



In re Estate of Augustine Khaemba Katami (Deceased) (Probate & Administration 56 of 1999) [2023] KEHC 20779 (KLR) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PROBATE & ADMINISTRATION 56 OF 1999**

DK KEMEL, J

JULY 21, 2023

**IN THE MATTER OF THE ESTATE OF AUGUSTINE
KHAEMBA KATAMI(DECEASED)**

BETWEEN

GEORGE KHAEMBA MUMALI PETITIONER

AND

PATRICK SIKUKU KHAEMBA 1ST OBJECTOR

ROSEMARY NASIMIYU KHAEMBA 2ND OBJECTOR

AUGUSTINE WEKESA KHAEMBA 3RD OBJECTOR

RULING

1. The application dated January 20, 2023, lodged by the objectors /applicants is premised under the provisions of section 76 of the [Law of Succession Act](#) and rule 44, 45 & 49 of the [Probate and Administration Rules](#). The objectors/applicants seek an annulment and/or revocation of the grant of letters of administration issued to George Mumali Khaemba on May 13, 2014; that a new grant be issued to a new administrator in place of the Petitioner/Respondent; that the sub-divisions creating new titles LR Nos East Bukusu/South Kanduyi 21673, 21674, 21675, 21671, 21677, 21678, 21679, 21680, 21681, 21682 and 21683 be cancelled and the same be reverted to LR No East Bukusu/South Kanduyi/514 in the name of the deceased herein and that the costs of the application be provided for. The application was premised on the following grounds that;
 - a. The grant was obtained fraudulently by making a false statement and by concealment of some material facts from the court.
 - b. The petitioner/respondent failed to list all of the deceased's dependents/beneficiaries in the list of distribution of the rectified grant.



- c. The petitioner/respondent is in the process of evicting the deceased's beneficiaries from land which devolves from the estate of the deceased.
 - d. Lack of disclosure of material facts that will waste away the deceased estate.
2. The application is supported by the grounds on the face of the application and by a supporting affidavit of the 3rd objector/applicant herein, the supporting affidavit dated February 6, 2023 sworn by the 2nd objector/applicant and the supporting affidavit sworn by Stellah Nelima Khaemba, Agnes Nasike Khaemba and Pasilisa Natecho Wafula dated February 9, 2023.
 3. In response to the application, the petitioner/respondent swore a replying affidavit dated February 2, 2023, arguing that the objectors/applicants application is an abuse of the due process of this Court as the same is defective, frivolous, vexatious and lacks merit. He averred that this instant application seeks similar orders to the application dated June 9, 2015 filed by the 1st objector which was dismissed together with the application dated November 16, 2022 filed by the 2nd objector and thus a duplication of proceedings and an abuse of the court process.
 4. He argued that he was substituted vide an order made on May 13, 2014 and all the beneficiaries to the estate of the deceased were included in the process and duly served. He further argued that prior to his substitution, the grant of letters of administration were already confirmed on September 8, 2000 by the Honourable Justice A G Ringera (now retired).
 5. He deponed that the matter was duly filed in court by the deceased administrator Mark Paul Mumali with the consent of all the beneficiaries to the estate of the deceased and the purported omitted beneficiaries never raised any objections.
 6. He argued that the 3rd objector/applicant is a son to the deceased beneficiary Alfred Ondenya Khaemba and whose share was given as per the certificate of confirmation of grant and title number was duly issued as East Bukusu/South Kanduyi/21682 measuring 0.57Ha.
 7. He deponed that in case of any concealment of facts, as alleged, the same ought not to be visited upon him. He further averred that out of the eight beneficiaries in the confirmation of grant, it is only three beneficiaries who are alive ie Patrick Sikuku Khaemba (1st objector), Gilbert Munyefu Khaemba and Ezekiel Katami Khaemba, and that both Gilbert and Ezekiel swore respective affidavits dated January 20, 2023 opposing the application
 8. The 1st objector in response to the application, filed his replying affidavit dated February 14, 2023, filed on even date deposing inter alia; that the petitioner mislead the court and did not name all the beneficiaries of the estate of the deceased herein and that he went on to illegally subdivide the land of the deceased without obtaining consent from the beneficiaries; that the petitioner is the grandchild to his father and he does not qualify to administer the estate of the deceased.
 9. In response to the replying affidavit of the 1st objector, and supporting affidavit sworn by Stellah Nelima Khaemba, Agnes Nasike Khaemba and Pasilisa Natecho Wafula dated February 9, 2023, the petitioner/respondent filed a further affidavit dated February 22, 2023 and filed on March 1, 2023, where he reiterated that the daughters of the deceased were well aware of the succession cause since its inception on August 2, 1989 and registered no objections then. He deponed that the present application is baseless, abuse of due process of the court and that the same lack merits. He urged this court to dismiss the same with costs.



10. Upon perusal of the court record, i do not see any replying affidavits sworn by Ezekiel Katami Khaemba and Gilbert Khaemba Munyefu on February 2, 2023. Nonetheless, I shall proceed to capture the responses of the parties to the same.
11. In response to the replying affidavits of Ezekiel Katami Khaemba and Gilbert Khaemba Munyefu dated February 2, 2023, Stellah Nelima Khaemba, Agnes Nasike Khaemba and Pasilisa Natecho Wafula swore a further affidavit on February 28, 2023 averring that no consent was ever obtained from them indicating that they were in agreement with the distribution of the deceased's estate by the petitioner/ respondent.
12. In response to the replying affidavits of Ezekiel Katami Khaemba and Gilbert Khaemba Munyefu dated February 2, 2023, the 2nd & 3rd objectors/applicants swore a further affidavit dated February 24, 2023 and filed on March 3, 2023, they averred that the 3rd objector/applicant's application dated January 20, 2023 is not defective, frivolous and vexatious, and that the same is not a duplication of proceedings since the application for revocation of grant by the 1st objector dated November 16, 2022 was withdrawn on January 23, 2023. They averred that consent was not obtained from the daughters of the deceased but only the sons and that some of the beneficiaries raised concerns with the area chief at Musikoma.
13. Directions were given on the 15th February 2023 that the matter proceeds by way of written submissions. All the parties have duly filed their submissions with the exception of the 2nd objector/ applicant.
14. This court has duly perused the pleadings, affidavits, respective submissions and relied upon authorities submitted by all the parties. Basically, they are pulling on their respective corners and all that they state is a reiteration of what is contained in the rival affidavits outlined above.
15. Having considered the application, the affidavits in support and in opposition as well as the respective submissions of the parties, it is my view that the main issues for determination by this court are as follows:
 - a. 'Locus standi'
 - b. Whether the application dated January 20, 2023 is res judicata;
 - c. Whether the application dated January 20, 2023 should be allowed.

Locus Standi'

16. It is essential in this matter for the court to determine whether the objectors/applicants have 'Locus standi'. The term 'locus standi' connotes the right of a party to bring an action. It seeks to determine whether a party has properly brought an action or is properly before the court. There are many decisions on the subject from the court and to quote the decision in the case of *Michael Osundwa Sakwa -v- Chief Justice and President Supreme Court of Kenya & Another* [2016] eKLR which referred to the matter of Ms *Priscilla Nyokabi Kanyua -v- Attorney General & IEBC*, Nairobi HC CP No 1/2010 stated that:-

“In Kenya, the court has emphatically stated that what gives Locus Standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that it would not be more affected than any other member of the population.”



17. Such interest ought to be vested legal interest giving the party a right to enforce the claim by way of a lawsuit. It follows that for a party to have a locus standi, he must have a vested interest in the subject matter before Court. ‘Locus standi’ is a point of law that touches on the jurisdiction of the court. In the *Law Society of Kenya –v- Commissioner of Land & Others*, Nakuru HCCC No 464/2000 the court stated that, “locus standi’ signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in a court of law.”
18. The dispute herein is a succession matter. The 2nd and 3rd objectors/applicants joined this suit vide an application dated January 20, 2023. Their prayers are that;
- “That a new grant be issued to a new administrator in place of the Petitioner/Respondent; that the sub-divisions creating new titles LR. Nos. East Bukusu/South Kanduyi 21673, 21674, 21675, 21671, 21677, 21678, 21679, 21680, 21681, 21682 and 21683 be cancelled and the same be reverted to LR No East Bukusu/South Kanduyi/514 in the name of the deceased herein and that the costs of the application be provided for.”
19. Based on the grounds on the face of the application, I am of the view that the 2nd and 3rd objectors/applicants have a vested legal interest in the estate of the deceased as the legal representatives of the deceased’s sons of the estate of the deceased.

Whether the Application Dated January 20, 2023 is Res Judicata.

20. The vital examination for determining the application of the doctrine of res-judicata in any given case is spelt out under section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
- “(a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) 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.”
21. Section -7- of the *Civil Procedure Act* 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.”
22. There are three conditions which have to be satisfied for the court to apply the doctrine. These are:-
- i) There is a former suit or proceeding in which the same parties in the subsequent suit had litigated.



- ii) The issue 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.
23. The core essence of the doctrine of res judicata is ensuring that litigation must come to an end and affords litigants an end and a respite from being faced with a vicious circle of disputes which have been determined by a competent court being taken back and forth. It is designed to protect litigants from time and resource consuming endless litigation. Without such control which the doctrine is meant to ensure, there would be endless litigation by parties filing multiplicity of suits in different courts hoping to obtain favourable outcomes. Judicial process would thus be abused and brought to disrepute. The basis for the doctrine being embedded in the civil procedure is to ensure public confidence in the finality of decision made by the courts.
24. The doctrine applies in disputes of civil nature where the circumstances of the case would allow a party to raise it. The application of the doctrine to succession matters would depend on the circumstances of the matter in issue. It is my humble view that considering the role the doctrine of res judicata serves, it is applicable in all disputes of civil nature including succession matters, where the conditions for the application of the doctrine exists, the doctrine can be successfully argued in succession disputes.
25. In light of the constitutional imperative under article 159 of the *Constitution of Kenya, 2010* on expedition in the resolution of disputes, there must be expeditious disposal of the administration of estate proceedings for the good of all parties, relying on the evidence and the law and using just means to achieve just ends.
26. This court in a ruling dated July 7, 2022 did put at rest this matter before all the parties. The 1st objector vide an application dated June 9, 2015 sought an annulment and/or revocation of the grant of letters of administration confirmed on September 8, 2000 and that he be appointed as the Administrator of the estate of the deceased herein. This court in that ruling dismissed the said application that had been lodged by the 1st objector/applicant herein.
27. There is no doubt that this matter was dealt with effectively by a court of competent jurisdiction.

Whether the Application Dated 20th January 2023 Should be Allowed.

28. I have clearly established that the application before this court dated January 20, 2023 is res judicata, this simply means that this court is functus officio.
29. The *Black's Law Dictionary*, Ninth Edition defines the describes functus officio as: -
 “[having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”
30. In *Raila Odinga –Vs- IEBC & 3 Others* Petition No 5 of 2013 the Supreme Court of Kenya cited with approval the following passage from “*The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law*” by Daniel Malan Pretorius: -
 ...“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has



been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

31. In light of the above, does the current court have jurisdiction over this matter? Jurisdiction goes into the heart and soul of any proceeding. In this regard, the question of jurisdiction should not only be raised at the earliest opportunity, but it must be the first issue to be resolved from the outset.
32. In the celebrated Court of Appeal decision in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi JA famously held: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.

A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
33. Disputes in the administration of estates of the deceased must be disposed of expeditiously for the good of all the parties. Delay only serves to escalate the dispute and bar parties from enjoying their inheritance. This matter has been pending since 1999. It should come to an end one way or the other.
34. I am of the view that this application is not actuated by the need for just determination of the dispute but meant to delay the conclusion of the matter. It is once again evident that the present application is meant to forestall the process of distribution of the estate of the deceased and to serve the purpose of checkmating the petitioner/respondent in these proceedings. This the Court will not entertain such.
35. In the result, it is my finding that the application dated January 20, 2023 is without merit. The same is dismissed. Each party to bear its own costs.

DATED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF JULY 2023.

D. KEMEI

JUDGE

In the presence of:

Wamalwa for Murunga for Petitioner/Respondent

No appearance Kundu & Simiyu for Objectors

Kizito Court Assistant

