



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

SUCCESSION CAUSE NO. 210 OF 2015

IN THE MATTER OF THE ESTATE OF FREDRICK KIPMITEI

CHEPKWONY ALIAS FRIDRICK KIPMITEI CHEPKWONY (DECEASED)

NANCY CHEPKORIR MITEI.....APPLICANT

VERSUS

MIRIAM CHEPKWONY.....RESPONDENT

RULING

1. The Application dated 5th August 2020 was filed by Nancy Chepkorir Mitei and it sought the following Orders:

(i) Spent.

(ii) THAT this Court issues Orders for preservation of the estate pending the hearing and determination of this Application.

(iii) THAT the Grant of Letters of Administration issued to MIRIAM CHEPKWONY in the estate of FREDRICK KIPMITEI CHEPKWONY (DECEASED) made on 29th March 2016 and confirmed on the 14th day of November 2017 be revoked/annulled.

(iv) THAT the Applicant be awarded costs.

2. The Application was brought under Section 76 of the Law of Succession Act, Cap 160 of the Laws of Kenya and Rules 44 (1), (2) and 73 of the Probate and Administration Rules. It was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Nancy Chepkorir Mitei on 27th July 2020.

The Applicant's case.

3. It was the Applicant's case that she was the rightful and only wife of the late Erick Mitei who was the son of the late Fredrick Kipmtei Chepkwony. That they were blessed with one child called EK who according to the Applicant was the only legitimate child of the late Erick Mitei who passed away on 12th March 2013.

4. The Applicant averred that the Respondent buried her late husband in another part of the land, land in which her husband did not till or reside in. That the intention was to force the Applicant to accept a small portion of land which initially belonged to Kenneth Mitei. It was her case that Kenneth Mitei used force to take her rightful share of the land. It was her contention that the reason for the forceful eviction was that her share of the land had a borehole and an electricity post adjacent to it.

5. It was her case that after the death of her father in law, she cited the Respondent to take up Petition for Letters of Administration and the Respondent obliged. It was the Applicant's further case that the Respondent did not seek her signature on the consent form. It was her case that the lack of consent from her part amounted to a concealment of a material fact. That she was neither present nor was she in agreement with the division of land as per the confirmed Grant.

6. The Applicant averred that the Respondent fraudulently introduced Gladys Chepkemoi as a beneficiary in the matter with the intention of disinheriting her of her late husband's land. That Gladys Chepkemoi who claimed to be a wife of her late husband did not attend the funeral of the late Erick Mitei and that the said Gladys Chepkemoi confirmed to the area chief that she was never married to the late Erick Mitei.

7. It was the Applicant's case that on 18th September 2015, the elders unanimously stated that she develops her share of the land next to Leonard Mitei. That the elders also noted that Gladys Chepkemoi had not conducted the marriage that she had claimed to have with Erick Mitei.

8. It was the Applicant's case that the Respondent had initiated subdivision of KERICHO/SILIBWET/5123 being her rightful share and that she promptly filed a Caution dated 8th July 2020.

9. The Applicant averred that she had no advocate to represent her when she tried to protest the confirmation of the Grant. Further that if this Court did not intervene and revoke the Grant, she would be rendered partially homeless and destitute.

The Applicant's submissions.

10. The Applicant submitted that as the wife of the late Erick Mitei, she was a beneficiary of 1 acre from the estate of the late Fredrick Kipmtei Chepkwony. She further submitted that the Respondent misled the court by bringing in a 3rd party as an alleged wife to her deceased husband with the intention of dispossessing her and her child of the land that she rightfully inherited from her late husband.

11. It was the Applicant's submission that her share of land had a borehole and the Respondent and her son had been jealous of her and have always tried to dispossess her forcefully by burying her late husband in a different land from the one she inherited.

12. She submitted that she was not represented by counsel during the objection proceedings hence she was unable to competently handle her objection.

13. The Applicant submitted that the Respondent fraudulently brought a second wife yet the Applicant was the only legally married wife to the late Erick Mitei.

The Respondent's case.

14. In her Replying Affidavit sworn on 1st March 2021, the Respondent (Mirriam Chepkwony) stated that she initiated the succession proceedings herein after she was cited by the Applicant. It was her case that she included all the beneficiaries of the estate of the deceased and the Applicant was one of them. She further stated that she did not obtain the Letters of Administration fraudulently or conceal any material fact.

15. It was the Respondent's case that the Applicant raised her issue of Gladys Chepkemoi and the issue was heard and determined by this Court. Further, that the issues for determination by this court in its earlier Ruling were relevant to those raised again by the Applicant.

16. The Respondent averred that this Court had ruled that Gladys Chepkemoi and her children were entitled to a share of the deceased's estate namely KERICHO/SILIBWET/1313.

17. It was the Respondent's case that she engaged a surveyor who subdivided the land based on the confirmed Grant. That the surveyor considered the already existing settlement and later on prepared mutation forms and maps that indicated the allocation of each share to each beneficiary. The Respondent averred that the Applicant and Gladys Chepkemoi were each allocated 0.5 acres. That the decision to allocate the said land to the Applicant and Gladys Chepkemoi was that their husband was buried there and that family members made a decision to grant them those portions in accordance to Kipsigis Customary Law.

18. The Respondent averred that the Applicant illegally and forcefully entered on the portion of land belonging to Kenneth Mitei and forced him out of his land. The Respondent further averred that the Applicant had caused her a lot of mental anguish as she did not co-operate and had not settled on her rightful share of the land.

19. It was the Respondent's case that she had always desired to include all the beneficiaries of the estate of the deceased, but the Applicant was always determined to exclude Gladys Chepkemoi who had two biological children with the late Erick Mitei.

20. The Respondent averred that the issues raised in this Application were *res judicata* and the same was meant to cause a delay in executing the Grant.

The Respondent's submissions.

21. The Respondent submitted that she was the widow of the deceased and had priority according to Section 66 of the Law of Succession Act to apply for a Grant and did not need the consent of any other person.

22. She submitted that she included all the beneficiaries of the deceased including the Applicant herein. That the Application for Confirmation of Grant was served upon the Applicant who in turn filed a Protest on 10th April 2017. It was her submission that the Application was heard and determined and therefore there was no concealment of facts from the Applicant.

23. The Respondent submitted that the Applicant had failed to demonstrate clearly how the Grant was obtained by an untrue allegation of fact.

24. It was the Respondent's submission that the issues raised by the Applicant were *res judicata* as the issues had already been dealt with in

the Ruling of this Court dated 14th November 2017.

25. It was the Respondent's submission that KERICHO/KAPKELEI/5123 did not form part of the estate of the deceased as alleged by the Applicant. That the land owned by the deceased was KERICHO/SILIBWET/1313.

26. The Respondent urged this court to issue directions regarding the serious conflict between Kenneth Mitei, the Applicant and Gladys Chepkemoi regarding who should occupy position E that measured one acre as indicated in the mutation form. In conclusion, the Respondent urged this court to dismiss the Application as it was *res judicata* and only meant to delay the dependants from acquiring their title deeds.

27. I have perused and considered the contents of the court file, the Summons for Revocation of Grant dated 5th August 2020, the Replying Affidavit dated 1st March 2021, the Applicant's Written Submissions dated 13th October 2021 and the Respondent's Written Submissions dated 29th September 2021. The main issue for my determination is whether the present Application was *res judicata*.

28. Section 7 of the Civil Procedure Act states 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.”

29. In the case of **The Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others, (2017) eKLR**, the Court of Appeal held that:-

“For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

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.

30. The Applicant's main grounds for wanting the court to revoke the Grant were that the undated Consent form did not contain her signature and that the Respondent herein had allocated 0.5 acres of her share to Gladys Chepkemoi. The other ground that the Applicant relied on was that Gladys Chepkemoi was not the wife of the late Erick Mitei and that she was introduced to the proceedings with the intent of disinheriting her of her rightful share of the deceased's estate.

31. Mirriam Chepkwony, the Respondent herein had filed an Application for Confirmation of Grant of Letters of Administration issued on 29th March 2016. The Applicant herein filed an Affidavit of Protest dated 5th April 2017 and a further Affidavit of Protest dated 7th April 2017. The gist of the protests were that the Respondent herein proceeded with the succession cause without the consent of all the family members and that Gladys Chepkemoi was included as one of the beneficiaries despite the fact that she was one of the concubines of the Applicant's late husband.

32. The Respondent filed a Replying Affidavit dated 20th April 2017 where she indicated that Gladys Chepkemoi and her son had sired two children and was therefore entitled to a share of the estate. She produced two birth certificates for F.C.M and C.K.K.

33. Gladys Chepkemoi filed a statement dated 10th May 2017 where she stated that she had cohabited with the late Erick Mitei and their union had resulted in two children. She further stated that they were in the process of formalizing their marriage and that the late Eric Mitei had paid Kshs.12,000 as part of the dowry. That unfortunately he passed away before they completed the formalities.

34. It is true that the undated Consent form did not bear the Applicant's signature. All other family members had signed the Consent form. It is also salient to note that the Consent form contained the name of Gladys Chepkemoi.

35. In a Ruling dated 14th November 2017, Muya J held that:-

“(19) In the petitioner's affidavit in support for summons for confirmation, the names Nancy Chepkorir and Gladys Chepkemoi are included.

(20) Their distribution of LR Kericho/Silibwet/1313 is shown to be 0.15 for each. These are equal portions.

(21) I do not find any fault in this mode of distribution. All the other beneficiaries apart from the objector are in agreement.

(22) The objector alleges that Gladys should be taken to belong to the league of other concubines belonging to her late husband. The petitioner has not included the alleged other concubines in the succession cause. This fact goes to show that the so called other concubines were not recognized by the family.

(23) The allegation that there was distribution of the estate prior to the death of the deceased is not backed by any other evidence to that effect.

(24) The objection proceedings have no merit and they are dismissed. Each party to bear its own costs”.

36. The issues in contention in both applications were whether the Applicant consented to the mode of distribution and whether the Petitioner was right to distribute her deceased son’s portion between the applicant and one Gladys Chepkemioi. The parties in the Application for Confirmation of the Grant and the Application for Revocation of the Grant were the same i.e. Mirriam Chepkwony and Nancy Chepkorir Mitei. Both Applications were filed under Succession Cause Number 210 of 2015 and the issues were fully determined by this Court as evidenced by the Ruling above.

37. In the case of **C. K Bett Traders Limited & 2 Others Vs Kennedy Mwangi & Another (2021) eKLR**, Mwita J held that :-

“The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.”

38. Further, in the case of **Kenya Commercial Bank Limited Vs Muiri Coffee Estate Limited & Another (2016)**, the Supreme Court held that:-

“The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties, and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

39. It is apparent from the present application that the Applicant was still aggrieved by the decision of the court to treat Gladys Chepkemioi as her (Applicant’s) co-wife entitled to an equal share of her late husband’s share as proposed by the Petitioner. The court approached this issue from the perspective of whether or not Gladys Chepkemioi and her children were beneficiaries and found in the affirmative. There was no inquiry as to whether or not the said Gladys was a wife as desired by the Applicant. None the less the Ruling dated 14th November 2017 is unchallenged. No appeal or review has been filed against it and the said Ruling remains in force to date.

40. It is my finding that the issues raised by the Applicant in the Application dated 5th August 2020 were dealt with Muya J in his Ruling dated 14th November 2017. The Applicant’s attempt to seek a fresh determination on issues that had already been dealt with by a court of concurrent jurisdiction is an attempt to have a bite of the cherry twice. Clearly the Applicant can only ventilate any dissatisfaction with the ruling in the court of appeal.

41. It is my finding that the Application dated 5th August 2020 is *res judicata* hence it has no merit. It is dismissed. This being a family matter, I order that each party bear their costs.

42. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 15TH DAY OF DECEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Kenduiwo for the Petitioner/Respondent, Ms. Chemutai for the Objector/Applicant and Kiprotich (Court Assistant).