



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Johana Kariuki Kamau (Deceased) (Succession Cause
89 of 2015) [2023] KEHC 17939 (KLR) (9 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
SUCCESSION CAUSE 89 OF 2015**

GL NZIOKA, J

MAY 9, 2023

BETWEEN

PHYLLIS WANJIKU CHEGE 1ST PETITIONER

MWANGI NGANGA 2ND PETITIONER

AND

PETER WAINAINA KAHORA 1ST INTERESTED PARTY

STEPHEN GITHUNGA KABIRII 2ND INTERESTED PARTY

STEPHEN WAHOME WAMUI 3RD INTERESTED PARTY

RULING

1. By a notice of motion application dated 27th January 2021, brought under the provisions of section 76 and rule 44 and 49 of the Law of Succession Act, (cap 160) Laws of Kenya (herein “the Act”) and all the other enabling provisions of the law, the petitioner/applicant is seeking for the following orders
 - a. Spent
 - b. That the applicants be and are hereby enjoined as interested parties and beneficiaries of the estate of Johanna Kariuki Kamau in their capacity as occupants for 31 years and or purchasers.
 - c. That the Honourable court be pleased to stay, nullify and revoke the grant and letters of administration issued on 8th October 2020 pending inter-parties hearing of this application
 - d. That the Honourable court do stay, revoke nullify and set aside the confirmed grant dated 19th October 2020 and letters of administration and or any other pending hearing and determination of this petition.
 - e. That the Honourable court do issue and order restraining, stopping, barring and stopping any adverse dealing or dealing with all that land known as Nyandarua/South Kinangop/811



measuring approximately 34.5 acres or its incisions including occupying, sue, subdivision, transfer, registration, trespass and cultivation or at all pending hearing and termination of this application and succession cause.

- f. That the Honourable court do include the interested party as a beneficiary and any other bonafide purchaser for value in respect to all the land known as Nyandarua/South Kinangop/811 and subsequently take out viva voce evidence of the interest of the parties/applicants herein.
 - g. That the costs of the application to be in cause.
2. The application is based on the grounds thereto and an affidavit of the even date sworn by the applicant, wherein it is stated that, the 1st applicant is the son of the late Dorcas Njeri Kahora. That between the year 1989 and 1990, late Dorcas Njeri Kahora and the 2nd and 3rd applicants bought parcels of land in Nyandarua/South Kinangop/811 from the deceased and paid the sale consideration.
 3. That, the families of the applicants resided on the said parcels of land they had purchased peacefully together with the children of the deceased even upon his demise. However, on 5th January 2021, illegal trespassers came to the land and attempted to and/or surveyed, subdivided, transferred and built a fence around the property leaving them landlocked and unable to access public utilities.
 4. That the petitioners falsely, fraudulently and without any right petitioned for the current succession, processed the grant and obtained a confirmed grant, without informing them of the succession cause despite them being bonafide purchasers and therefore the letters of administration and the confirmed grant dated 19th October 2020, be nullified and/or set aside.
 5. However, the application was opposed vide a replying affidavit dated 8th March 2021 sworn by Mwangi Nganga, the petitioner/respondent on his own and on behalf of the co-petitioner/respondent. He avers that the matter was concluded after a conclusive process that involved all the affected persons including the interested parties.
 6. That, the mother of the 1st applicant, the 2nd applicant and twenty (20) other parties who claimed to have settled on the land were represented by the firm of Kunini & Co Advocates in the matter. Further, the mother of the 1st applicant filed an affidavit with the same set of facts reintroduced in the present application contrary to the law on res judicata.
 7. Furthermore, the court made a site visit and went around the entire parcel giving audience to all parties claiming to be beneficiaries of the same. That, the applicants were physically present and were represented by their lawyers.
 8. That the court, in paragraph 35 of its judgment identified the interests of the applicants and pronounced itself on it and therefore there is nothing new to litigate. Further the succession cause began in 2008 in Nakuru High Court and continued to the current station and it is far-fetched that the applicants did not know about it.
 9. Furthermore, the applicants have been interfering and hindering implementation of the court's orders as per the Certificate of Confirmation of Grant by uprooting beacons placed during sub-division and the use of police and local authorities to harass any person trying to implement the same.
 10. The application was disposed of through filing of submissions. The applicants in their submissions dated 2nd December 2022 submitted that, article 40 of the Constitution recognizes the right to own property and article 6 guarantees the right to use and access land. That, being lawful purchasers, the court should allow them to state their evidence on the same as the sale took place before the demise



of the deceased. Further, the interest of an innocent purchaser for value was recognized in *Re Estate of Josephine Magdalene (deceased)* [2016] eKLR and *Re Estate of David Julius Nturibi Mitbinji-Deceased* [2012] eKLR.

11. It was submitted that the court has inherent jurisdiction as held in *Mesballum Waweru Wanguku v Kamau Kania* [1982 -88] 1 KAR 780 and prayed that the court recall titles that may have been issued to the petitioners and beneficiaries and further allow their application.
12. However, the respondent in their submissions dated 11th January 2023 gave a brief summary of the suit stating that by a chamber summons application dated 5th December 2017, the applicants through the firm of. Kunini & Co Advocates made an application to be enjoined in the suit.
13. That, on 8th February 2019, the applicants together with Phyllis Wanjiku Chege, the co-petitioner filed a consent on the mode of distribution. However, when Mwangi Nganga, the co-petitioner, made an application for confirmation of grant with his proposed mode of distribution, his co-petitioner filed an affidavit in protest and stated that the applicants herein were also beneficiaries.
14. That the applicants were well aware of the succession proceedings and this application is an attempted to sneak in this matter an appeal disguised as an application for revocation of grant. Further, the application is an abuse of the court process, brought in bad faith and an act of perjury.
15. That the petitioners and recognized beneficiaries have already engaged a surveyor and subdivided the suit property into smaller parcels as per the judgment of the court. Further, the matter has been in the court for the last 14 years and re-opening the matter will rope in numerous fresh parties and be the worst case scenario.
16. It is urged that litigation must come to an end and if the applicants are aggrieved by the decision of the court they can approach the Environmental and Land Court and file a suit for adverse possession against any person they deem fit.
17. After considering the matter herein in the light of the arguments advanced by the parties and materials produced I find that the issues for determination are inter alia whether, the application is Res Judicata, the prayers sought should be granted and who will bear the costs.
18. The analysis of the facts herein reveals that, by memorandum of appearance dated 4th December 2017, the interested parties in the succession cause at the time were; Dorcas Njeri Kihome, Stephen Kaburi Githungu and 20 others, who includes the applicants herein (as per their description of the parties herein). Therefore, the applicants have all along been parties to the proceedings herein.
19. As such it is insincere to aver (as stated in their respective supporting affidavit) that, “the petitioners did falsely fraudulently and without right petitioned for this succession cause without notifying me and/or my relatives or interested third parties, hence prejudicing and embarrassing us” (see paragraph 6 of affidavit sworn by Peter Wainaina Kahora and paragraph 5 of Stephen Wahome’s affidavit).
20. Similar sentiments to the effect that; “That, I aver that an inquiry, I realized that, the succession in this matter had gone on crudely and at no information to us hence this application” (See paragraph 5 of affidavit of Stephen Githunga Kabiri).
21. Furthermore, from the evidence on record that, the applicants produced in this matter the same documents produced herein being inter alia; an affidavit sworn by Dorcas Njeri Kahora whose contents mirror the averments in the affidavit by the 1st applicant, Peter Wainaina Kahora, other documents duplicated include consents from the Land Control Board.



22. In the same vein, and to concrete it, the ruling delivered by the Hon. Justice R. Mwangi on 8th October 2020, clearly dealt with the applicants claim of being bonafide purchaser for value hence beneficiaries. It is therefore clear that, there are no new issues herein and indeed, the issues raised herein were heard and determined in the subject judgment by Hon. Mr. R. Mwangi.

23. It is therefore the finding of the court that, this matter is *Res Judicata*. The doctrine of res judicata is governed by the provisions of section 7 of the [Civil Procedure Act](#) that 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.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

24. In the decision of this court *Malezi Preparatory School Ltd v Ecobank Kenya Limited* [2020] eKLR it was held that:

“ 14. The principle of res judicata is founded upon the principles of justice, equity, and good conscience. The purpose of this principle is to inculcate finality into litigation, and the rationale behind the principle is that; an issue or cause of action fully litigated should not be litigated again.

15. Res Judicata includes two concepts of; claim preclusion and issue preclusion. Issue preclusion is also known as collateral estoppel. Parties cannot sue each other again after the final judgment on the basis of merits has reached in civil litigation.

16. Indeed, when addressing a res judicata argument, a court will look at three factors. First, the court will consider whether there was previous litigation in which identical claims were raised, or in which identical claims could have been raised. The second factor to be considered is that the parties must be the same parties as those who litigated the original action. The third factor is that the original action must have received final judgment on the merits.



17. A "transaction or occurrence" test is usually used by the court to determine whether claims could have been raised in previous litigation; that is, if the two claims are based on the same transaction or occurrence, they must be brought in the same action.
18. In the case of; *Henderson v Henderson* [1843] 3 Hare 100, 67 ER 313, the English Court of Chancery, confirmed that a party may not raise any claim in subsequent litigation which they ought properly to have raised in a previous action, and in the case of *Mathura Prasad v Dossibai N.B. Jeejeebhoj* 1971 AIR 2355, 1970 SCR (3) 830, it was held that Res Judicata constitutes between the parties to the previous case and cannot move again in collateral proceedings. Generally, a decision by a competent court operates as res judicata even on point of law".
25. Having held the matter is Res Judicata, it is subject to being struck out with costs. I concur with the respondents that, if the applicants are aggrieved with the judgment herein, they should appeal.
26. To re-litigate issues dealt with to finality is an abuse of the court process and in fact, the affidavits sworn in support of the application that they are not aware of the succession matter amounts perjury.
27. Even then the matter has been in court since 2008, stated to be 14 years old and ought to come to an end one way or another. The judgment was delivered 8th October 2020.
28. The upshot is that the application is struck out for being *Res Judicata* with costs to the respondent.
29. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 9TH DAY OF MAY 2023

GRACE L. NZIOKA

JUDGE

In the presence of:-

Mr. Gachengo Gitau for the Petitioner

Mr. Kimani for the interested party/applicants

Ms Mwaluko holding brief for Mr. Maina for the Petitioner

