



**Chomboi v Chepkuto & another (Civil Appeal E017 of 2023)
[2024] KEHC 13700 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13700 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL E017 OF 2023
RB NGETICH, J
NOVEMBER 7, 2024**

BETWEEN

AMOS CHOMBOI APPELLANT

AND

CHEMJOR CHEPKUTO RESPONDENT

AND

CHEMJOR CHEPKUTO APPLICANT

RULING

1. The Application dated 15th February,2024 seeks the following orders:-
 - i. That the Applicant herein Cosmas Chemjor be substituted as the Respondent/administrator of the estate of the deceased herein in place of Chemjor Chepkuto who passed away on 16th November,2020.
 - ii. The costs of this application be provided for.
2. The application is founded on the grounds that the Applicant is the son of the late Chemjor Chepkuto the deceased Respondent/administrator herein. That the Applicant has obtained limited grant of letters of administration intestate for the Estate of Chemjor Chepkuto and the chiefs letter issued to the family of Chemjor Chepkuto(deceased) confirms the Applicant’s relationship and it is only just that this application be allowed as prayed.
3. The application is supported by an affidavit sworn by the Applicant Cosmas Chemjor sworn on the 15th February,2024. He avers that Chemjor Chepkuto(deceased) died on 16th November, 2020 and that he is the son of the late Chemjor Chepkuto, and one of the administrators of the Estate of Chemjor Chepkuto (deceased) Respondent herein; and the chief’s letter issued to the family of Chemjor Chepkuto (deceased)on 5th October,2023 confirms his relationship.



4. That the instant Appeal specifically relates to land parcel No. Pokor/Keбен/Kures/83 which has been a subject to litigation in several courts namely the High Court at Nakuru, the court of Appeal and the Environment and Land court. That he is a party to the suit filed in the Environment and Land court in Nakuru and that the land parcel No. Pokor/Keбен/Kures/83 is a subject of the intended objection proceedings by the Appellant herein in Kabarnet High court Succession cause No. E010 of 2023.
5. That his substitution for Chemjor Chepkuto(deceased) is necessary as an administrator to participate in the instant proceedings.

Response

6. The Appellant in response to the Application filed a notice of Preliminary Objection dated 28th February, 2024 raising the following grounds: -
 - i. That the Application dated 15th February, 2024 is res judicata; a similar application dated 30th January, 2023 by the same Applicant against the present Applicant where the same applicant sought similar reliefs before a court of competent jurisdiction (Kabarnet Chief Magistrate's court Succession Cause No. 05 of 1991-Estate of the late Chepkuto Arap Birir -Chemjor Chepkuto(Applicant) versus Amos Chomboi (Respondent) where Hon. J. Wanjala C.M pronounced herself on 31st May, 2023.
 - ii. That the present applicant neither appealed nor applied for review against the court's Ruling of 31st May, 2023 but instead filed another similar application dated 6th July, 2023 seeking similar reliefs in the same court which upon consideration by the Learned Senior Principal Magistrate Hon. P. Koskey, the application was struck out for being res judicata with costs to the present Appellant on 7th September, 2023. No appeal was filed against this decision.
7. The Appellant urges this court to invoke section 47 of the *law of succession Act* and Rule 73 of the Probate and Administration Rules and find that the Application dated 15th February, 2024 is res judicata and strike it out with costs to the Appellant/Respondent which costs to be borne by Cosmas Chemjor in person.
8. On 8th April, 2024, this court gave directions that the application and the preliminary objection proceed by way of written submissions so that the court will first determine the preliminary objection first and if the objection is upheld, it will stop there and if the preliminary objection is dismissed, the court will proceed to consider the prayers in the application.

Applicant's Submissions

9. By submissions dated 27th May, 2024 and the applicant submit that he has invoked the provisions of Rule 73 of the succession rules and invited the court to exercise its inherent powers to make such orders as may be necessary for the ends of justice and to prevent an abuse of the court process. That the instant appeal was filed on 13th December, 2023 and served upon counsel for the deceased Respondent. That the deceased having died by the time the appeal was being served, an application dated 15/02/2024 was made to court that the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case.
10. They submit that the Preliminary Objection dated 28th February, 2024 has been raised against the intended substitution. That they seek to distinguish the instant application dated 15th February, 2024 and the one dated 30th January, 2023 which was canvassed in the lower court. That in the lower court, the applicant did not have the capacity as contemplated in Section 2 of the *Civil Procedure Act*.



11. That the Applicant in the instant application was issued Letters of Administration Intestate issued on 8th February, 2024 by this honorable court. That the evidence in the form of "Annexure CC3" has been tabled to show that the Applicant indeed is a person contemplated by the above definition, that is to say, the legal representative of the estate of the Respondent. That the rules of substitution require substitution of a party clothed with legal representation.
12. On whether this Court can permit the substitution of the deceased Respondent by the said the Applicant, the applicant argues that in law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act.
13. That the Law of Successions Act provides the procedure to be followed in the application for such a grant, and the various forms a grant may take including letters of administration. Further that Section 54 of the Act provides that a Court may limit a grant of representation which it has jurisdiction to make in any of the forms described in the Fifth Schedule.
14. That it is not in doubt that the Applicant has followed the aforesaid procedure in seeking a legal representative of the deceased Respondent's estate and submit that the Applicant intends to substitute the deceased Respondent in the instant Appeal as per the provisions provided in the Succession Act for the purposes of the pending proceedings and the Applicant has provided material to this court to support his assertion that indeed he is such legal representative of the deceased Respondent.
15. That it is important to note that the deceased Chemjor Chepkuto and the Applicant (Cosmas ChemjoR) have been sued by the Objector in relation to land parcel No. Pokor/kures/83 which is a subject matter in the instant succession Appeal which interestingly has been a subject of litigation and has been determined by the court of Appeal and ELC court in favour of Chemjor Chepkuto and the deceased. That a copy of the court of Appeal judgment and a copy of the ELC Order striking out the suit filed subsequent to the decision of the court of Appeal are available in the lower court file which this honorable court will have opportunity to peruse and appreciate.
16. The Applicant further submit state that the objector abandoned the objection proceedings which related to POKOR /KURES/83 in the Succession cause No. 5 of 1991 filed at the lower court for a period of over 28 years as he pursued Nakuru HCC NO. 644 OF 1991(OS) wherein the deceased respondent and the Applicant were parties.
17. That the objector is in essence attempting to revisit the issue of ownership of the property POKOR/ KURES/83 which has already been adjudicated and determined in by the court of Appeal. That litigation must come to an end and this honourable court should not be invited to adjudicate on issues already determined by the court of Appeal. That the Preliminary objection as filed is intended to deny the applicant an opportunity to bring to the attention of this honorable court the mischief of the Appellant; and urged this court to allow the applicant's application herein and the preliminary objection dismissed.
18. That Article 159 of the Constitution vests judicial authority in the courts to be exercised in accordance with the principles enumerated therein which principles include protecting purposes and principles of the constitution and administering justice without undue regard to technicalities.
19. They submit that the discretionary powers of the court are constrained by the objectives of the Constitution to grant access to justice which calls for an overall assessment in the light of the facts outlined above and an assessment of circumstances under which the application in the lower court was dismissed to arrive at a decision reflective of administering justice without undue regard to procedural technicalities.



Analysis And Determination

20. Preliminary Objection was described in the Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696 to mean: -

“So far as I am aware, 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 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”.

21. The point of law raised by the preliminary objection is that the application before court is res judicata. The issue for determination is whether this suit falls on all fours of section 7 of the Civil Procedure Act which stipulates 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.”

22. The Applicant vide chamber summons 30th January, 2023 filed in the lower court sought to substitute the name of Chemjor Chepkuto (deceased) with that of the Applicant Cosmas Chemjor who is the deceased's son. The Respondent/Applicant's argument is that the present application has been heard and determined by the Ruling delivered by Hon. J. Wanjala on the 31st May, 2023.

23. In the case of Henderson vs Henderson (1843) 67 ER 313 res-judicata was described as follows: -

“...where a given matter becomes the subject of litigation in, and 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 litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas 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”.

24. I have perused the lower court file and confirm that the applicant filed application dated 30th January 2023 seeking the same orders sought in the application herein. A ruling on the application was delivered by Hon. Wanjala on 31st May 2023. He filed similar application dated 6th July 2023 and was dismissed by Hon. P. Kosgey on 7th September 2023 on ground that the matter had been determined between the same parties by Hon. Wanjala. The applicant herein did not appeal against the decision of the two Learned Magistrate nor filed review but has instead chosen to file the application herein seeking the same order against the same party. The issue having been dealt with by a court of competent jurisdiction and applicant having failed to appeal, the issue is settled; the matter is Res judication and this is abuse of court process.



25. Final Orders: -

1. Preliminary objection dated 28th February 2024 is hereby upheld.
2. Application dated 15th February 2024 is hereby dismissed with costs to the Respondent.

RULING DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 7TH DAY OF NOVEMBER 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

1. Elvis – Court Assistant.
2. Mr. Karanja for Applicant.
3. Mr. Tombe for Respondent.

