



REPUBLIC OF KENYA



**Njui & another v Wanyee & another (Succession Cause 225 of 1985)  
[2023] KEHC 3983 (KLR) (Family) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3983 (KLR)

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

**SUCCESSION CAUSE 225 OF 1985**

**MA ODERO, J**

**APRIL 24, 2023**

**BETWEEN**

**PETER KAMAU NJUI ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN KAMAU NJUGUNA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SHARON LOUISE WANYEE ..... 1<sup>ST</sup> APPLICANT**

**BOAX REUBEN SHUMA ..... 2<sup>ND</sup> APPLICANT**

**RULING**

1. Before this Court are two applications for determination. The first is the Application dated 7<sup>th</sup> April 2022 filed by the Applicants Peter Kamau Njui And Stephen Kamau Njuguna.
2. The second matter for determination is the Notice of Preliminary Objection dated 7<sup>th</sup> April 2022 filed by the Respondents Sharon Louise Wanyee and Boaz Reuben Shuma. The court directed that the two be canvassed together by written submissions. The Applicants filed written submissions dated 23<sup>rd</sup> January 2023 whilst the Respondents relied upon their written submissions dated 23<sup>rd</sup> December, 2022.

**Background**

3. This Succession Cause concerns the estate of the late Patrick Roki Wanyee hereinafter ‘the Deceased’ who died intestate on the 6<sup>th</sup> February 1984. Following the demise of the Deceased the Respondents herein Sharon Louise Wanyee (widow to the Deceased) and Boaz Reuben Shuma were issued with a Grant of letters of Administration Intestate dated 27<sup>th</sup> May 1985. The Grant was subsequently confirmed on 24<sup>th</sup> November 1989.



4. On 7<sup>th</sup> September 2021 the Applicant herein Peter Kamau Njui and Stephen Kamau Njuguna filed a summons seeking revocation/annulment of the Grant which had been issued to the Respondents on grounds that the Deceased was an Uncle to the Applicants being a brother to their late mothers Martha Njeri Wanyee and Scholastica Wanjiru Wanyee. The Applicants claim that the Deceased held the property known as LR Dagoretti/Riruta/63 measuring (0.19) hectares (now Dagoretti/Riruta 4607, Dagoretti (Riruta 4606 and Dagoretti (Riruta 4620) hereinafter referred to as the ‘suit land’ in trust for all the children of Teresia Nyambura Wanyee and Stephano Wanyee who are the grand-parents of all the parties herein.
5. The Applicants state that they have resided on the suit land all their lives and that the Deceased Patrick Roki Wanyee left the Applicants well settled in the portions of the suit land which had been allocated to them by their grand-parents. That the Respondent as the Administrators of the estate of the Deceased have now threatened to evict the Applicants from the suit land.
6. In response to the summons for revocation of Grant dated 7<sup>th</sup> September 2021. The Respondents filed the Notice of Motion dated 7<sup>th</sup> April 2022 seeking the following orders:-
  - “ 1. Spent.
  2. That the application dated 7<sup>th</sup> September, 2021 is and be hereby struck out by this Honourable Court.
  3. This Honourable Court be pleased to issue such other orders and directions as may be expedient in the circumstances.
  4. The costs of this application be borne by the Respondents.
  5. Respondents in the cause.”
7. The Application was premised upon Article 40 of the *Constitution* of Kenya Section 1A, 1B, 3A and 63e of the *Civil Procedure Rules* 2010 Section 155 (1) and (2) of the *land. Act* and all other enabling provisions of Law and was supported by the Affidavit of even date sworn by Eunice Lumallas an Advocate of the High Court of Kenya.
8. The Respondents also filed the Notice of Preliminary Objection dated 7<sup>th</sup> April 2022 which notice was premised upon the following ground:-
  - “ 1. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants filed summons for Revocation/Annulment of Grant and certificate of confirmation of Grant to this Honourable court dated 7<sup>th</sup> September 2021.
  2. The matter in issue had abated in Environment and Land court case No. 3992 of 1998 that had raised similar issues and the file was accordingly closed.
  3. In view of the foregoing, this matter amounts to *res Judicata* and should not be allowed to proceed any further. The Applicants are attempting to bring up this matter through mischievous and frivolous means.
  4. Further the Applicants herein lack locus standi as they have direct dependency to the Deceased and/or his estate as the Respondents do. They have failed and/or ignored to prove their locus in their application for Revocation/Annulment.



5. The Honourable court should therefore have the application dated 7<sup>th</sup> September 2021 be dismissed and the main suit against the Respondents in its entirety should be struck out.”
9. In response the Applicants filed a Replying Affidavit dated 8<sup>th</sup> June 2022 in which they objected to the Advocate for the Respondents deponing to matters of fact on behalf of her clients. That the Respondents have frustrated the hearing of their summons for revocations of Grant by filing numerous applications in this matter.
10. The Applicants asserted that having lived on the suit land all their lives they were entitled to a share of the same. They insisted that the Deceased held the suit land in trust as per the entry in the Green Card and that the share due to their unmarried mothers who were buried on the property ought to devolve to them.
11. The Applicants concluded that the Notice of Motion and the Preliminary Objection both dated 7<sup>th</sup> April 2023 were an abuse of the court process. They prayed that both be dismissed and that the summons for Revocation of Grant dated 7<sup>th</sup> September 2021 be set down for hearing.
12. I will now proceed to deal with each application separately.

**(i) Notice of Motion**

13. In this application the Respondents prayed that the summons for Revocation of Grant dated 7<sup>th</sup> September 2021 be struck out.
14. Counsel for the Respondents averred that the Applicants had failed to prove that the confirmed Grant issued to the Respondents was fraudulently obtained. That the pendency of the application is prejudicial to the Respondents who are being prevented from enjoying the use of their own land.
15. It was averred that the Respondents are the rightful beneficiaries to the estate of the Deceased. That the Deceased and all her siblings (who include the parents of the Applicants) each received their share of the suit land therefore the Applicants claim that the suit land was held in trust had no basis.
16. It is trite law that striking out is a draconian measure which ought only be applied in the most clear cut of cases. The Applicants have approached the court seeking to have the confirmed Grant revoked. At the very least they are entitled to a hearing on merit.
17. With respect the arguments which are raised by counsel in the supporting Affidavit dated 7<sup>th</sup> April 2022, these are issues which properly form the reply to the summons for revocation of Grant. They are all matters requiring proof and cannot form the basis for striking out the summons.
18. Instead of filing the application dated 7<sup>th</sup> April 2022 the Respondents should have waited the hearing of the summons for revocation of Grant and challenged the same on the basis of the grounds set out in that application.
19. I find no merit at all in the Notice of Motion dated 7<sup>th</sup> April 2022. The same is dismissed in its entirety.

**(ii) Notice of Preliminary Objection Dated 7<sup>th</sup> April 2022**

20. The Respondents in the Preliminary Objection asked that the summons for revocation of Grant dated 7<sup>th</sup> April 2022 be struck out on grounds that the Applicants have no ‘locus standi’ in the matter. It is also argued that the issues raised in the summons for revocation of Grant are ‘*res Judicata*’



21. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA where the court stated 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 the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions 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.”

22. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court of Kenya stated as follows:-

“a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.” [own emphasis]

23. Therefore in order for a preliminary objection to succeed the following tests must be satisfied.

- (i) The Preliminary Objection should raise a pure point of law.
- (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
- (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
- (iv) A valid Preliminary Objection ought if successful dispose of the entire suit.”..... [Own emphasis]

24. In this preliminary objection the Respondents argue that the Applicants have no locus standi in this matter. They also state that the issues raised in the summons for revocation of Grant are *res Judicata* as the same were already determined in a suit filed before the Environment and Land Court. I am satisfied that the Preliminary Objection raises matters which if successful would determine the entire suit. I therefore find that it is a proper Preliminary Objection.

#### **(a) Locus Standi**

25. The term ‘locus standi’ is a latin term which literally means “place of standing” and refers to the capacity of a party to file suit or to act in a particular suit. Where a party has no ‘locus standi’ then any action taken by such party will be null and void.

26. The Respondents submit that the Applicants have no locus standi in this succession cause as they are not beneficiaries to the estate of the Deceased Patrick Roki Wanyee.

27. On their part the Applicants do not claim to be beneficiaries of the estate of the Deceased. They do however claim an interest in the suit land on grounds that the Deceased held the suit land in trust for his siblings. There is no contest that the mothers of the Applicants were siblings to the Deceased herein.



28. Under Section 76 of the Law of Succession Act, any party interested in the estate of the deceased may bring the application contemplated under that Section and/or Rule 2 as read with Rule 17(1) of the Probate & Administration Rules. Rule 17(1) of the Probate & Administration Rules provides that:-

“Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has already applied for by another person may do so.”

29. The Applicants are therefore claiming the share of the suit land which they allege belonged to their mothers. The Applicants also claims to have resided on the suit land all their lives.

30. Therefore the Applicants are interested parties who through their late mothers claim a beneficial interests in the suit land which land is listed as one of the assets belonging to the estate of the Deceased. The Applicants claim that they were not involved nor consulted at the time when the Grant was being issued and/or confirmed.

31. In the circumstances the Applicants are not strangers to the matter. In my view the Applicants have proper *locus standi* to file the summons for revocation of Grant.

**(b) ‘Res Judicata’**

32. The doctrine of *res Judicata* is set out in Section 7 of the Civil Procedure Act which provides:-

“No court shall try any suit or issue in which the matter 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.”

33. Therefore in order to satisfy the principle of *res Judicata* it must be shown that:-

- (i) There is a former suit or proceeding in which the same parties in the subsequent suit had litigated.
- (ii) The issues in dispute was directly or substantially in issue in the former suit.
- (iii) That a court with competent jurisdiction had heard the matter and finally determined it.

34. The Respondents allege that the issues raised by the Applicants in their summons for revocation of Grant relating to the suit land are ‘*res Judicata*’ That the said issues were determined by the Court in ELC NO. 3992 OF 1988 in a suit filed by the Applicants parents, whom the Respondents claim had also attempted to disinherit the Deceased’s wife and children. That the ELC Suit No. 3992 of 1998 has abated.

35. Therefore according to the Respondents the summons for revocation of Grant is merely an attempt by the Applicants to revive a suit which was aborted.

36. Firstly the Respondents have cited a suit which was allegedly filed in the Environment and Land Court in the year 1988. The ELC did not exist in Kenya in 1988. These courts were only set up in the 2012 under the new Constitution of Kenya 2010.

37. Secondly though the Respondent have made reference to this suit No. 3992 of 1988 they have not bothered to annex a copy of the Ruling/Judgement which they claim determined the dispute over the suit land. Accordingly this court is unable to determine whether the summons filed by the Applicants in indeed ‘*res Judicata*’ as alleged.



38. Based on the foregoing I find no merit in the Notice of Preliminary objection dated 7<sup>th</sup> April 2022. The same is dismissed in its entirety.

**Conclusion**

39. Finally and in conclusion this court makes the following orders:-

- (1) The Notice of Motion dated 7<sup>th</sup> April 2022 is dismissed in its entirety.
- (2) The Notice of Preliminary Objection dated 7<sup>th</sup> April 2022 is also dismissed in its entirety.
- (3) The summons for Revocation of Grant dated 7<sup>th</sup> September 2021 to be set down for hearing within sixty (60) days.
- (4) The Respondents shall pay the costs for the two applications.

**DATED IN NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL, 2023.**

**MAUREEN A. ODERO**

**JUDGE**

