



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 146 OF 1997**

**IN THE MATTER OF THE ESTATE OF JULIUS MBAE MWARANIA (DECEASED)**

**FLORENCE KARAMBU MWARANIA.....PETITIONER/RESPONDENT**

**VERSUS**

**MARY NTHIORI.....1<sup>ST</sup> OBJECTOR/APPLICANT**

**SAMWEL NDUNGU.....2<sup>ND</sup> OBJECTOR/APPLICANT**

**R U L I N G**

1. The grant in this matter was issued to the petitioner on 13<sup>th</sup> June, 1997 and subsequently confirmed in her favour on 7<sup>th</sup> July, 1999. One of the properties that was wholly distributed to her was **Ntima/Igoki/2823**.
2. The grant was not perfected in respect of this property and on 17<sup>th</sup> January, 2018, the petitioner applied for the removal of a caution that had been registered on 24<sup>th</sup> February, 1998. On seeing that the said caution had been registered before confirmation of the grant and that the entry preceding that caution showed that the deceased's interest in that property was only 101/260 and the other share of 159/260 belonged to one **Livingstone Kirimi Mwiti**, the court insisted that the application be served upon **Mary Nthiori**.
3. On being served with the application, the said **Mary Nthiori** ("the 1<sup>st</sup> applicant") and one **Samuel Ndung'u** ("the 2<sup>nd</sup> applicant") filed a Summons dated 4<sup>th</sup> July, 2018 for the revocation of the grant. The grounds upon which the application was made were stated to be; that the applicants had lived on the subject property throughout their lives; that the petitioner did not inform them at the time she lodged this Cause and that the grant was obtained fraudulently by the making of false statements to the court.
4. This was met with a Notice of Preliminary Objection dated 16<sup>th</sup> October, 2018. The objection was that; the applicants lacked *locus standi* to bring the instant application; that this court lacks jurisdiction to determine the dispute on the ownership of the subject property; that the matter was *res judicata*, the matter having been determined in **Meru CM. ELC Case No. 395 of 2014**.
5. The objection was determined through written submissions. It was submitted for the petitioner that the dispute relates to ownership of the subject property; that such a claim can only be enforced through an ordinary suit in the Environment and Land Court. The case of **Meru H.C Succ. Cause No. 720 of 2013 In re Estate of Julius Ndubi Javan (Dcd) (UR)** was relied on in support of that submission. That since the matter had been determined in the **Meru CM ELC Case No. 395 of 2014**, the matter was already *res judicata* and there was therefore no need to set it aside for determination of the issue of ownership. Mr. Muthomi, Learned Counsel for the petitioner urged that the objection be upheld.
6. Mr. Otieno, Learned Counsel for the objectors/applicants submitted that; since the application was grounded under **sections 76 and 47 of the Law of Succession Act, Cap 160 Laws of Kenya ("the Act")**, the court has jurisdiction; that since the 1<sup>st</sup> applicant is the wife of **Livingstone Kirimi Mwiti**, the co-owner of the subject property, the 1<sup>st</sup> applicant has *locus standi* to mount the application. That the Environment and Land Court is not the correct forum and that the doctrine of *res ipsa loquitur* was not applicable in the circumstances of this case. The cases of **Andrew Mwangi Kabungo vs. Robinson Gichobi Richard & Anor [2017] eKLR**, **In re Estate of Daniel Murango Nderi (dcd) [2018] eKLR** and **In re Estate of Levy Nyange Walugha (dcd) [2018] eKLR** were relied on in support of those submissions. Mr Otieno urged that the objection be dismissed.
7. Having considered the entire record, the averments on oath of the applicants and the submissions of learned Counsel, the issues for determination are; **whether this matter is res judicata, whether the applicants have locus standi to mount the application before court, and whether this court has jurisdiction to entertain the application.**
8. On *res judicata*, I think this was a misplaced argument. There was nothing that was produced to show that **Meru CM ELC Case No. 395**

**of 2014** existed; that it had been lodged by the applicants herein, that it was on the same subject matter between the same parties, that it had been heard and a determination made therein. No pleading or any evidence whatsoever was produced by the petitioner to prove that claim. To that extent, that was but a red herring which should be dismissed, as it is hereby, without much ado.

9. As regards *locus standi*, this is an issue to be looked at on two levels. First, if the 1<sup>st</sup> applicant is claiming as the widow of **Livingstone Kirimi Mwiti** as the part owner of the subject property, then I agree with Mr. Muthomi Advocate that the 1<sup>st</sup> respondent has no *locus standi*. Since it was not in dispute that the said **Livingstone Kirimi Mwiti** was now deceased, only a personal representative of his estate could bring an application on behalf of his estate. The 1<sup>st</sup> respondent did not show that she had been appointed the personal representative of the estate of her late husband. For that reason, she could not maintain any action in respect of the subject property.

10. On the second level, there was the claim that both the applicants had lived on the subject property throughout their lives. Their ages were not disclosed. However, supposed that both had set their feet on the property by 13<sup>th</sup> June, 1997, when the grant in this matter was issued, by the time the petitioner filed her application dated 17<sup>th</sup> January, 2018, a period of 31 years had already passed. A claim under the **Limitation of Actions Act, Cap 22 Laws of Kenya** had arisen and could be maintained. If that is the claim then, the applicants have *locus standi* to the extent that their right for adverse possession has to be investigated.

11. That brings me to the 3<sup>rd</sup> issue. Does this court have jurisdiction to hear the matter? **In re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR** Musyoka J stated:-

*“It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.*

*Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.”*

12. That then is the position when there are claims by or against 3<sup>rd</sup> parties in relation to the estate of deceased persons. That such claims have to be settled outside the framework of the **Law of Succession Act and the Probate and Administration Rules**. That is why, **Rule 41(3) of the Probate and Administration Rules** provide for scenarios where there can be partial confirmation pending settlement of claims touching on other parts of the estate.

13. As already stated, the application has been couched in a too a broad manner that one cannot tell whether it is based on the 1<sup>st</sup> applicant claiming on the basis that her late husband had an interest in the subject property or her and the 2<sup>nd</sup> applicant’s right for adverse possession.

14. Whichever way one looks at it, if the 1<sup>st</sup> applicant applied for a limited grant for the estate of her late husband, she will have *locus* to mount the application and this court will have jurisdiction under **sections 76 and 47 of the Act** to entertain the application. On the other hand, since both the applicants have raised the issue that they are entitled to the property by virtue of adverse possession, that is not a claim that is not a claim capable of being entertained before a family court such as this one. The proper forum is the Environment and Land Court.

15. In this regard, since it is clear that the 1<sup>st</sup> respondent has two claims, on behalf of her late husband and on her own right for alleged adverse possession, and the 2<sup>nd</sup> respondent has a claim allegedly based on adverse possession, the best route is for both to pursue their claims through the Environment and Land Court.

16. In this regard, suffice to state that, the dispute of ownership of **land parcel number Ntima/Igoki/3823** cannot be determined in this forum as jurisdiction lies elsewhere. However, if the 1<sup>st</sup> Respondent were to apply on behalf of the estate of her late husband this court can pronounce itself.

17. One disturbing issue is that, when the petitioner came to court for confirmation, she did not disclose to court that the deceased was only a part owner of the subject property. She caused the court to grant her the entire property as if the deceased was entitled to the whole property. It is for this reason that the default clause to the orders I propose to make will still warrant the petitioner to fully prosecute her application dated 17<sup>th</sup> January, 2017 at a later date.

18. For reasons of what I have stated above, and for the reason that the 1<sup>st</sup> respondent’s claim is two pronged, I will strike out the application dated 4<sup>th</sup> July, 2018 and make the following orders:-

a) I grant the applicants 24 months to lodge and prosecute appropriate proceedings before the Environment and Land Court before lodging a compliant application in these proceedings or alternatively, the 1<sup>st</sup> Respondent to file a compliant application within 60 days of this date.

b) Unless the applicants comply with order No. a) above, the petitioner will be at liberty to prosecute her application dated 17<sup>th</sup>

January, 2018 for appropriate orders.

19.I will make no order as to costs.

**DATED and DELIVERED at Meru this 2<sup>nd</sup> day of May, 2019.**

**A. MABEYA**

**JUDGE**