



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 684 OF 2015**

**IN THE MATTER OF THE ESTATE OF KIPLEIGE ARAP WOGO (DECEASED)**

**MICHAEL KOSKEI SERONE.....1<sup>ST</sup> APPLICANT**

**SAMUEL KIBII MARINDANY.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**TRUPHENA SIRISIA CHUMO.....RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Applicant, Michael Koskei Serone first petitioned for Letters of Administration for the Deceased's estate in Nakuru Succession Cause No. 208 of 2010. In the said Succession Cause, he named himself, the 2<sup>nd</sup> Applicant herein and Daniel Kipkoeh Langat as beneficiaries. The Respondent then filed Summons for Revocation, in which the Court- **Wendoh J.** – found in her favour. In a Judgment dated 15/12/2014, the Learned Judge ordered for a revocation of the on the grounds that the same had been obtained based on a forged Death Certificate and by concealment of material facts from the Court.

2. After the revocation of grant, the estate was left unadministered until 25/01/2016 when the Respondent petitioned afresh for Letters of Administration in this instant cause. She was issued with a Grant of Letters of administration on the same date. She then sought Confirmation of the said Grant *vide* Summons for Confirmation dated 15/02/2017. She named herself and her 11 children as beneficiaries.

3. It was in the period leading to confirmation of the grant in the instant cause that the Applicants allege they became aware of the instant Succession Cause. They filed the Application dated 23/02/2017 seeking *inter alia*, annulment of the Grant of Letters of Administration issued on the 25/01/2016. In their grounds for seeking annulment, the Applicants allege that when petitioning afresh for a Grant of Letters of Administration, the Respondent wilfully excluded them as beneficiaries to the Deceased's estate.

4. The Respondent has brought a Preliminary Objection dated 10/05/2017 against the Application dated 23/02/2017 on the grounds:

a. THAT the Application and/ or the proceedings are Res Judicata

5. The Preliminary Objection is opposed through the Replying affidavit of Michael Koskei Serone dated 05/06/2017. The Applicants depose that the application is not *res judicata* since the issue of who the beneficiaries are was neither raised nor determined in *Succession Cause No. 208 of 2010*.

6. I directed that the Preliminary Objection be heard first and directed the parties to file written submissions. Both parties filed submissions. The Respondent's submissions in support of her Preliminary Objection are dated 08/02/2021. She argues that the issue of whether the 1<sup>st</sup> Applicant was a beneficiary of the Deceased's estate was raised in *Succession Cause 208 of 2010* and it was determined that the 1<sup>st</sup> Applicant was neither a beneficiary nor a relative of the Deceased.

7. The Applicants' submissions are dated 09/02/2020. The Applicants maintain that the issue of who are beneficiaries to the Deceased's estate was never dealt with. They rely on the explanation of *res judicata* given in *Njue Ngai v Ephantus Njiru Ngai & Another [2016] eKLR*. The Applicants also argue that the Respondent's Preliminary Objection does not meet the threshold of a Preliminary Objection since it is not purely based on a point of law but rather on disputed facts. They cite the case of *AKN v JNM [2014] eKLR*.

8. The first issue for determination is whether the Preliminary Objection meets the required threshold. The case of *Mukisa Biscuit Co. v West End Distributors Ltd 1969 EA 696 (Mukisa Biscuit Co.)* remains the guiding authority on what constitutes a proper Preliminary

Objection. In that case, a Preliminary Objection was defined as one which consists of a pure 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. Post 2010, the Courts have expanded the test of Preliminary Objections. In the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR**, the Supreme Court stated the two functions of Preliminary Objections as follows:

The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement.

9. Does the objection of *res judicata* as raised by the Respondent serve these two purposes? In my view, it does. This is because if argued successfully, it would dispose of the application dated 23/02/2017 thus avoid profligate litigation and save the scarce judicial time.

10. Having said that, I will now determine the second and main issue, which is whether the Application dated 23/02/2017 is *res judicata*. The factors the Court considers when considering the issue of *res judicata* were laid out by the Supreme Court in **Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR**, as follows:

Hence, whenever the question of *res judicata* is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in **Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others, (2010) eKLR**, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

11. Applying the same principles to this case, it requires little analysis to conclude that the Application dated 23/02/2017 is not *res judicata*. This is so for at least two reasons.

12. Firstly, the matters in issue in **Succession Cause No. 208 of 2010** are distinct from those in the application of 23/02/2021. The purpose of the revocation proceedings in **Succession Cause 208 of 2010** was to establish the validity of the process used in obtaining the grant issued to the 1<sup>st</sup> Respondent and ultimately, the validity of the said grant. In doing so, the Court delved into matters such as the authenticity of the documents and information presented to Court and the exclusion of the Respondent as a beneficiary. The Court reached the conclusion that the Grant had been obtained fraudulently and revoked the same.

13. Secondly, the Judgment of 15/12/2014 did not conclusively determine who the beneficiaries to the estate of the Deceased are. While the Court undeniably concluded that the Respondent was a beneficiary of the Deceased's estate, the Court did not pronounce itself on whether the Applicants were beneficiaries or not. While it also concluded that the 1<sup>st</sup> Applicant had obtained the Grant fraudulently, the question of whether the 1<sup>st</sup> Applicant and all those claiming with him are beneficiaries was not canvassed. The issue cannot be said to have been dealt with to its logical conclusion.

14. Unlike in ordinary civil litigation, where disputes arise out of concluded transactions, new matters will often arise in Succession cases due to the likelihood of changes in circumstances. The Deceased died in 1983. The distribution of his estate has been pending since then, the issue of succession only having been first brought to Court in 2010 and is still pending to date. It would be in the interest of all the parties to resolve the issues substantively and distribute the estate with finality. While the Applicants can be faulted for unbecoming conduct in the previous proceedings, this does not disentitle them from making a claim in the instant succession cause.

15. From the foregoing, the Preliminary Objection dated 10/05/2017 lacks merit and is hereby dismissed.

16. Costs shall be in the cause.

17. Orders Accordingly.

**DATED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021**

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**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic