



**Maina v Wanjiru & another (Succession Cause 172B of 2014)
[2023] KEHC 3223 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 172B OF 2014
RM MWONGO, J
APRIL 18, 2023**

BETWEEN

BETH WANGECHI MAINA APPLICANT

AND

CATHERINE WANJIRU 1ST RESPONDENT

BETH WANGECHI GICHUKI 2ND RESPONDENT

RULING

1. The deceased died on June 27, 1999. A grant of letter of administration was issued on April 2, 2002 to the 1st and 2nd Respondent jointly. The grant was confirmed on August 16, 2008.
2. On September 29, 2009 Mary Wakuthii Maina, the deceased's sister, filed a summons for revocation of grant on the grounds; that the proceedings to obtain the grant were defective in substance; and that the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material.
3. In the supporting affidavit of the application Mary Wakuthii Maina, she says that the respondents failed to disclose that the deceased had another wife namely Jane Wacera Michael Maina, the applicants mother. Further that the said wife and the deceased had another daughter Beth Wangechi Maina, both of whom were entitled to inherit but were let out of the distribution.
4. From the proceedings it is clear that the said application the application was compromised by a consent entered in the following terms on June 16, 2015.

“By consent Beth Wangechi Maina the applicant and Mary Wakuthii Maina do get:

1. LR No Kirinyaga/Gathigiriri/1194.



2. Village Plot No 15 Haraka - Plot No TKIM No 5 Kimbimbi shall be shared equally between both Wangechi Maina and Festus Kiragu Gichuki.”
5. The court (Limo, J) recorded the consent and adopted it as an order of the court on June 16, 2015.
6. By the summons dated February 13, 2019 which is the matter presently before me, the applicant seeks revocation of the aforesaid grant on the grounds, inter alia that:
 - a) the court did not have jurisdiction to hear the matter.
 - b) the grant was obtained by fraud and concealment.
 - c) the proceedings to obtain the grant were defective.
 - d) the respondent’s acts were both fraudulent and illegal and meant to depone the lawful heir of the estate.
 - e) the grant has become useless and inoperative.
7. In her supporting affidavit deponed on 18th March, the applicant asserts, inter alia, that:her sister Mary Wakuthii was not given any share in the deceased’s estate.part of the estate was given to persons who were not beneficiaries.
8. The respondents filed grounds of opposition dated June 25, 2019, essentially on the basis of *res judicata*.

In Addition, the respondents filed Replying Affidavit in which they confirm that the issues in the application were the subject of account arising from family discussions. Further that action has been taken to effect the confirmed grant pursuant to the consent.
9. Parties filed written submission in respect of the application. The applicant in the present application argues that she has never filed a summons for revocation and was never involved in the earlier proceedings.

Secondly, she argues that the respondents have not demonstrated, by evidence, that any property of the deceased hand.
10. The respondents essentially hold the view that the applicant, was mentioned in the consent, was a party benefitting from the earlier application.
11. On January 26, 2021 the 1st respondent filed a Preliminary Objection on grounds that the proceedings and application are *res judicata*.
12. The only issue which I must determine at this stage is the Preliminary issue that is, whether the summons for revocation dated February 13, 2019 is re judicata on account of the consent filed in court on June 16, 2015.
13. I have carefully considered the parties submissions, and the documents filed. I have also carefully perused the record of proceedings.
14. Res judicata arises where the parties have previously litigated upon a subject matter which has then been determined. Section 7 [Civil Procedure Act](#) 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.”

15. The applicant in the summons for revocation of September 29, 2009 is Mary Wakuthii Maina. Her counsel was Maina Kagio Advocate. In subsequent notices for mention/hearing the name of Mary Wakuthii Maina only features as the applicant. Further, there is no application on record seeking to enjoin the present application with the previous application.
16. I have, however, come across an affidavit by Mary Wakuthii dated March 18, 2016 and filed on March 24, 2015 in which she indicates in paragraph 4 that her mother and father (the deceased) had a child Beth Wangechi.
17. Further there is an affidavit filed on the same day in the same bundle deposed by Beth Wangechi and dated 18.3.2015. In this latter affidavit at paragraph 9, Beth Wangechi states:

“That I support the application for revocation of grant so that the estate can be distributed afresh.
18. Other than that affidavit at paragraph 9, there is no other document seen by me in which it can properly be asserted that Mary Wakuthii Maina was acting for or on behalf of her sister Beth Wangechi. Whilst it is true that Beth Wangechi supported her sister, Mary Wakuthii’s application for revocation, it cannot, however be inferred from the document alone, that Mary Wakuthii was acting on behalf of Beth Wangechi. No doubt, however, they were acting in unison.
19. In the proceedings, the court in 2015 repeatedly referred to the counsel for the “applicant,” not applicants. This changed on February 25, 2015 when the coram was indicated to show that:

“Mary Wakuthii Applicant present
Beth Wangechi Maina present.”
20. On May 17, 2015 the record shows that Maina Kagio was present for the applicant and also that “Beth Wangechi and Mary Maina applicants” were present.

The subject matter coming up was the hearing of the application for revocation of grant.
The counsel present in court then told the court that the parties were in discussions and needed a week or so. The court directed:
“Court: in view of the likelihood of settlement in this matter, mention on June 16, 2015 to find out if the parties will have agreed.”
21. As at those dates, February 25, 2015 and May 11, 2015, both Mary Wakuthii the applicant and Beth Wangechi Maina were present in court. Summons for revocation was to be heard.

The court on May 22, 2015 directed:
“The summons for revocation of grant dated September 29, 2009, shall be disposed of by way of viva voce evidence. Parties to this cause are at liberty to file further affidavit within 14 days.....”
22. Clearly, it is on the basis of these directions that Beth Wangechi Maina filed her affidavit of March 18, 2015, in support of the summons for revocation. Thus on May 11, 2015 when the court allowed an



adjournment so that parties could settle, Beth Wangechi and Mary Wakuthii were being treated By the Court as “applicants”.

23. In any event, On 16.6.2015, it was reported to the court that the parties had reached a settlement. Mr. Kagio was present for the applicant; Mr. Munene was present for the administrators; and Mr. Ombachi for the interested parties was present. At the mention, Mr. Ombachi confirmed that:

“The two applicants are now recognised” as beneficiaries.

Mr. Kagio for the applicants read out the consent:

“By consent Beth Wangechi Maina and Mary Wakuthii Maina be considered as beneficiaries to the estate of Joseph Maina Gichuki.”

That agreement relative to the previous unrecognised beneficiaries was adopted as an order of the court.

24. In quick succession after Beth Wangechi Maina and Mary Wakuthii were recognised as beneficiaries, and therefore as parties to the matter under consideration being the summons for revocation - a further consent was stated by Mr. Kagio on behalf of all parties. This is the consent by which Beth Wangechi and Mary Wakuthii were given shares in the deceased’s land.
25. In my considered view, although Beth Wangechi did not file a formal application for revocation together with Mary Wakuthii, there can be no doubt from the appearance of both in court that they deemed and treated by the court as applicants and as beneficiaries. By appearing in court and engaging in support of the application, and thereafter by getting involved in the settlement agreement, Beth Wangechi played her role in the matter “directly and substantially in issue”.

Further, the court roped her as an applicant as beneficiary, and issued an order to that effect. To that extent she became a party in the matter.

Conclusion

26. A court is entitled to treat a party who includes him or herself as a supporter of a motion, and who, in that motion engages in settlement discussion, as a party or, at least to an interested party to that motion.
27. The argument that Beth Wangechi did not file any summons for revocation is therefore merely a technical but salutary argument. It cannot stand given her actual conduct and involvement in the original summons for revocation of grant, which she was formally supporting together with Mary Wakuthii, and in which she was involved as a party to the settlement agreement.
28. In light of all these circumstances I am satisfied that the preliminary objection succeeds, and that the matter was subjected to settlement discussions in which she was involved as a central player.
29. Accordingly, I find and hold that the summons for revocation by Beth Wangechi is an attempt at a second bite of the cherry in the very matter in which she was engaged in reaching a settlement.
30. In the result, the summons for revocation shall not proceed for hearing.

The Preliminary Objection succeeds.

Orders accordingly.

DATED AT KERUGOYA THIS 18TH DAY OF APRIL 2023

R. MWONGO



JUDGE

DELIVERED IN THE PRESENCE OF:

Munene holding brief for Ngigi for 1st Respondent

Ombachi for the 2nd Respondent

Momanyi holding brief for Mogusu for Applicant

Mr. Murage, Court Assistant

