



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**SUCCESSION NO. 231 OF 2012**

**IN THE MATTER OF THE ESTATE OF NCHOGU SAGANA (DECEASED)**

**BETWEEN**

**MORAA NCHOGU .....1<sup>ST</sup> PETITIONER /RESPONDENT**

**CHRISANTUS NCHOGU .....2<sup>ND</sup> PETITIONER/RESPONDENT**

**CATHERINE KERUBO NYANG'ATE.....1<sup>ST</sup> OBJECTOR/APPLICANT**

**JOYCE KERUBO NCHOGU..... 2<sup>ND</sup> OBJECTOR/APPLICANT**

**JOHN KAMANDA .....3<sup>RD</sup> OBJECTOR/APPLICANT**

**RULING**

1. This ruling disposes of two preliminary objections raised against the objectors' applications, both of which are dated 27<sup>th</sup> July 2020. The 1<sup>st</sup> and 2<sup>nd</sup> objectors filed an application seeking orders that;

- a. Spent;
- b. That the grant of letters of administration intestate made on 26<sup>th</sup> July 2012 and the subsequent confirmation thereof made on 12<sup>th</sup> April 2013 be varied and or annulled;
- c. The grant in respect of land parcel NYARIBARI CHACHE/ KEUMBU / xxx amended to include the objectors' names;
- d. That the subsequent sub-division into land parcel NYARIBARI CHACHE/KEUMBU/xxxx, xxxx and xxxx be cancelled; and
- e. That the applicant be awarded the costs of this application

2. In her supporting affidavit the 1<sup>st</sup> objector, Catherine Nyang'ate accused the petitioners of obtaining the grant by misrepresentation of facts. She claimed that the respondent had not disclosed that their late father had two wives and had also failed to disclose that the 2<sup>nd</sup> house had seven children. Catherine claimed that the initial letter by the chief had not indicated that their late father had two wives but the letter from the current chief clearly showed that they were beneficiaries of the estate.

3. She also accused the respondent of failing to disclose that land parcel no. NYARIBARI CHACHE/ KEUMBU/xxx was in their family's exclusive use. She claimed that three of her late brothers namely James Nyabuto, Evans Onger and Geoffrey Nyagaka and the child of her brother Samwel Atika Nchogu were buried in the land. She also claimed that their late mother had a home on land parcel no. NYARIBARI CHACHE/ KEUMBU/xxx which was subsequently subdivided to create land parcels NYARIBARI CHACHE/ KEUMBU xxxx, xxxx and xxxx.

4. The 2<sup>nd</sup> petitioner swore an affidavit in response to the application and also raised a preliminary objection to the 1<sup>st</sup> and 2<sup>nd</sup> objectors' application dated 12<sup>th</sup> August 2020 on grounds that;

- a. The Summons for Revocation and Annulment of Grant falls under the doctrine of Res Judicata;
- b. The Summons Application is filed contrary to the provisions of section 7 of the Civil Procedure Act, 2010 and therefore the

Honourable Court lacks jurisdiction to grant the orders prayed;

c. The Application is bad in law, vexatious and an abuse of the Court process.

5. As for the 3<sup>rd</sup> objector, John Kamanda, he filed an application seeking the following orders;

a. Spent;

b. That the grant of letters of administration intestate made on 26<sup>th</sup> July 2012 and the subsequent confirmation thereof made on 12<sup>th</sup> April 2013 be varied and or annulled;

c. The grant in respect of land parcel NYARIBARI CHACHE / KEUMBU / xxx be given to the objector;

d. That the transfer of land parcel NYARIBARI CHACHE / KEUMBU / xxx to Julius Mariga Onsongo on 22.8.2014 be cancelled;

e. That the applicant be awarded the costs of this application.

6. Kamanda swore an affidavit claiming that the petitioner had concealed from the court that him and his large family were in occupation of land parcel NYARIBARI CHACHE/KEUMBU/xxx. He claimed that the land was the subject of Kisii High Court Civil Suit No. 265 of 1989 which was settled when the deceased's father agreed to transfer land parcel NYARIBARI CHACHE/KEUMBU/xxx to him and his deceased brother. Kamanda averred that the petitioner knew of their occupation of the land was aware of the judgment between his deceased father and their family but proceeded to obtain grant and sell the land which he transferred to Julius Mariga Onsongo. The objector therefore sought for orders that the grant be revoked or amended and the illegal transfer to Julius Mariga Onsongo be cancelled and the land be given to him and his family.

7. In opposition to the 3<sup>rd</sup> objector's application, the 2<sup>nd</sup> petitioner raised a preliminary objection dated 2<sup>nd</sup> October 2020 on grounds that;

a. The Objector/Applicant was relying on an order issued on 8<sup>th</sup> June 1993 which was unenforceable as it is statute barred by virtue of sections 4 (4) of the Limitation of Actions Act;

b. The Objector/Applicant was not related to the deceased and hence lacks locus and the court cannot entertain his application for lack of jurisdiction.

## **SUBMISSIONS**

8. The parties filed their respective submissions on the preliminary objections and Mr. Ongegu, learned counsel for the petitioners also made oral submissions in support of the preliminary objections.

9. On the 1<sup>st</sup> and 2<sup>nd</sup> objectors' application, the petitioner's counsel submitted that the objectors had averred that they were children of Cecilia Kemunto Nchogu and had attached a letter from the area chief dated 16<sup>th</sup> July 2020 confirming that were siblings of Samuel Ateka. However, Cecilia Kemunto Nchogu and Samuel Ateka had filed an application for revocation of grant dated 23<sup>rd</sup> April 2018 alleging that the grant had been issued by misrepresentation and non-disclosure of facts and their application had been dismissed by Hon. Majanja J. who held, in a ruling dated 27<sup>th</sup> May 2019, that Samuel Ateka and his siblings were not children of the deceased. Counsel observed that the objectors and the applicants in the former application and their siblings had not appealed against the decision of Hon. Majanja J., but had instead filed a similar application seeking similar prayers as those in the former application. It was counsel's submissions that the objectors' application had met the conditions for the doctrine of res judicata to apply. He therefore urged the court to dismiss the application as it was an abuse of court process.

10. He relied on the cases of *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR*, *Attorney General & another ET vs [2012] eKL*, *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR*, *Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR*, *In re Estate of M N J (Deceased) [2018] eKLR*, *Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others and Joseph Ndung'u Njoroge v Lilian Atieno Siwolo [2015] eKLR* to support the position that this court ought to strike out the 1<sup>st</sup> and 2<sup>nd</sup> objector's application for being res judicata.

11. In response, the objectors' counsel submitted that **Section 2** of the **Law of Succession Act** which deals with the applicable law under probate matters was silent on the application of Section 7 of the Civil Procedure Act. Counsel also argued that Section 7 of the Civil Procedure Act had been consciously omitted from Rule 63 of the Probate and Administration Rules which listed the provisions of the Civil Procedure Rules that could be imported into the Law of Succession Act. He relied on the case of *Josephine Wambui vs. Margaret Wanjiru Kamau Another [2013] eKLR*, where the Court of Appeal stated;

*"We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and Rules of procedure. In the few instances where the need to supplement the same has been identified some specific rules have been directly imported to the Act through Rule 63(1)."*

12. Counsel asserted that Section 7 was not applicable to matters touching on the Law of Succession Act and the defect in the application was not curable by the provision of Article 159(2)(d) of the Constitution as the said provision was never intended to completely displace

rules of procedure. Therefore, the petitioners' preliminary objection ought to collapse.

13. Counsel further argued that the court was clothed with the jurisdiction to entertain the objector's Summons for Revocation. He submitted that based on the letter from the chief Nyaribari Keumbu Location dated 16<sup>th</sup> July, 2020, the objectors had demonstrated that they were children of the deceased and first class dependants as defined by **section 29** of the **Law of Succession Act**. They had therefore satisfied the conditions for revocation of the grant. Counsel submitted that a grant of representation could be revoked or annulled at any time and that there was no limitation of the number of times an application seeking revocation could be filed. According to learned counsel, the petitioner's preliminary objection had not raised pure points of law as it had matters of fact and should be dismissed with costs.

14. Regarding the 3<sup>rd</sup> objector's application, the petitioners' learned counsel submitted that Kisii High Court Civil Suit Number 265 of 1989 between Samuel Mose Samusi & Another and Njongu Sagana had been filed over thirty one (31) years ago and orders issued over twenty seven (27) years ago but the objector had not presented any proof to show that he tried to get the parcel of land back. It was further submitted that when the Petitioners filed for Letters of Administration Intestate on the 26<sup>th</sup> of July 2012 the application was published on the Kenya Gazette and the objector if he had any interest in the parcel of land, would have filed an objection to the granting of Grant. Counsel submitted that any reasonable person who had an interest in their property would be quick to defend their property. In this instance the objector's conduct proved otherwise.

15. Counsel further submitted that the consent in the civil suit stated that the plaintiffs in that suit were to pay the deceased for transfer of the parcel of land but there was no evidence that the objector paid the stipulated amount. Therefore, the objector could not raise the consent 27 years later seeking to enforce it or asking the court to act on it. Counsel relied on **Section 4** of the **Limitation of Actions Act**, which provides that an action may not be brought upon a judgment after the end of twelve years. He submitted that the objector's application was time barred together with the decree/order he was relying on as time started running when the order was given but the objector had been indolent and had slept on his rights.

16. This court's jurisdiction to determine the objector's application was also challenged since the 3<sup>rd</sup> objector lacked locus as he was not related to the deceased as provided under the Second Schedule {r 7 (i)(e)(iii)} of the Probate and Administration Rules. To support his arguments, counsel relied on the cases of **Martha Karwirwa Anthony v Barclays Bank of Kenya Ltd [2019] eKLR** and **M'ikiara M'rinkanya & Another v Gilbert Kabeere M'mbijiwe [2007] eKLR**.

17. The 3<sup>rd</sup> objector's counsel on the other hand submitted that the Law of Succession Act was an independent and comprehensive statute that was not dependent on the Limitation of Actions Act or any other statute save for the Constitution. He relied on the case of **Josephine Magdalena Motion(deceased) [2016] eKLR** in support of the position that the Limitation of Actions Act did not apply to succession causes or applications for revocation of grant under Section 76 of the Law of Succession Act.

18. It was submitted that the objector was not attempting to execute a decree but was seeking a revocation of the grant on the grounds that the petitioner had obtained grant by concealing the fact that the objector was in possession of the land. The petitioner was accused of attempting to prevent the objector from being heard yet his interest on the suit property was a live issue as the 3<sup>rd</sup> objector resided on the land with his family.

#### **ANALYSIS AND DETERMINATION**

19. A preliminary objection is a pure point of law which may dispose of a suit at the first instance. Sir Charles Newbold in the oft cited case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696** defined the concept as follows;

*“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”*

20. The deceased in this matter died intestate on 12<sup>th</sup> December 1994. The grant in the deceased's estate was issued to the petitioners herein on 26<sup>th</sup> July 2012 and confirmed on 12<sup>th</sup> April 2013 whereby the deceased's land parcels no. NYARIBARI CHACHE/ KEUMBU/xxx and land parcel no. NYARIBARI CHACHE/ KEUMBU/xxx were subdivided equally among his three beneficiaries James Onsare, Christopher Chweya and Chrisantus Nchogu. The objectors have now filed their respective applications seeking revocation of the grant which are opposed by the petitioner on various points of law.

21. The petitioner raised a preliminary objection against the 1<sup>st</sup> and 2<sup>nd</sup> objector's application on the ground that it was *res judicata* as this court (differently constituted) had dismissed a similar application by the 1<sup>st</sup> and 2<sup>nd</sup> objectors' mother and brother.

22. The doctrine of *res judicata* was defined by the Court of Appeal in the case of **John Florence Maritime Services Limited –v- Cabinet Secretary for Transport and Infrastructure & 3 Others 2015 Eklr** thus;

*“Res judicata is not a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been split and is now sufficiently settled. We therefore do not wish to re-invent any new wheel. We can however do no better than reproduce the reindention of the doctrine many centuries ago captured in the case of **Henderson –v- Henderson (1843) 67 ER 313**.*

*“where a given matter becomes the subject of litigation in an 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 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 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 parties to form opinion and pronounce a judgment but not every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.”*

23. A party seeking to rely on the doctrine of res judicata to bar a suit from being heard must prove each of the following elements;
- The suit or issue was directly and substantially in issue in the former suit;*
  - The former suit was between the same parties or between the same parties under whom they or any of them claim;*
  - The parties were litigating under the same title in the former suit; and*
  - 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.*
24. The principle of res judicata provides good order and certainty in judicial decisions and protects a party from being vexed twice on an issue that has already been determined by a court of competent jurisdiction. The objectors’ argument that the doctrine does not apply to succession has no basis as it is a universal principle that litigation must end.
25. In *re Estate of the late Jotham Wanjohi Kariithi (Deceased) SUCCESSION CAUSE NO. 33 “B” OF 2013 [2020] eKLR* the court held as follows on the applicability of res judicata to succession causes;

*The applicant has submitted that Section -7- of the Civil Procedure Act does not apply in succession proceedings. This submission is not correct. Rule 63 Probate and Administration Rules specifically refers to application of Civil Procedure Rules and High Court (Practice and Procedure Rules). It does not refer to the Civil Procedure Act. The preamble to the Civil Procedure Act states that it is in Act of Parliament to make provision for procedure in Civil Courts under Section -2- of the Act it is provided that the Act applies in proceedings in the High Court. There is therefore no bar to raising any issue based on the Civil Procedure Act in succession matters. Civil Procedure Rules are subsidiary legislation and the Law of Succession Act has its own elaborate Rules. That explains why only the specified Civil Procedure Rules are applicable as they are relevant under the Probate and Administration Rules. The doctrine of res judicata is provided under the Civil Procedure Act. It applies in Succession matters may be raised by a party for determination by the court depending on the circumstances of the case.*

26. Similarly, the court in *Andrew Mwangi Kabungo v Robinson Gichobi Richard & another MISCELLANEOUS SUCCESSION CAUSE NO. 3 OF 2015[ 2017] eKLR* held;

*“I also wish to make it clear that contrary to what the Respondent has contended, the doctrine of res judicata applies in all matters of a civil nature inclusive of succession matters.”*

27. In their application, the 1<sup>st</sup> and 2<sup>nd</sup> objectors claim that they are the deceased’s children from the second house. They have annexed an introductory letter from the chief dated 16<sup>th</sup> July 2020 to prove that they are children of Cecilia Kemunto Njogu and the deceased.

28. On 24<sup>th</sup> April 2018, Cecilia Kemunto Njogu and the objectors’ brother Samuel Atika Nchogu filed summons for revocation of grant for the reason that the petitioners had failed to the existence of the deceased’s second family. Majanja J. heard *viva voce* evidence for and against the application for revocation of grant and in the ruling dated 18<sup>th</sup> March 2019, directed the 2<sup>nd</sup> petitioner or any of his brothers Christopher Chweya and James Onsare together with Samuel Atika to undergo a DNA test to determine their relationship.

29. In a subsequent ruling dated 27<sup>th</sup> May 2019, the learned judge observed that although Chweya and Onsare had gone to the government chemist for testing as directed, Samwel Atika had not availed himself for testing. The learned judge went on to make the following findings;

*“Although there is evidence that there was a relationship between Cecilia and the deceased. **In light of the entire evidence I find that Cecilia did not establish a customary marriage for several reasons...***

*When I directed that Samwel should take a DNA test to establish whether he was related to Chrisantus by having a common father, I had entertained considerable doubt as to his paternity for several reasons. The evidence of DW 1 is that the deceased had divided his land amongst his sons. Why did he not give land to his children from Cecelia while he was still alive? I also find considerable was cast in the manner in which Samwel acquired his ID by naming his mother as Mora Nchogu. Lastly, I note that although the evidence is Cecelia married the deceased in 1965, her life with the deceased from that time is not accounted for until the 1980’s when she gave birth to her children. Since she was born in 1937 according to her identity card, she started giving birth when she was 43 years old and continued to give birth to the deceased’s children well into her fifties. This in my view, casts doubt on Cecelia’s claim that she had children with the deceased.*

*I gave a chance to Samwel to conclusively prove through DNA that he was a son of the deceased but he rejected that opportunity. In the circumstances, I am entitled to draw an adverse inference that in fact he was not a son of the deceased. **Consequently, and for the reasons I have given, I find that the Samwel and his siblings were not children of the deceased.***

*Turning back to the case of Cecelia, I prefer the version of events narrated by Chweya that after a long time Cecelia returned to Plot xxx and imposed herself on the land with the aid of the local administration as evidenced by the correspondence he and his advocate wrote to the local administration regarding the trespass on his land by Cecelia and her children. I have also looked at the letter*

relied on by the applicants from the Office of the Chief, Keumbu location dated 7<sup>th</sup> December 2017 which states that the deceased had two wives. It is unclear and does not show which officer signed it. The totality of the evidence is that the applicants have not discharged the burden of establishing their case.

The summons for revocation dated 23<sup>rd</sup> April 2018 is dismissed. I make no order as to costs. **[Emphasis added]**

30. Res judicata does not only apply to suits but also to applications. This legal position was stated in the case of **Mburu Kinyua vs Gachini Tuti [1978] KLR 69 at 81** and reiterated by the Court in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** thus;

*“That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation.”*

31. Cecilia Kemunto and Samuel Atika Nchogu filed the application that was determined by the court in the ruling dated 27<sup>th</sup> May 2019 on behalf of the second house. The issues they raised in the former application are the same issues the 1<sup>st</sup> and 2<sup>nd</sup> objectors have raised in their impugned application. In their present application, the 1<sup>st</sup> and 2<sup>nd</sup> objectors claim that they are the deceased’s children from the second house. That issue was conclusively dealt with by the court in the above decision. In its ruling, which is partly reproduced above, the court found that there was neither evidence of a marriage between the deceased and Cecilia Kemunto, his alleged second wife nor was there any proof that Samuel Atika Nchogu and his siblings were children of the deceased. All the conditions for application of the doctrine of *res judicata* have thus been met. The petitioners’ preliminary objection against the 1<sup>st</sup> and 2<sup>nd</sup> objectors’ application dated 27<sup>th</sup> July 2020 has merit and is hereby upheld.

32. Next I turn to the preliminary objection on the 3<sup>rd</sup> objector’s application. The petitioner contends that the 3<sup>rd</sup> objector’s application is statute barred for the reason that he seeks to execute the orders issued in High Court Civil Suit No. 265 of 1989 more than 12 years after they were issued. The petitioner referred to **Section 4 (4)** of the **Limitation of Actions Act** which provides;

*“(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered...”*

33. He also referred to the decision of the Court of Appeal in **Willis Ondiü Odhiambo v Gateway Insurance Co. Ltd KSM Civil Appeal No. 37 of 2013 [2014] eKLR**, where the court had held as follows on execution of decrees after lapse of the statutory time limit;

*“In other words, the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by section 4(4) of the Limitation of Actions Act which is in the following terms: ...*

*The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27<sup>th</sup> August, 2008”*

34. The petitioner also challenged the 3<sup>rd</sup> objector’s application on the ground that this court lacks jurisdiction to entertain the application for the reason that the 3<sup>rd</sup> objector was not related to the deceased.

35. The 3<sup>rd</sup> objector sought orders for revocation of the grant in his application on the basis that the petitioners had failed to disclose that he and his family were in exclusive possession of land parcel no. Nyaribari Chache/Keumbu/ xxx. He referred to High Court Civil Suit No. 265 of 1989 where he and one Samuel Mose Samusi had sued the deceased seeking a declaration *inter alia* that they were the rightful heirs of land parcel no. Nyaribari Chache/Keumbu/ xxx. He annexed a consent order to his application dated 8<sup>th</sup> June 1993 which had settled the suit in the following terms;

*“By consent it is agreed and ordered that the Plaintiffs do pay Kshs. 16,000/- to the defendant and the defendant do transfer the parcel of land No. Nyaribari Chache/Keumbu/xxx jointly to the plaintiffs in equal shares. The said transfer be effected forthwith. Should any party neglect to execute any documents to effect the above transfer the same be executed by the E.O. of this court. The plaintiffs to pay the above sum of Kshs 16,000/- to the defendant by monthly installments of Kshs. 2,000/- each w.e.f. 5th of July 1993 and then on the 5th of each month until payment in full. In default execution to issue.”*

36. My understanding of the 3<sup>rd</sup> objector’s application is that it is not for execution of the decree of the court in High Court Civil Suit No. 265 of 1989 but for revocation of the grant for the reason that the petitioners failed to reveal that the 3<sup>rd</sup> objector and his family have an interest in land No. Nyaribari Chache/Keumbu/xxx which they knew about. The 3<sup>rd</sup> petitioner has sought orders that the grant with respect to land parcel no. xxx be given to him and that the transfer of the land by the petitioner to one Julius Mariga Onsongo be cancelled.

37. From his application, it is evident that the 3<sup>rd</sup> objector is not a beneficiary of the estate of the deceased. He is a third party seeking to protect his interest in land parcel No. Nyaribari Chache/Keumbu/xxx which has since been distributed as part of the deceased’s estate.

38. The probate court is however concerned with the distribution of the estates of deceased persons. **Section 3(1)** of the **Law of Succession** defines “*an estate*” as the free property of a deceased person and defines “*free property*” as the property of which the deceased was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death. Where questions of

ownership arise with respect to property identified as the deceased's property, such disputes should be determined before confirmation as provided under **Rule 41(3)** of the **Probate and Administration Rules** thus;

*(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.*

39. In the event that the grant is confirmed and such questions as to the ownership of the property distributed by the probate court arise, they should first be determined in the appropriate forum as the probate court does not have jurisdiction to determine questions regarding ownership.

40. I agree with the persuasive authority of ***In Re Estate of Alice Mumbua Mutua (Deceased) Succession Cause No. 3142 of 2003 [2017] eKLR*** where Musyoka J held;

*“Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. **Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned.** The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.” **[Emphasis added]***

41. In ***Monica Wangari Njiri & 4 others v Eunice Wanjiru Igamba & another SUCCESSION CAUSE NO. 432 OF 2009 [2016] eKLR*** the Court held as follows;

*“This court (M.K. Ibrahim, J. as he then was) had the occasion to pronounce itself on the issue of the probate court's jurisdiction to resolve a claim based on land held in trust. The court expressed itself thus: ...*

*The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed. Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings.”*

42. Agreeing with the reasoning of the above authorities, I find that having confirmed the grant in the estate of the deceased, this court lacks jurisdiction to determine the issues raised by the objector in his application. The 3<sup>rd</sup> objector is not a dependant or beneficiary of the estate of the deceased and has no capacity to be issued with grants with respect to the deceased estate as sought in his application.

43. Matters relating to the occupation and proprietorship of the subject land do not fall within the jurisdiction of the probate court. The 3<sup>rd</sup> objector ought to institute separate proceedings to articulate his claim in a different forum where the question of whether his claim is statute barred will be addressed. The petitioners' preliminary objection on the 3<sup>rd</sup> objectors' application is therefore found to be merited and is hereby sustained.

44. The upshot of the foregoing is that the 1<sup>st</sup> and 2<sup>nd</sup> objectors' application dated 27<sup>th</sup> July 2020 and the 3<sup>rd</sup> objector's application dated 27<sup>th</sup> July 2020 are hereby dismissed with costs to the petitioners.

**Dated, signed and delivered at Kisii this 8<sup>th</sup> day of July 2021.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**Mr. Bonuke For the Objector**

**Respondent Absent**

**Mr. Orwasa Court Assistant**