



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**MISC SUCCESSION CAUSE NO. 29 OF 2001**

**IN THE MATTER OF THE ESTATE OF NGARI M'TETU (DECEASED)**

JEMIMAH WAWIRA.....1<sup>ST</sup> APPLICANT

RUTH MUKAMI.....2<sup>ND</sup> APPLICANT

**VERSUS**

**DAVID NJERU NGARI**

(Sued as the legal representative of the estate of **Jedidah Ruguru Ngari**).....RESPONDENT

**AND**

**NICHOLAS NJAGI NGARI.....1<sup>ST</sup> INTERESTED PARTY**

**JOSEPHAT IRERI NGARI.....2<sup>ND</sup> INTERESTED PARTY**

**JANE WANJOKA NGARI.....3<sup>RD</sup> INTERESTED PARTY**

**MARGERY NJOKI NGARI.....4<sup>TH</sup> INTERESTED PARTY**

**TISIANA KARIMI NGARI.....5<sup>TH</sup> INTERESTED PARTY**

**DIONISIUS MATHEW NJERU.....6<sup>TH</sup> INTERESTED PARTY**

**JEREMIAH NYAGA MUCHANGI.....7<sup>TH</sup> INTERESTED PARTY**

**KENNEDY NJAGI NGARI.....8<sup>TH</sup> INTERESTED PARTY**

**JONATHAN NJUE NGARI.....9<sup>TH</sup> INTERESTED PARTY**

**GAVATI NGARI.....10<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

**A. Introduction**

1. The application before the court is for the revocation of grant issued to Jedidah Ruguru (Deceased) and Prisca Marigi Ngari (Deceased) in respect to the estate of Ngari M'Tetu and further to that of the respondent in Embu High Court Succession Cause No. 189 of 2009 in respect of Jedidah Ruguru Ngari's estate issued on 28.08.2008 and later confirmed on 24.06.2010.

2. In the same breadth, the court also takes notice of the fact that a summons for revocation of the grant confirmed on 23.2.2001 and dated 9.11.2010 had previously been filed with prayers inter alia that the grant issued to Jedidah Ruguru (Deceased) and Prisca Marigi Ngari

(Deceased) in respect to the estate of Ngari M'Tetu be revoked. The application was grounded on the fact that the applicants who are beneficiaries were never aware of the succession proceedings in respect to the estate of the deceased herein. It remains unclear what became of the application since the applicants chose not to prosecute it and further proceeded to file the current application before court thus signifying a clear act of abuse of the court process.

3. The applicants submitted that despite them being children of the deceased, they were never involved in the proceedings leading to the issuance of grant relating to the estate of the deceased herein. That given that all the beneficiaries of the estate of Ngari M'Tetu did not take part in the distribution process and further that the process was defective not following the stipulations of the law as enunciated in the Law of Succession Act, the subsequent dealings in the suit land should not stand.. That having established sufficient grounds to revoke the grant relating to the estate of the deceased herein, the application should not be defeated by the fact that it has been brought late in the day. They therefore urged this court to revoke the grant issued to Jedidah Ruguru and Prisca Marigu Ngari on the 16<sup>th</sup>.10.1996 and confirmed on the 23.02.2001 in respect to the estate of Ngari M'Tetu the deceased herein and further that issued to the respondent in respect to the estate of Jedidah Ruguru (Deceased).

4. The respondent submitted that the grant was obtained in a proper manner and thereafter confirmed and so, the application to revoke the grant ought not to be set aside. He further deponed that the application to revoke the grant issued to one Jedidah Ruguru (Deceased) in regard to the estate of the deceased herein had been dealt with. The respondent further argues that he is the registered proprietor on transmission of LR 1575 which was his mother's share and issued with the title in 2012; this was after he obtained a grant in Succession Cause No. 189 of 2009 in respect of his mother's estate. The respondent further argued that all the transfers and dealings on his land are proper in law since all the legal procedures were involved in the whole process. The applicants who already had their mother's share did not file any objection or protest in the Succession Cause No. 189 of 2009. He urged this court to find that the grant was issued legally and procedurally and that the applicants have not satisfied the court as to why the grants should be revoked.

### **B. Analysis And Determination**

5. The issue/s for determination in respect of the application dated 27<sup>th</sup>.11.2020 is whether the grant issued on the 16<sup>th</sup>.10.1996 to Jedidah Ruguru and Prisca Marugu and consequently the one issued to the respondent in respect to the estate of Jedidah Ruguru (Deceased) and confirmed on 24.6.2010 should be revoked.

### **Whether the application is Res Judicata**

6. 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."*

7. 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 MugiNdegwa 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".*

8. Similarly, in the case of **Attorney General & another vs ET (2012) eKLR** it was held that;

*"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".*

*In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: **If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....**”.*

9. The application before the court is for the revocation of grant issued to Jedidah Ruguru (Deceased) and Prisca Marigi Ngari (Deceased) with the respect to the estate of Ngari M’Tetu and further that the grant issued to the respondent in Embu High Court Succession Cause 189 of 2009 in respect of Jedidah Ruguru Ngari on 28.08.2008 and later confirmed on the 24.06.2010 be revoked.

10. The grounds in support of that application were *inter alia* that **“the grant was obtained fraudulently by making of false statements and concealment from court of material facts, that the grant was obtained by means of untrue statements of facts essential in point of law and that the proceedings to obtain the grant was defective.**

11. My understanding of the application is that it does not, *per se* bring new issues for determination by this court, rather it is basically a change of parties seeking the same prayers as the previous applicants.

12. The applicant’s mother, one Prisca Magiru Ngari filed summons for revocation or annulment of grant dated 19<sup>th</sup>.03.2001 in Misc Application No.29 of 2001 which was dismissed by the court. It would then appear that the application to revoke the grant issued to one Jedidah Ruguru was previously dealt with by a court of competent jurisdiction to this court.

13. The essence of the principles of res-judicata is not only to 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 counsels.

14. In light of the constitutional imperative under Article 159 of the constitution on the expeditious 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. This is a fairly old matter dating back to the year 1993 and thus, it should come to an end so that even the beneficiaries herein can realize their inheritance.

15. In the case of **E.T.V –v- Attorney General & Another (2012) eKLR** Majanja J stated that:

***“The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”***

16. Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit.

17. In light of the above, and given that the application seeking to revoke the grant dated 19.03.2001 was dismissed by a competent court of concurrent jurisdiction to the present court, then it only translates to the fact that this court cannot deal in the merits of the said application again.

18. 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: -

***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.”***

19. The Succession Cause No. 117 of 1993 was instituted by the representatives of the two families/estate after the death of their husband. Further to that, the two women were granted joint grant to be administrators to the estate as shown by the grant dated 23.02.2001.

20. The applicants argue that the mother to the respondent was an aunt rather than their father’s wife, nothing has been presented before this court to support their argument; the area chief vide a letter dated 24.02.2009 confirms that the respondent’s mother was indeed a wife to the deceased herein.

21. The court also notes that there is also another pending application by way of summons for revocation of the grant issued in respect of the estate of the deceased herein dated the 19<sup>th</sup> November 2010. There is no indication as to whether that application was ever prosecuted or what became of it.

22. Given that the application dated 9<sup>th</sup> March, 2001 was dismissed by the court and none of the parties hereby appealed against the dismissal order, it therefore follows that the application before the court is *res judicata* and an abuse of the court process.

23. In the circumstances foregoing, the grant issued to Jedidah Ruguru (deceased) and Prisca Marigu Ngari (deceased and confirmed on 23/02/2001 is still valid. It follows, therefore that the grant issued to the respondent and confirmed on 24/06/2010 is still in force as the same is a product of the grant issued to Jedidah Ruguru and Prisca Marigu Ngari.

24. In the circumstances, I find and hold that, the application herein has no merit and it is hereby dismissed.

25. It is so ordered.

**Delivered, dated and signed at Embu this 10<sup>th</sup> day of November, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicants

.....for the Respondent

.....Interested parties