



REPUBLIC OF KENYA



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**In re Estate of the Late Godfrey Gitahi Kariuki (Deceased) (Succession Cause 28 of 2019) [2023] KEHC 17722 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17722 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
SUCCESSION CAUSE 28 OF 2019  
CM KARIUKI, J  
MAY 18, 2023  
IN THE MATTER OF THE ESTATE OF THE  
LATE GODFREY GITAHI KARIUKI (DECEASED)**

**BETWEEN**

**ROBERT MWANGI KARIUKI ..... 1<sup>ST</sup> EXECUTOR  
PATRICK MATHENGE KARIUKI ..... 2<sup>ND</sup> EXECUTOR  
JAMES WAIGWA KARIUKI ..... 3<sup>RD</sup> EXECUTOR  
RICHARD MUBEA KARIUKI ..... 4<sup>TH</sup> EXECUTOR**

**AND**

**CHARLES MAINA ..... RESPONDENT**

**RULING**

1. Charles Maina, the Applicant herein, filed summons for revocation of Grant of Probate dated 5/10/2022 seeking that the grant be revoked and that the Court declare the will and testament of Godfrey Gitahi Kariuki, the deceased herein, as invalid.
2. The Executors/Respondents opposed the same and raised the instant preliminary objection dated 15/11/2022 on the basis that: -
  - i. The Applicant has no locus standi
  - ii. The said application is bad in law, fatally incompetent, unsustainable, does not lie, is an abuse of court process, and null and void ab initio.
  - iii. The said application and/or the matters in issue therein are res judicata, and the Court is functus officio in regard thereto.



- iv. The Court has no jurisdiction to entertain or adjudicate the said application and/or the matters raised therein.

### **3. Applicant's Written Submissions**

4. The Applicant submitted that the cause of action in Nakuru HCC No. 35 of 2017 and the present cause are different and urged this Court to find as much. That at the initial stages of filing this succession cause, his role was limited as the same was with regard to a limited grant and when the Respondents filed the main petition that was the only time the Applicant could present his interest in this estate as he has done.
5. It was contended that as demonstrated in Nyahururu HCC No. 35 of 2017, the Applicant demonstrated that the deceased was his father hence the need to participate in the funeral arrangements and as such his interest has not come as a surprise to the Respondents as they were aware that he has been there.
6. The Applicant averred that this Court has jurisdiction to identify the rightful beneficiaries of the deceased and distribute his estate and that in that regard the Applicant should not be locked out of these proceedings before his interest is heard and determined by this Court.
7. It was argued that the Applicant's initial suit was not dismissed on merit rather for non attendance. As such there was no determination on the Applicant's relationship with the deceased and that this matter has provided another chance and through a different cause of action for the Applicant to ventilate the same issue. That this Court should invoke its jurisdiction and determine whether the Applicant is a beneficiary of the estate herein and distribute the estate amongst the rightful beneficiaries as required of it.
8. Lastly, the Applicant submitted that the notice for preliminary objection is untenable and should be dismissed with costs.

### **9. Executors/Respondents' Written Submissions**

10. The Respondents submitted that the Applicant had instituted Nyahururu HCCC no. 35 of 2017 Charles Maina vs Patrick Mathenge Gitahi, Gladys Wairimu Kariuki & Robert Mathenge Kariuki where the very same allegations and alleged evidence were lodged by the Applicant. That any participation of the Applicant herein should be predicated upon and should await the hearing and determination of that suit. They submitted that with the eventual dismissal of that suit, the matter of the Applicant's lack of capacity to participate herein was put to rest.
11. It was reiterated that the matter of the Applicant's locus standi was already determined herein on 13/10/2020 before Hon. Lady Justice R. Wendo where the Court expressly rendered itself thus: -
  - a. "Ms. Kinuthia's client Charles has no standing in this matter until his status is determined in the matter that is pending before the court, here he is seeking to be recognized as the deceased's son...."
12. That the other matter Nyahururu HCCC No. 37 of 2017 was eventually dismissed with costs and therefore the question of the Applicant's locus standi is now settled and is no longer open for revisiting.
13. Further, the Respondent asserted that the Applicant is either a child or beneficiary of the deceased or of the deceased's estate and therefore had no locus standing. He is also not an interested party and a person can only become an interested party in an existing suit by being enjoined by an order of Court upon a



formal application to that effect. It was averred that the Applicant is clearly merely a busybody trying to poke his nose where it does not belong.

14. Reliance was placed on Section 76 of the *Law of Succession Act*, Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party [2019] eKLR
15. The Respondent submitted that Nyahururu HCCC No. 35 of 2017 was dismissed for non-attendance and for want of prosecution. The Applicant has never challenged that dismissal either by appeal or review and hence that dismissal remains final and binding on the parties. The matters and issues which were subject of the said suit cannot be brought back to be litigated herein. That if the Court herein were to entertain those issues afresh, the Court would be sitting on appeal on its own decision. Reliance was placed on Florence Nyaboke Machani vs. Mogere Amosi Ombui & Others, Civil Appeal 184 of 2011.
16. It was also argued that the Applicant herein is estopped by law from bringing back the same issues through the back door and that this Court is functus officio and cannot re-open for interrogation or determination the issues raised in the suit to wit the alleged paternity of the Applicant. Reliance was placed on Order 12 Rule 6 of the Civil Procedure Rules.
17. The Respondents stated that the issue if the Applicant's paternity having been a matter directly and substantially in issue in a former suit was res judicata, and this Court is barred from trying any such issue afresh by dint of Section 7 of the *Civil Procedure Act*. It was also asserted that the Court lacks jurisdiction to try such suit or issue as has now been brought by the Applicant in the present application.
18. Analysis and Determination
19. The main issue for determination is whether the preliminary objection is merited and what the order is as to costs.
20. I will begin by considering the preliminary objection. It has been well settled that a preliminary objection ought to be raised on pure points of law. In the case of Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors [1969] EA 696 at Page 700, Law JA stated thus:

“...a ‘preliminary objection’ consists of a pure 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.”

At page 701 Sir Charles Newbold, P added that:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”

21. The Applicant herein filed summons for revocation of Grant of Probate dated 5/10/2022 seeking that:
  - i. This honourable Court be pleased to revoke the signed grant of probate issued in the succession proceedings.
  - ii. This honourable Court does declare the will & testament of Godfrey Gitahi Kariuki as invalid.



- iii. The estate caters for the costs of this application.
22. The summons was premised on the grounds that the Applicant is the son of the deceased arising from the union between the deceased and Grace Wachira, also deceased. The Applicant claimed that the deceased's family had excluded him after his death despite the fact that the Executors/Respondents were aware of the relationship between the Applicant and the deceased, who have chosen to side-line him and disinherit him. Further, he alleged that the deceased's will had left out properties belonging to the deceased which may be wasted if not put into proper distribution.
  23. On the other hand, the Executors/Respondents opposed the same and raised the instant preliminary objection on the basis that:
    - i. The Applicant has no locus standi
    - ii. The said application is bad in law, fatally incompetent, unsustainable, does not lie, is an abuse of court process, and null and void ab initio.
    - iii. The said application and/or the matters in issue therein are res judicata and the Court is functus officio in regard thereto.
    - iv. The Court has no jurisdiction to entertain or adjudicate the said application and/or the matters raised therein.
  24. The gist of the preliminary objection revolves around the doctrine of res judicata as advanced by the Respondents. Can it then be said that the issues in the summons for revocation of the grant, the application hereinafter, have already been heard and determined by a court of competent jurisdiction?
  25. The Respondents asserted that the issues raised in the application have been directly and substantially in issue in the former suit, i.e., Nyahururu HCCC No. 35 of 2017. It was stated that the suit was instituted before this Court by the Applicant herein against the Respondents over the same subject matter to wit whether or not the Applicant is a child of the deceased herein and hence entitled to the deceased's estate, and the same was dismissed and is no longer open for revisiting by this Court.
  26. I have had the opportunity to peruse the court file, Nyahururu HCCC No. 35 of 2017: Charles Maina Wathiegeni vs. Patrick Mathenge Gitahi & 2 Others. The Plaintiff, in that matter, the Applicant herein vide the amended plaint dated 18<sup>th</sup> July 2017, sought the following:-
    - i. A declaration that the exclusion of Plaintiff from the burial arrangements of the late Godfrey Githahi Kariuki (popularly known as G.G. Kariuki) is a wrongful and degrading treatment to Plaintiff.
    - ii. An order directing exhumation within three (3) days to the date of order/decreed of the remains of one Godfrey Gitahi Kariuki (popularly known as G.G. Kariuki), which were interred on the 14<sup>th</sup> day of July 2017 at Rumuruti.
    - iii. An order directing the Public Health Officer, Laikipia, to carry out the exhumation and m/s biotech forensics be allowed and permitted to extract from it the necessary specimen for purposes of conducting DNA analysis to ascertain whether the deceased was the biological father of the Plaintiff/Applicant and that in doing do, the OCPD Laikipia do give protection and security.
    - iv. Such other and further relief that the honourable Court may deem fit and just to grant.
    - v. Costs of this suit.



27. The Respondents, the Defendants, then entered their defence and the matter culminated in dismissal for want of prosecution vide the order of this Court dated 1<sup>st</sup> July 2021, a year later. Substantially, the aforementioned suit, which was later dismissed, centered on the issue of whether or not the deceased was the Applicant's father, an issue which he later raised in the summons for revocation of grant. This is what the Respondents termed as res judicata contending that the Applicant has no locus standi, the Court is functus officio, the matter is res judicata, and the Court has no jurisdiction to entertain the application. Admittedly, res judicata is one factor limiting a court's jurisdiction.

**a. Is the matter res judicata?**

28. Its trite law that if any court or judicial tribunal in the exercise of its jurisdiction delivers a judgment and/or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata. The defence of res judicata can be raised if any fact or right which was determined by an earlier judgement is raised in any subsequent proceedings (unless they are of an appellate nature) in the same or any other court and/or judicial tribunal. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different.

29. Res judicata covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them<sup>1</sup>.

30. The Court in the English case of Henderson vs Henderson [1843-60] All E.R.378, observed thus:-

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in the contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

31. Furthermore, in *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR, it was held that:-

“The requirements for res judicata are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the ‘determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.’”

32. Section 7 of the *Civil Procedure Act* provides for the doctrine of res judicata. The purpose is to bar multiplicity of suits and guarantee finality to litigation and bar the repetition of lawsuits between the same parties, the harassment of a Defendant by a multiplicity of actions, and the possibility of conflicting decisions by the different courts on the same issue. Section 7 lays out the following five conditions which, when in co-existence, will bar a subsequent suit:-

<sup>1</sup> Somervell L.J. in *Greenhalgh vs Mallard* (1) (1947) 2 All ER 257.



- i. The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;
  - ii. The former suit must have been between the same parties or privies claiming under them;
  - iii. The parties must have litigated under the same title in the former suit;
  - iv. The Court which decided the former suit must have been competent to try the subsequent suit; and
  - v. The matter in issue must have been heard and finally decided in the former suit.
33. Additionally, In the case of Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering what amounts to res judicata under Section 7 of the Civil Procedure Act held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. The Court stated those elements as follows:-
- i. The suit or issue was directly and substantially in issue in the former suit.
  - ii. That former suit was between the same parties or parties under whom they or any of them claim.
  - iii. Those parties were litigating under the same title.
  - iv. The issue was heard and finally determined in the former suit.
  - v. 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.
34. Accordingly, the facts raised in the application, particularly the Applicant’s paternity issue, were raised in the previous proceedings. The case is largely based on the same issues, facts, and circumstances.
35. The circumstances that led to the termination of Nyahururu HCCC No. 35 of 2017 was a dismissal by want of prosecution on the Applicant’s side. The Respondent’s argument contends that a dismissal of a case for want of prosecution is a Judgement. However, I disagree. I humbly believe that to constitute res judicata, the issues raised in Nyahururu HCCC No. 35 of 2017 must have been heard and finally determined. I find that the Court did not hear the case on its merits and determine it; therefore, the present application cannot be held to be res judicata.
36. Moreover, in the case of Satya Bhama Gandhi [supra] the Court stated that:-
- a. The requirements for res judicata are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the ‘determination of questions necessary for the determination of the present case and substantially determine the outcome.
37. I also associate myself with the sentiments of the Court in the case of Michael Bett Siror v Jackson Koech [2019] eKLR, where the Court tackled The question of whether a judgment arising from a dismissal of a suit for want of prosecution satisfies the requirements of Section 7 of the Civil Procedure Act which states as follows:-
- “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.”

38. The Court stated that: -

” We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment, however, such a judgment does not satisfy the requirements of section 7 of the *Civil Procedure Act*, as the issues raised in the suit has not been addressed and finally determined by the Court, but the judgment is the result of what may be described as a technical knockout”.

39. Further, in the case of *Ahmed Noorani v Joyce Akinyi Ochieng* [2017] eKLR, the Court of Appeal stated that:-

“Where an application for committal had been dismissed for non-service on the Respondent, and a fresh application was brought, the fresh application was not res judicata as the Judge who dealt with the dismissed application had not delved into the merits of and did not make conclusive findings thereon.”

40. Consequently, I find that there was no conclusive adjudication of the issues raised by the Applicant in *Nyahururu HCCC No. 35 of 2017* and that the preconditions that constitute res judicata according to Section 7 of the *Civil Procedure Act* were not met and, therefore the present application cannot be held to be res judicata.

41. The Respondents also contended that the summons is an abuse of the court process. They averred that the said application is bad in law, fatally incompetent, unsustainable, does not lie, and an abuse of the court process. It is trite law that the Court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The abuse consists of the intention, purpose, and aim of the person exercising the right to harass, irritate, and annoy the adversary and interfere with the administration of justice.

42. In the case of *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 [2009] eKLR 229, the Court of Appeal stated as follows; -

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of the judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive.”

43. The Black Law Dictionary defines abuse as:-

“Everything which is contrary to good order established by usage that is a complete departure from reasonable use "An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use”

44. In *Satya Bhamu Gandhi* [supra], *Mativo J* (as he then was) stated that:-

The situation that may give rise to an abuse of the court process is indeed exhaustive, it involves situations where the process of Court has not been resorted to fairly, properly, and honestly to the detriment of the other party. However, abuse of the court process in addition to the above arises in the following situations:-



- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different Court even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and Respondent notice.
- d. Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.
- e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
- f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the Respondent at the Court of Appeal.
- h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.

45. He went on to state that:-

“The civil justice system depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of civil actions becomes unjust, delayed, and expensive.”

46. Order 2 Rule 15 of the Civil Procedure Rules provides as follows:

“(1) At any stage of the proceedings, the Court may order to be struck out or amended any pleading on the ground that—

47. it discloses no reasonable cause of action or defence in law; or
48. it is scandalous, frivolous, or vexatious; or
49. it may prejudice, embarrass or delay the fair trial of the action; or



50. it is otherwise an abuse of the process of the Court and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1) (a), but the application shall state concisely the grounds on which it is made.”

51. In *D.T. Dobie & Co. (Kenya) Ltd. Vs Joseph Mbaria Muchina & Another* [1980] eKLR, it was held that:-

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of court process.....”

52. Having found that the previous suit was not heard on merits and having considered the instances where abuse of court process manifest as enumerated in *Satya Bhamu Gandhi* [supra], it is clear from the foregoing that the Applicant’s summons for revocation of the grant does not amount to an abuse of court process. The Applicant is free to vent her issues in the instant application. However, he is warned against improper use of the Court’s process as against the Respondent.

- i. In conclusion, the Executors/Respondents preliminary objection is unmerited and is dismissed.
- ii. Costs shall abide the outcome of the matter.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 18<sup>TH</sup> DAY OF MAY 2023.**

.....

**CHARLES KARIUKI**

**JUDGE**

