



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1678 OF 2009**

**IN THE MATTER OF THE ESTATE OF CATHERINE NYAMBURA KARUNDITU (DECEASED)**

MARY WANJIRU KARUNDITU.....1<sup>ST</sup> APPLICANT

VERSUS

JANE NJERI KANYUA.....1<sup>ST</sup> RESPONDENT

STEPHEN REUBEN KARUNDITU....2<sup>ND</sup> RESPONDENT

MUITUNGU LIMITED.....3<sup>RD</sup> RESPONDENT

ALICE WANJIRU KARUNDITU.....4<sup>TH</sup> RESPONDENT

**RULING**

1. In **Benson G. Mutahi –v- Raphael Gichovi Munene Kabutu & 4 Others [2014] eKLR** Justice B.N. Olao cited the Indian case of **Brij Kishore –v- Bir Singh and Others –v- Bir Singh and Others at the High Court of Punjab and Harana LR 5922 of 2013** in which Justice Paramjeat Singh quoted from the Supreme Court case of **Prem Lala Nahata & Another –v- Chandi Prasad Sikaria (2007) 2, Supreme Court cases 551 at paragraph 18** as follows –

**“It cannot be disputed that the Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arise in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits.”**

2. In **Stumbeg and Another –v- Potgeiter [1970]EA 323** it was observed that:-

**“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered”.**

3. The purpose of consolidation is to facilitate and further the efficient and expeditious disposal of the cases and to provide a framework for a fair and impartial administration of justice to the parties (**Law Society of Kenya – The Centre for Human Rights and Democracy, Supreme Court Petition No. 14 of 2013**). Consolidation is not intended to confer any undue advantage upon the party who seeks it, nor is it intended to occasion any disadvantage towards the party who opposes it.

4. This court deals with the administration of testate and intestate estates, and related matters, under the **Law of Succession Act (Cap 160)**. It also deals with matters under the **Children Act Cap 141, Marriage Act No. 4 of 2014** and **Matrimonial Property Act No. 49 of 2013**.

5. The Environment and Land Court, on the other hand, was created under **Article 162(2)(b)** of the Constitution of Kenya 2010 and **section**

13 of the **Environment and Law Court Act No. 19 of 2011** to hear and determine all disputes relating to environment and land.

6. Following the death of Catherine Nyambura Karunditu (the deceased) on 7<sup>th</sup> July 2009 a petition was filed before this court for the grant of probate of written Will. The same was issued, and the dispute is awaiting the confirmation of the grant.

7. While alive, the deceased was married to Stephen Reuben Karunditu (the 2<sup>nd</sup> respondent). In 1998 the 2<sup>nd</sup> respondent sought to divorce the deceased in **High Court at Nairobi Divorce Cause No. 11 of 1998**. In the **High Court at Nairobi Civil Suit No. 9 of 2009 (OS)** the deceased sued the 2<sup>nd</sup> respondent for the determination and division of matrimonial property. In the **HC ELC No. 163 of 2009 (OS)** the deceased sued the 2<sup>nd</sup> respondent seeking declaratory orders in regards to the shareholding in, and property held by, Muitungu Limited (the 3<sup>rd</sup> respondent).

8. The deceased left a written Will whose executrices were her daughter Mary Wanjiru (the applicant) and her (deceased's) younger sister Jane Njeri Kanyua (1<sup>st</sup> respondent). Following her death, the two substituted her as the plaintiffs in **HC Civil Suit No. 9 of 2009 (OS)** and **HC ELC No. 163 of 2009**. Consents were recorded in February and March 2011, respectively, to compromise the suits. The deceased was buried on LR No. 6392/36. The compromise over matrimonial property decreed that this property be registered in the names of two children of the family to hold in trust for the rest. However, the 2<sup>nd</sup> respondent secretly transferred the property to one of the children, the 4<sup>th</sup> respondent Alice Wanjiru Karunditu. He declined to surrender the title documents to the property to the executrices. The 4<sup>th</sup> respondent is now purporting to assert the rights of an owner of the property to the exclusion of the other siblings. She is a daughter of the deceased.

9. **HCCC No. 9 of 2009 (OS)** and **HC ELC No. 163 of 2009** were consolidated by Justice Mbogholi Msagha on 11<sup>th</sup> February 2010 following application. The judge found that the two suits were basically claims by a married woman (the deceased) during her lifetime and after she died; that she was laying claim to all the property in the two suits in that capacity; that upon her death executrices of her written Will had taken over the claims on behalf of her estate.

10. On 3<sup>rd</sup> November 2016 the executrices filed a motion in **HC ELC No. 163 of 2009** seeking various prayers. They were basically saying that in the consolidated suits the parties had reached a compromise on the properties in question. Subsequently, however, the 2<sup>nd</sup> respondent had breached the agreements and, among the things, transferred one of the properties (where the deceased was buried) to the 4<sup>th</sup> respondent in absolute terms. The applicants sought that transfer be declared null and void and that it be declared that the 4<sup>th</sup> respondent holds the same in trust; the property and the others be conserved until the matter is determined; the property compromised in favour of the deceased be transferred to her estate, andU so on.

11. On 1<sup>st</sup> February 2017 the applicant filed the summons in this cause under **section 47** of the **Law of Succession Act** seeking the removal of the 1<sup>st</sup> respondent from the office of executrix. This was because the 1<sup>st</sup> respondent did not want any proceedings enforced against the 2<sup>nd</sup> and 4<sup>th</sup> respondents who had gone against the compromises above and were putting the estate property to prejudice. The 1<sup>st</sup> respondent had been asked to renounce her executorship but had declined.

12. The applicant has requested that these two applications be heard together which has been opposed by the 1<sup>st</sup> respondent whose case is that the issues raised in the two cases (this succession cause and the consolidated case) are not similar and that the present application has been brought by the applicant to her exclusion. It was submitted that the two suits were between different parties, were at different stages of hearing, and have different questions of law and fact. The 3<sup>rd</sup> intended defendant opposed the quest to consolidate on the basis that this court lacks jurisdiction to hear and determine the issues in **HC ELC No. 163 of 2009**, the applicant lacks *locus standi* in that matter and therefore that the application is incompetent, incurably defective and abuse of the process of the court.

13. I agree with what Justice Mbogholi Msagha observed that, **HCCC No. 9 of 2009** and **HC ELC No. 163 of 2009** were brought to adjudicate the rights of the deceased and the 2<sup>nd</sup> respondent to the properties acquired during marriage which lasted between 1969 and 1989. These were claims that ought to have been filed in this Division. The Environment and Land Court exercises special constitutional jurisdiction, but that does not cover family issues contained in spousal properties and inheritance.

14. The present cause deals with the determination of the estate of the deceased, the identification of the beneficiaries of the estate, the ascertainment of their respective shares, and related matters. When **HCCC No. 9 of 2009** and **HC ELC No. 163 of 2009** were compromised, part of the property in the cases was adjudicated to belong to the estate of the deceased of which the applicant and the 1<sup>st</sup> respondent are the executors. The respondents are now going against the compromises, and that is the complaint in the two applications that are sought to be consolidated.

15. It is my considered view that, after looking at the rival affidavits and the written submissions, the two matters and applications relate to the same parties and deal with the same subject matter, which is the deceased's spousal property rights when she was married to the 2<sup>nd</sup> respondent. I consequently allow the application dated 6<sup>th</sup> June 2018.

16. Given the nature of the dispute, I make no orders as to costs.

**DATED and DELIVERED at NAIROBI this 5<sup>TH</sup> FEBRUARY 2019**

**A.O. MUCHELULE**

**JUDGE**