



**In re Estate of Mary Wanjiru Thiongo (Succession Cause 634 of 2006)  
[2024] KEHC 12067 (KLR) (Family) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12067 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**SUCCESSION CAUSE 634 OF 2006**

**CJ KENDAGOR, J**

**OCTOBER 4, 2024**

**IN THE MATTER OF THE ESTATE OF MARY WANJIRU THIONGO**

**RULING**

**Introduction**

1. The deceased, Mary Wanjiru Thiongo's alias Mary Wanjiru died on 2<sup>nd</sup> October 2005. She was survived by one adopted daughter, Serah Njeri Wanjiru, hereinafter referred to as the Respondent. Court records show that the deceased left behind a Written Will where she shared her properties amongst the Respondent and 4 other relatives- (a brother, a cousin, a nephew, and a cousin-in-law. One of the four relatives is Richard Njoroge Nyanjui, a cousin to the deceased, hereinafter referred to as the Applicant. A Grant of Probate of Will was issued to the Applicant on 2<sup>nd</sup> June, 2006 and was later confirmed on 27<sup>th</sup> September, 2010.
2. The dispute before the Court relates to one of the deceased's property, Limuru/Rironi/T. 348, hereinafter referred to as ("The Property"). According to the terms of the Will, the property was to be sold and the proceeds thereof shared amongst the 5 beneficiaries as per their respective shares. The Applicant should get 30%, Mungai Thiongo 30%, John Karanja Nyingi 20%, Eunice Mwihaki Mbai 10%, and the Respondent is to get 10% of the proceeds. The Respondent resides on the property with her children.
3. Court records show that the Applicant has been trying to sell the property so that he can share the proceeds amongst the beneficiaries as per the Will. The Respondent resides on the property and has repeatedly defied his efforts to sell the property. The Applicant sued the Respondent in Nairobi ELC No 29 of 2011 seeking an order to evict the Respondent from the property. The Respondent did not enter appearance and a judgment was issued against her on 17<sup>th</sup> April, 2013 directing her to vacate the property within 30 days of service of the decree.
4. The Court issued a decree on 2<sup>nd</sup> April, 2014 but the Respondent was yet to vacate the property as of February 2023. Consequently, the Applicant approached this Court with Summons for Rectification



of Grant dated 7<sup>th</sup> February, 2023 in which he seeks to rectify the Certificate of Confirmation of Grant issued on 27<sup>th</sup> September, 2010. He seeks to amend the Grant to capture the proper and actual manner of holding the Property. He pleads that the property ought to be registered exclusively in his name (as the executor) so that he can subsequently sell it and share the proceeds amongst the entitled beneficiaries. All other beneficiaries have consented to the proposed rectification except the Respondent.

5. The Respondent opposed the Applicant's request for rectification and filed a Replying Affidavit dated 5<sup>th</sup> September, 2023 in which she made allegations against the executor, the Applicant. She states that the executor has not involved her in the entire succession cause or the distribution of her mother's estate. She also states that she was not part of the proceeding and disputes the affidavits of service filed in Court, alleging she was served. She also states that the deceased, her mother, did not leave a valid Will and that the Grant was obtained erroneously and should be revoked.
6. In addition, she opposes the proposed rectification on the grounds that the property is her home and the eventual sale would leave her homeless. She claimed that the administrator had already sold all the assets of the deceased without involving her and that she did not benefit from any other asset of her mother's estate. Lastly, she states that the property is her only home since her childhood and that it is the only asset that she has from her deceased mother. She asked the Court to revoke the Grant of Probate to enable her to apply for a Grant of Letters to administrate her mother's estate.
7. The matter was canvassed by way of oral submissions.

### **The Applicant's Oral Submissions**

8. The Applicant prayed that the property be registered in the name of the administrator to enable sale, and thereafter, the proceeds be shared with the beneficiaries. He argued that the proposed rectification is made to give effect to the Will.
9. In addition, the Applicant argued that the issues being raised by the Respondent concerning the validity of the Will are res judicata because they have been raised before and rejected. He argued that the issues were dealt with, leading to the confirmation of the Grant. He submitted that the Respondent was represented and actively participated in the proceedings. The Applicant also argued that there is no order setting aside or an application to set aside the Certificate of Confirmation of Grant.

### **The Respondent's Oral Submissions**

10. The Respondents opposed the Rectification, questioning the attached Will. She also argued that it is unfair that the Applicant wants to sell the place she has called home since she was ten years old. She argued that, even if the Applicant has the Grant, he cannot leave her destitute.

### **Issues for Determination**

#### **Whether the Issues raised by the Respondent about the validity of the will are Res judicata**

11. The Respondent raised issues around the validity of the Written Will, on which basis the Applicant obtained the Grant of Probate. She argued that the deceased did not leave behind a valid Will. She also argued that the Will is invalid because it discriminates against her as the only surviving child of the deceased. On the other hand, the Applicant argues that the issues raised above are res judicata because they were raised in the past and rejected.



12. The substantive law on res judicata is found in Section 7 of the Civil Procedure Act Cap 21, 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”

13. In the case of Kennedy Mokuu Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR, the High Court stated as follows;

“In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

- a. What issues were really determined in the previous Application;
- b. Whether they are the same in the subsequent Application and were covered by the Decision.
- c. Whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction”.

14. In re Estate of Nchogu Sagana (Deceased) [2021] eKLR, the High Court held as follows;

23. A party seeking to rely on the doctrine of res judicata to bar a suit from being heard must prove each of the following elements;

- a. The suit or issue was directly and substantially in issue in the former suit;
- b. The former suit was between the same parties or between the same parties under whom they or any of them claim;
- c. The parties were litigating under the same title in the former suit; and
- d. 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.

15. I have gone through the Court file to ascertain whether the issues raised by the Respondent were ever raised and addressed in the past. The records show that just after the Applicant was issued with the Grant of Probate on 2<sup>nd</sup> June, 2006, the Respondent filed a Protest and sought to revoke the Grant vide Summons for Revocation of Grant dated 17<sup>th</sup> September, 2006 and filed in Court on 18<sup>th</sup> October, 2006.

16. In her Protest, the Respondent disputed the existence of the Will and claimed that whatever the Applicant claimed to be a Will was indeed a forgery. Thus, she claimed that the Grant had been obtained through fraud and forgery and that the deceased had died intestate. She also claimed she had not been adequately provided for under the alleged Will.

17. However, there is little or scanty information of what eventually became of the Protest. In an Affidavit dated 16<sup>th</sup> December, 2009 the Applicant alleges that the Respondent (Serah) withdrew her Protest



- on 21<sup>st</sup> October, 2009. In the Affidavit, the Applicant states that the parties recorded a Consent Order on 21<sup>st</sup> October, 2009 to the effect that the Will was valid.
18. I have looked at the handwritten court proceedings for the said date (21<sup>st</sup> October 2009). It shows that the advocates representing the two parties (Respondent and the Applicant) were present in court that day, and both advocates signed at the end of the court proceedings that day.
  19. According to the court proceedings, the matter would come back for a mention on 8<sup>th</sup> December, 2009 for further directions. When the day came, the Advocate for the Applicant (Administrator) said, "Mention to ascertain if petitioner has filed a valuation report. Petitioner filed valuation report on 26/11/09. Property to be sold in terms of the will." When the advocate for the Respondent (Serah) rose to address the court, he said, "My instructions are different, that parties have not agreed."
  20. The parties came back to Court on 20<sup>th</sup> July, 2010 where the Respondent (Serah) was personally present in court. Her advocate requested an adjournment and asked for a month to file her papers. However, the advocate for the Applicant (Administrator) objected to the application for adjournment and stated, "We object to the application. The issues in dispute have already been determined by consent." The Court allowed the adjournment and stated, "In the interest of justice, I will grant the Adjournment. Hearing of the Application dated 16/12/2009 shall be heard on 27/9/2010. The Respondent (Serah Njeri) is granted last adjournment."
  21. On 27<sup>th</sup> September, 2010, the Advocate for the Respondent stated as follows; "We have not filed any papers in opposition to the confirmation of grant. I had difficulties getting in contact with the Respondent (Serah Njeri)." In response, the advocate for the Applicant (Administrator) stated as follows; "Since the application is unopposed, I pray that the grant be confirmed in terms of our prayers in our application dated 16/12/2009." The court ordered as follows; "The Letters of Administration issued to the Petitioner on 2/6/2006, is hereby confirmed. The estate of the deceased shall be distributed in accordance with the schedule to distribute the deceased's estate contained in the affidavit dated 30/8/2007. The Protestor did not file any papers in confirmation of the grant despite the fact that the court had granted her a last adjournment."
  22. The question is whether, based on the above extracts from the Court proceedings, it can be said that the issues about the validity of the Will were determined so as to make them res judicata. I have looked at the file, and I did not find an indication that the parties had consented to the issues around the validity of the Will. Even though the Applicant claims that a Consent Order was recorded on 21<sup>st</sup> October, 2009, it is also clear to me that the Respondent's advocate disputed the same when the matter came for mention on 8<sup>th</sup> December, 2009.
  23. It is also not clear, and it's doubtful whether the Respondent was adequately represented during the Court mention on 20<sup>th</sup> July, 2010 and on 27<sup>th</sup> September, 2010. The Court recordings for 20<sup>th</sup> July leave doubt on whether the Respondent intended to act in person or whether they intended to be represented by/was represented by Ngatia Kamau & Co Advocates. For instance, the proceedings indicate that the Respondent (Serah) was personally in Court and was acting in person. However, in the same Court attendance, the firm of Ngatia Kamau & Co Advocates appeared to be acting on behalf of the Respondent and addressed the Court as such.
  24. On the same line, the Court notes that the Court records do not reveal at what point the Ngata Kamau & Co. Advocates firm came on record for the Respondent (Serah). From the perusal of the file, it is clear that the initial correspondences from the Respondent to the Registrar of the High Court were done by the Respondent personally. This might have changed somewhere along the way because the firm of Ngata Kamau & Co. Advocates drew the Respondent's Summons for Revocation of Grant.



25. Sometimes in 2010, it appears she acted in person because affidavits of service indicate pleadings were being served on her. Currently, it appears she is being represented by a different firm of advocates. All along, there is no notice of appointment/change of advocates on record so it is not easy for this court to tell with certainty which firm was acting for the Respondent at any particular time.
26. In her Replying Affidavit, the Respondent asked the Court to revoke the Grant of Probate and allow her to apply for Letters of Administration. This raises the question of whether the Respondent can still seek revocation of the Grant, given that it was confirmed almost 14 years ago.
27. In *re Estate of Charo Kazungu Masha (Deceased)* [2022] eKLR, the High Court held as follows;
- “ 42. Regarding the question of limitation of time, the law of succession is not governed by the *Limitation of Actions Act* hence suits touching on probate issues have no time limitation unless specified in the Act or the court in exercise of its discretion finds the delay purely unreasonable subject to the circumstances and merits of each individual case. See in the estate of *Josephine Magdalene (deceased)* (2016) eKLR where the court stated:
- “My reading of this is that an application founded in Section 76 of the *Law of Succession Act* can be made at any time. There is no limitation set to the provision for the making of the application. The provision is open ended. Of course there is need for bringing in the test of reasonableness to play. That, however consent does not introduce time limitation. It merely requires the court to bring in to bear reasonableness in its exercise of discretion as whether or not to revoke a grant.”
43. The court in the case of In *re Estate of Josephine Magdalena Motion (Deceased)* [*supra*] stated;
- “I am conscious that the *Limitation of Actions Act* does in some provisions provide for actions in respect of property of a deceased person. However, what these provisions envisage are ordinary suits, often referred to as administration suits, filed by administrators or beneficiaries in respect of estate property seeking a variety of reliefs. The Act sets time limitations for the bringing of such administration suits. Those provisions have nothing to do with reliefs that are created by the *Law of Succession Act*, and that are brought within the framework of the *Law of Succession Act*.”
28. Having found that the issues being raised by the Respondent concerning the validity of the Will are not res judicata, I hereby find that, in the interest of justice, the Court should allow the Respondent the opportunity to file a formal and proper application, if need be, for the revocation of the Grant. This will enable the parties to canvass the issues and let the Court determine the matter on merit.
29. I am well guided by the decision in In *re Estate of Shem Marcaad Nyamai alias Shem M Owiti Nyamai alias Shem M O Nyamai (Deceased)* [2021] eKLR, where the High Court Held that;
- “ A grant having been issued, the issue of issuance of Citation and entry of appearance and filing of objection is overtaken by events. The Court cannot reverse the clock to the stage of issuance of a Citation. A grant is already in place.
29. Has the Court been moved properly to direct that the Applicants do petition for a Grant of Letters of Administration? As stated, there is already a grant issued on the strength of a Petition by the Applicant



that she is a wife. According to the Applicants, the Respondent was not a wife to the Deceased and that she is a stranger. The only legal recourse the Applicants have is to seek for revocation of the Grant if they think the respondent is not a widow to the deceased and therefore not a beneficiary to the estate.”

30. Having held as above, it is my finding that I do not wish to delve into the issues regarding the existence and or legality of the Will of the deceased. To do so will prejudice any possible proceedings where evidence on the disputed Written Will will be adduced and a determination made. For the sake of justice, I will not make a determination on the issue of the Will and the process of obtaining the grant at this stage, as that Will be addressed in a properly filed application, if any.
31. In view of the issues raised by the Respondent, I find that the Applicant’s application dated 7<sup>th</sup> February, 2023 is not merited and is dismissed.
32. The Respondent is hereby directed to file the appropriate application, if any, within the next 60 days of this ruling.
33. In the interest of justice, the Applicant is hereby stopped from selling the Property, Limuru/Rironi/ T. 348, until the application filed by the Respondent under 32 (above), if any, is heard and determined. The order shall stand lifted in the event the Respondent does not move the Court within the said 60 days. The file will be mentioned before the Deputy Registrar to confirm filing and/or for directions as may be appropriate.
34. Each party shall bear its own costs.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 04<sup>TH</sup> DAY OF OCTOBER, 2024.**

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**C. KENDAGOR**  
**JUDGE**

In the presence of:

Court Assistant: Beryl

Kerio: Advocate for Respondent (Present)

