REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO. 15 OF 2018

(FORMERLY MERU HIGH COURT SUCC. CAUSE NO. 2020 OF 1996)

IN THE MATTER OF THE ESTATE OF THE LATE ISHMAEL MUCHIRI NKINYANGI alias ISMAEL MUCHIRI NKINYANG alias MUCHIRI NKINGANGI (DECEASED)

FRANCIS NJERU MUCHIRI.....APPLICANT/ADMINISTRATOR

VERSUS

MERCY KAMBURA MUCHIRI....RESEPONDENT /PROTESTOR

R U L I NG

The applicants filed a summons under a certificate of urgency dated 12/11/2020 seeking orders that status quo ante be ordered pending the hearing and determination of the application. That the Deputy Registrar of this court be ordered to supervise the sub-division of land parcel no. Mwimbi/Murugi/253 in accordance with the certificate of confirmed grant. She further prays that the court do order the County Surveyor and County Land Registrar to cancel land Title No. Mwimbi/Murugi/5754 to 5766 and the occupation and the development by the dependants.

1. The application is based on the grounds that the grant has been implement and the respondent has not factored in the applicants developments. That they have been placed in a sloppy and inhabitable to land and unless the process is re-done they shall be rendered landless and destitute.

2. To this application, the respondent filed grounds of opposition dated 17/11/2020 and the gist of contention is that the application is *res-judicata* and the court is functus officio in so far as the issue of survey exercise is concerned. It is contended that the surveyors report was adopted by the court which gave a ruling on 10/3/2020.

3. There is another summons dated 17/11/2020 filed by

- Mercy Kambura Muchiri
- Fridah Nkirote Muchiri
- Purity Igonji Mugendi
- Evalyn Mukwanyaga Ismael.
- Catherine Kamuru Ismael.

Mercy Kabura is the respondent in the summons dated 12/11/2020. These applicants are seeking orders that the respondent do vacate the various land parcels which they have listed being Mwimbi/Murugi/5759, to 5761, 5755 and 5763. They play that failure by the respondents to vacate willingly, the applicants be at liberty to forcibly evict them under the supervision of the OCS Chogoria police station. The contention by the applicants is that the respondents have violently refused to allow the applicants to take possession of their respective portions. The 5th respondents has interfered with the peaceful access by the 1st applicant. That the respondents have damaged all the building material utilized by the applicants to fence their respective portion. They further contend that the dispute was determined by this court and the respondents have not filed an appeal to challenge the decision.

4. The respondents filed an affidavit sworn by Julian Wambeti Mugambi on 30/11/2020 reiterating the ground in support of the application dated 12/11/2020.

5. On 19/11/2020 the court directed that the applications be heard together. The court also directed that the application be disposed off by

way of written submissions.

For the applicants in application dated 12/11/2020, the submission were filed by Kijaru Njeru Advocates for the applicants. For the respondents, submissions were filed by Basilio Gitonga Murithi and Associates. I have considered the applications and all the matters which have been raised by the parties. The issue which arises for determination is whether a re-survey of the estate should be carried out under the supervision of the Deputy Registrar of this court.

The application is brought under section 48 of the law of succession Act and all the other enabling provisions of the law.

The section is not relevant and does not give the court jurisdiction to make the orders which the applicant is seeking. The party is bound by his pleadings. This matter took long to come to the present position where the applicants in the application dated 12/11/2020 are seeking orders to set aside the orders of my brother Justice Limo and issue fresh orders. I will retrace the journey for ease of reference. The grant was confirmed on 18/7/2018. Thereafter, there does not seem to have been any objection to the mode of distribution of the estate.

6. An application dated 29/8/2018 was filed but was only seeking rectification of the grant to correct the names of the deceased. The application was allowed.

7. The applicant Mercy Kambura filed application dated 2/10/2018 seeking orders that the Deputy Registrar executes the documents on behalf of the petitioner. The application was allowed. Another application was filed by Francis Njeru seeking orders that survey works conducted on 10/4/2019 be nullified and the court do issue orders for fresh sub-division of LR Mwimbi/Murugi/253. After considering the application, the parties were directed to seek a settlement outside court. On 12/6/2019 the court directed the County Surveyor to visit the estate and conduct survey works and sub-division pursuant to certificate of confirmation of the grant issued by this court. The court went ahead to order that the survey/subdivision to as much as possible take into account developments especially permanent structures that are put up by the respective beneficiaries in order to as much as much as possible preserve them for the benefit of the respective beneficiaries. The court further directed that all the parties be involved.

On 18/10/2019 the District Surveyor presented her report in court. Mr. Kirimi then appearing for the applicant said they were dissatisfied with the work. The judge proceeded to give a ruling dated 24/10/2019 and directed the District Surveyor to go to the ground under the company of police officers provided by OCS Chogoria and confirm whether the work done by the surveyor is correct as per the confirmation of the grant. The court ordered the surveyor to file a report in court. The surveyor complied and filed a report. The Judge noted that the surveyor took into consideration the existing developments as much as it was practicable. The Judge then held that in view of the report dated 1/11/2019 by the District Surveyor the matter was marked as settled.

8. As if that was not enough, two applications were filed, one by Francis Njeru dated 17/11/2019 and another dated 4/12/2019 by Mercy Kabura Muchiri. The ruling in the two applications was delivered on 10/3/2020 and the Judge stated that he did not find any basis to maintain an impediment to the realization by the applicant of the fruits of her litigation.

9. My view is that Justice Limo heard the parities and dealt with all the concerns by the parties with regard to the survey. The Judge confirmed that the sub-division was done as much as practicable in accordance with the distribution ordered in the confirmed grant and took consideration of the developments on the land.

I have looked at this background to show that his matter was dealt with at length by **Justice Limo** who ensured that the distribution of the estate took into account. The developments on the ground and each beneficiary got its rightful share as per the confirmed grant. It is trite law that I cannot sit on appeal on the decision by my brother Justice Limo with whom I have concurrent jurisdiction. The principle that litigation must come to an end holds in this matter. My view is that no one court can make a determination in a contested dispute like the one herein which will satisfy all the parties. That is why the law provides that there must be an end to litigation in one way or the other. The respondent has raised the issue of *res-judicata.*

The test 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."**

In the cases of **Nguruman Ltd vs Jan Bande Nielsen & another (2017) eKLR**; DSV **Silo vs the Owners of Sennar (1985) 2 All ER 104 as cited in Bernard Mugi Ndegwa vs James Nderitu Githae & 2 others (2010) eKLR.** The case of **Henderson vs Henderson (1843) 67 ER 313** has also been cited where 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".

The court must always be vigilant to guard against litigants bent on evading the doctrine of res judicata by raising new matters with a view to approach the court seeking the same remedy before the same court. The test is whether the party in subsequent suit is attempting to bring before the court in another way and inform of anew cause of action which has been determined by a court with competent jurisdiction. See ***E.T. -v- Attorney General & Another (2012) eKLR.***

The application before me is not seeking to set aside or a review of the orders issued by Justice Limo. It is seeking an order for resurvey. As I have analysed the background above, the land was surveyed, a resurvey was ordered and yet another survey was done culminating in the Judge marking the matter as settled.

The Respondent did manage to employ the services of a surveyor who did subdivide the estate herein; but due to the dissatisfaction of the 1st Applicant, another exercise of survey was ordered by the court.

The court did note that the surveyor had already done his work and placed a report on record; the court went ahead to make orders based on that report.

With regard to the Sub County's surveyor's report dated 1st.11.2019, it is indicated that the survey did put into consideration the permanent structures on the ground access roads which are key in planning.

It is clearly on record that the report was produced before the court and the counsel for the Applicant's having felt that the County Surveyor never carried out the survey, the court ordered that the Surveyor appears in court; the counsel representing the Applicants were granted an opportunity to cross examine on the same.

Expounding further on the essence of the doctrine this Court in ***John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR*** pronounced itself as follows:

> "The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

That the essence of the principles of res-judicata is to not only protect the courts from disrepute, but also to protect litigants from unending litigation, that this principle is so classic in that it includes points or issues that ought to have been brought before the court but which did not find their way there due to the inadvertence of the parties or their counsel.

In light of the constitutional imperative under Article 159 of the constitution on expedition in the resolution of disputes, there must be expeditious disposal of the administration of estates for the good of all parties, relying on the evidence and the law and using just means to achieve just ends. This is a fairly an old matter dating from the year 1994 and thus it should come to an end so that even the beneficiaries herein can realize their inheritance.

There is no doubt that this matter was dealt with effectively by a court of competent jurisdiction.

Whether the court is functus officio.

The **B**lack's Law Dictionary, Ninth Edition defines the describes *functus officio a*s: -

> **"[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."**

The rule of *functus officio* has exceptions. **Section 99** of the **Civil Procedure Act** establishes the slip rule it provides that: -

> **"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."**

The Civil Procedure Rules provides under **Order 21 Rule 3 (3)** that: -

> **"A judgment once signed shall not afterwards be altered or added to save as provided by section 99 of the Act or on review."**

The law allows for the correction of the judgement but not its merits. *The Court of appeal in* ***TELKOM KENYA LIMITED CASE*** *(supra) also held that: -*

> **"The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions..."**
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> The application for review by the applicant pointed to the fact that his name had been struck out by the amendment to the plaint and the court ought not to have attached liability to a 1st defendant who did not exist and dismissed the case of a 2nd and 3rd Defendant whilst the suit only had two defendants, which did not include the appellant, at the time of the hearing and decision making. The court due to these circumstances was not functus officio and was not barred from reviewing the judgment.

Similarly 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 Pretorious**:-

> **..."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."**

In addition the Supreme court also referred to the case of **Jersey Evening Post Limited –Vs- A. Thani [2002]JLR 542** at pg. 550 where the Court stated:-

> **"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available." [own emphasis]**

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.

In **Republic v Karisa Chengo & 2 others [2017] Eklr,** the Supreme Court of Kenya held: -

> "Jurisdiction" has emerged as a critical concept in litigation. Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350 thus defines "jurisdiction" as "…the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision." John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term 'jurisdiction' as follows: -
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> "By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.
>
> The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.
>
> A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics…. Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given".

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.".

I am of the view that the matters which the applicants are seeking in the application dated 12/11/2020 are *re judicata*. This court is *functus*

officio in so far as the issue of the survey of the parcel of land comprising the estate of the deceased is concerned. In deed Justice Limo observed that the conduct of the applicants is aimed at delaying the conclusion of the distribution of the estate of the deceased.

The emerging jurisprudence and the law as laid down in the constitution is that disputes ought to be resolved expeditiously. **Section 159 (2) (b**) **of the Constitution** provides that;

> **" In exercising judicial authority the courts and tribunals shall be guided by the following principles.**
>
> **(b) Justice shall not be delayed."**

Finally disputes in the administration of estates of the deceased must be disposed off 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 1994. It should come to an end one way or another.

Having carefully considered the proceedings before Justice Limo, I am of the view that the application is not actuated by the need for just determination of the dispute put but it meant to delay the conclusion of the matter. This the court will not entertain. I find that the application dated 12/11/2020 is without merits and it is dismissed.

10. With regard to the application dated 17/11/2020 the issue for determination is whether the respondents should be ordered to move to their respective portions.

The application is brought under Section 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules. **Section 47** provides:

> **" The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice."**

7The applicants in this application are contending that the estate had been distributed with finality and all the beneficiaries have obtained their respective title deeds. The applicants pray that the matter be concluded to its finality.

11. The grant in this matter was confirmed on 18/2/2018. The distribution of the estate was in accordance with the occupation of the dependants on the ground. Survey was done and the ensured and indeed confirmed that subdivision respected the developments on the ground. The surveyors report was tabled in court and forms the record of this court. The court gave the parties an opportunity to cross-examine the surveyor. There was no allegation that the surveyor did not comply with the order to respect the development and the occupation of the parties on the ground. There is no pending application for revocation of grant and there is no challenge to the mode of distribution and the identification of the shares of the beneficiaries. This matter was settled. There is no allegation that the applicants' are seeking to demolish buildings and indeed the surveyor indicated that precaution was to ensure that no buildings would be affected by the boundaries created for each sub-division. There is no matter standing on the way of the implementation of the grant. I find that this application has merits. I grant the application as prayed in prayer No. 2 of the application dated 17/11/2020. It would not be in the interest of justice to allow the applicants to evict the respondents. The parties are family members and the execution of the grant should be done in a humane and civil manner. The parties to move to their respective portions within 30 days from today. In default the OCS Chogoria to provide security when the grant is enforced on the ground in the event that they don't comply. Each party to bear its own costs.

Dated, signed and delivered at Chuka this 4th day of March 2021.

L.W. GITARI

JUDGE

4/3/2021

The ruling has been delivered in open court.

L.W. GITARI

JUDGE

4/3/2021