



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 2070 OF 2011

IN THE MATTER OF THE ESTATE OF MACHARIA KIMANI (DECEASED)

RULING

1. The deceased herein died intestate on 5th May 1998 leaving a widow by the name of Wangari Macharia and three children namely; Eliud Ndirangu Macharia (son), Rose Murugi Macharia (daughter) and Bernadette Murugi Macharia (daughter). On 5th May 1998, the widow and her son Eliud sought a grant of representation. The same was issued to the two jointly on 3rd April 2000. Unfortunately, Wangari (widow) died on 15th October 2000 thus necessitating a fresh grant to issue to the surviving administrator (Eliud Ndirangu Macharia) on 7th March 2001 as the sole administrator.

2. Subsequently, Bernadette Murugi filed an application dated 28th January 2014 seeking to revoke the grant confirmed in the name of Eliud Ndirangu Macharia. On 6th July 2015, the three surviving children entered a consent and had a fresh grant of letters of administration intestate issued to them jointly. On 5th May 1998, Eliud Ndirangu died leaving a widow and children. Consequently, the court issued joint grant of letters of administration to the two daughters and Naomi Wanjiru Mbithu wife to Eliud Ndirangu pursuant to the application dated 30th September 2014.

3. Later, Rose Murugi and Bernadette Murugi filed an application dated 13th October 2015 seeking confirmation of the grant. They proposed to have the estate shared out equitably between themselves and the heirs to the estate of their late brother Eliud Ndirangu through his wife Naomi the 3rd administrator.

4. Through her affidavit of protest sworn on 22nd February 2016, the wife to the late Eliud Ndirangu Macharia challenged the mode of distribution proposed by her sisters-in-law (the co-administrators). She claimed that her sisters-in-law had sufficiently been provided for through gifts *inter vivos* and that some properties did not belong to the estate. In essence, she claimed the entire estate left by the deceased.

5. After hearing the application for confirmation and the protest thereof, the court delivered its ruling on 29th September 2017 dismissing the protest on grounds that there was no proof of gifts *inter vivos*. The court further found that there was no proof of any properties that did not belong to the estate. It was further held that the deceased having died intestate, the estate was to be shared out equally as proposed in the application for confirmation in accordance with Section 38 of the Law of Succession.

6. Aggrieved by the said ruling, Naomi Wanjiru widow to the late Eliud Ndirangu lodged the instant application dated 18th April 2018 and filed on 19th April 2018 pursuant to Article 159 (2) (d) (e) of the Constitution, Sections 74, 76 of the Law of Succession, rules 44, 49, 59, 63 (1) and 73 of the P & A rules and Sections 1A, 1B and 3A of the Civil Procedure Rules seeking orders as hereunder:

- (a) That the Honourable Court be pleased to certify this application as extremely urgent and hear it at the earliest time possible.**
- (b) That the honourable court be pleased to rectify the errors that occurred when this matter was confirmed on 29th September 2017 when the certificate of confirmation of grant was issued.**
- (c) That the certificate of confirmation of grant confirmed on 29th September 2017 be revoked/or annulled.**
- (d) That the honourable court be pleased to grant leave to rectify the errors on the certificate of confirmation of grant dated 29th September 2017 to confirm only the deceased's properties on the schedule of assets.**
- (e) That the honourable court be pleased to give such further orders it deems fit and convenient in the circumstances of this case.**

7. Before the said application could be heard and determined, Bernadette Murugi also filed an application dated 23rd April 2018 seeking court's authority to authorize the Deputy Registrar to sign all necessary documents on behalf of the 3rd administrator(applicant) to facilitate execution of the grant. She argued that the objector had not proved that her consent was obtained through fraud or coercion.

8. In response to the said application, Bernadette Murugi Gitau and Rose Murugi Macharia filed a preliminary objection dated 4th December 2018 and filed on 5th December 2018 contending that:

1. Naomi has not raised any new issue for the court to address that was not raised in her affidavit of protest and addressed by the court in the judgment of the honourable Judge Musyoka on 29th September 2017

2. The application has not met the threshold of Section 74 of the Law of Succession Act because the section clearly states that the court can only rectify and amend errors in names and descriptions, or in setting out the time and place of the deceased's death.

3. The application has also not met the threshold for annulment or revocation of the grant under Section 76 of the Law of Succession Act and rule 44 of the Probate and Administration rules.

4. The court is functus officio for the honorable Judge W. Musyoka in his judgment dated 29th day of September 2017 adjudicated on all the matters raised by Naomi Wanjiru Mbuthu herein in her application dated 18th April 2018 as follows;

a) All paragraphs 3, 5, 10 and 20 of the supporting affidavit are about an alleged oral will by the deceased all of which were considered in the judgment at paragraph 11, 12 and 13 which distributed the estate as intestate.

b) Paragraph 6 of Naomi's supporting affidavit raises the issue of valuation which she had raised in her affidavit of protest and that the same issue appears in paragraph 18 of honourable W. Musyoka's judgment.

c) Paragraph 7 of the supporting affidavit in complaining about P & A cause No. 22 of 2000 not being considered in the judgment. This number was this estates' case number in Kiambu before it was transferred to this current case number.

d) Succession cause number 166 of 2003 was the succession cause for the estate of the mother in law of Naomi and was considered irrelevant to these proceedings in paragraph 12 of the judgment.

e) Paragraph 14 of the supporting affidavit is suspicious as it talks of unspecified and non-existent properties in relation to the late husband as the certificate of confirmation of the grant of his estate does bear properties similar to this estate and had no immovable property.

f) Paragraph 16, 17 and 18 in the application are completely new matters for decision by this court and were never raised during hearing.

g) Paragraph 8 and 9 are ambiguous in that the alleged mistakes, errors and omissions of the decision have not been identified.

9. When the matter came for hearing on 6th May 2019, parties agreed to canvass the preliminary objection first and held the applications dated 18th December 2018 and 23rd December 2018 in abeyance.

10. M/s Njeri counsel for the objector/respondent reiterated the grounds in support of the preliminary objection. She urged the court to find that the application dated 18th December 2018 is resjudicata and amounts to an abuse of the court process as the issues raised have already been adjudicated by a court of competent jurisdiction through its Judgment dated 29th September 2017. Learned counsel submitted that there was no proof of any errors, fraud or concealment of any material information in the acquisition of the grant and subsequent distribution of the estate to warrant rectification or revocation.

11. With regard to review, counsel submitted that there was no proof of any mistake, error apparent or discovery of any new evidence that was not within the knowledge of the applicant at the time when the protest was heard and determined.

12. In a nutshell, counsel asserted that the applicant is trying to revive and reopen the entire case thus inviting this court to sit as an appellate court to the decision of a court of equal status and competent jurisdiction. To support this position, counsel referred to the decision in the case of **Telkom Kenya Ltd vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd) (2014)e KLR** where the court stated that a court becomes functus officio when it has performed all its duties in a particular case.

13. In response to the preliminary objection, the applicant/3rd administrator filed a replying affidavit sworn on the 7th December 2018 arguing that the application dated 18th December 2018 is anchored on sound constitutional and legal principles which have been denied unjustly or violated by the 1st and 2nd administrators. She averred that in its judgment, the court purported to distribute property belonging to her husband which she inherited through a Will executed by the deceased her father in-law.

14. She claimed that some of the properties had been distributed in Kiambu Chief Magistrate's court succession cause No. 47/2015 in respect of the estate of her late husband Eliud Ndirangu Macharia and Kiambu SRMC S cause No. 166/2003 in respect of the estate of Rose Wangari

a widow to the deceased herein.

15. Mr. Okerosi appearing for the applicant reiterated the averments contained in the affidavit in support of the application and the aforesaid replying affidavit to the preliminary objection. Counsel basically opined that the preliminary objection was bad in law, unfounded and amounts to a miscarriage of justice.

16. I have considered the preliminary objection herein, response thereto and oral submissions by both counsel. The only issue that emerge for determination is whether the suit herein(application) amounts to resjudicata thus rendering the court functus officio.

17. The principles governing determination of a preliminary objection have been a subject of deliberation in numerous judicial precedents among them **Mukhisa Biscuits Manufacturing Co. Ltd. Vs West End Distributors Ltd (1969) E.A 696**, where Law J.A. had this to say:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.....”.

18. The preliminary objection herein is anchored on the ground that the application dated 18th December 2018 amounts to resjudicata and that by it's judgment delivered on 29th September 2017, the court has been rendered functus officio.

19. Does this court have the power to entertain and determine the issues raised in the applicant's application dated 18th December 2018? The doctrine of resjudicata is clearly underpinned under Section 7 of Civil Procedure Act which provides:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially 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 trying such subsequent suit in the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

20. In the case of **Independent Electoral and Boundaries Commission vs Maina Kiai and 5 others Nairobi CA Civil Appeal No. 105 of 2017 (2017) eKLR** the court of appeal rendered itself on the doctrine of resjudicata as follows;

“thus for a bar of resjudicata 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) the 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 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”.

21. The applicant has cited several grounds in her quest to have the grant revoked or annulled. Among the grounds raised are: that the court did not consider her evidence during the hearing of her protest; that the deceased had expressed his wish through a Will that his son Eliud Ndirangu was to inherit all his properties to the exclusion of his daughters who had been gifted through their mother; that the estate was overvalued so as to manipulate the distribution process; that Kiambu Succession Cause number 22/2000 and 166/2001, 47/18 had distributed some of the properties distributed in this case and, lastly, that the grant was obtained through fraud by making false statements and concealment of material information.

22. I have carefully considered the preliminary objection and the response thereof vis a vis issues advanced for revocation and rectification of the grant in the application dated 18th December 2018. It is incumbent upon the court to determine whether the issues raised in the application under scrutiny were ventilated upon and a determination made by a competent court. Section 74 of the Law of Succession provides guidelines or circumstances under which a grant can be rectified. These includes an error on descriptions or in setting forth the time and place of the deceased's death, or, the purpose in a limited grant. None of these elements were set out or mentioned with specificity in the said application.

23. It is common ground that the judgment delivered on 29th September 2017 was a culmination of a protest filed by the applicant herein opposing the mode of distribution of the estate as proposed in the application for confirmation filed by the 1st and 2nd administrators. Parties called their respective witnesses and had their day in court. A plain reading of the application dated 18th December 2018 reveals that the issues raised in the aforesaid protest are similar.

24. At Paragraph 15 of the said judgment, the court addressed the issue of the purported Will left by the deceased in favour of his son. The court found that there was no such Will and that the deceased died intestate. Equally, at paragraph 17, the court found that there were no gifts intervivos passed during the deceased's life time hence ordered for the estate to be shared out in compliance with Section 38 of the Law of Succession.

25. Concerning valuation, the court at paragraph 18 held that none of the parties submitted any valuation report hence nobody could take advantage of the omission. The court further stated that the distribution proposed by the 1st and 2nd administrators was fair in the circumstances.

26. In a nutshell, the issues now being raised by the applicant are geared towards reopening the entire suit which is already determined. The applicant is actually raising an appeal indirectly in the same court. She should have challenged the decision before the court of appeal instead of filing one through the backdoor. The allegations that some properties listed in the schedule of assets had been distributed in the estates of Wangari Macharia the widow to the deceased and Eliud Ndirangu Macharia is not correct as the assets in each cause are distinct.

27. In the circumstances of this case, this court has become functus officio. Section 76 regarding annulment or revocation cannot apply as parties were given an opportunity to be heard and presented their respective cases when the protest was canvassed. To hear and determine the application in question will be akin to sitting on an appeal in respect of my colleague's judgment. The suit has been fully heard and determined by a competent court with jurisdiction. Indeed, litigation must come to an end. The applicant should be contented with the determination (Judgment) and the mode of distribution of the estate adopted by the court.

28. For the above reasons stated, I am convinced that the application dated 18th December 2018 is bad in law on account of resjudicata and the same is dismissed with no order as to costs.

29. Accordingly, application dated 23rd December 2018 by the 1st administrator shall be fixed for hearing.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY 2019.

J.N. ONYIEGO

JUDGE