which in effect denies the other beneficiaries an opportunity to get their rightful share.
14. Ordinarily, where property is discovered after confirmation, the parties have a window to come back to Court with an application for review for the confirmation of grant to be reconsidered. In the instant cause however, the issues raised by the applicant are untenable. The same ought to have been pursued before confirmation.
15. The application dated 1<sup>st</sup> July 2024 is, therefore, incompetent, for the reasons that I have discussed above. I hereby strike it out.
16. It is so ordered

**DATED SIGNED AND DELIVERED AT ELDORET, THIS 11<sup>TH</sup> DAY OF OCTOBER 2024**

**R. NYAKUNDI**

**JUDGE**

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