



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2989 OF 2004**

**IN THE MATTER OF THE ESTATE OF ESTHER GATHONI (DECEASED)**

**JACINTA NDUTA.....ADMINISTRATRIX/APPLICANT**

**AND**

**GRACE WAIRIMU MACHUA.....1<sup>ST</sup> OBJECTOR/RESPONDENT**

**ROSEMARY WAMAITHA KAMAU.....2<sup>ND</sup> OBJECTOR/RESPONDENT**

**RULING**

1. The Application coming for consideration in this Ruling is dated 24<sup>th</sup> January, 2019 seeking the following orders:

(i) **THAT this Court be pleased to give an order removing the restriction made vide a Court Order given on 1<sup>st</sup> April 2008 by the Hon. Lady Justice Kalpana Rawal and registered as entries 5 and 6 against the Title for Land Reference No. Dagoretti/Mutuini/92.**

(ii) **THAT costs of this Application be provided for.**

2. The Application is supported by the Affidavit of the Applicant JACINTA NDUTA MUNGAI dated 24.1.2019 in which she has deposed as follows;

(i) **THAT she is the surviving Administrator of the Estate of ESTHER GATHONI (Deceased) having been issued with letters of administration intestate on 1.4.2008.**

(ii) **THAT on the same day, 1/4/2008 the Court issued restraining orders against her and her co-administrator Elizabeth Wambui (now deceased) from conducting any dealings over LR No. DAGORETTI/MUTUINI/92 (hereafter referred to as the suit property) pending the hearing of the summons for revocation of grant date 3.10.2007.**

(iii) **THAT the said Summons for revocation were dismissed for want of Merit on 9.11.2017 and the objector's Application for Stay of Execution was also dismissed on 13.7.2018.**

(iv) **THAT since the summons were dismissed and no Stay of Execution was granted, that it is paramount for this court to make an order removing the aforesaid restriction.**

(v) **THAT the Land Registrar requires an express Court order removing the said restriction.**

3. The Respondents who opposed the application filed grounds of opposition dated 12.2.2019 in which they stated as follows:

(i) **THAT the Respondents have since filed an appeal against the Judgment delivered on 9/11/2017 being Civil Appeal No. 45 of 2019 GRACE WAIRIMU MACHUA and ROSEMARY WAMAITHA KAMAU V. JACINTA NDUTA which is pending in the Court of Appeal.**

(ii) **THAT the matters in respect of the suit property are ongoing and the suit property should be preserved under the doctrine of *lis pendens* and under Section 45 of the Law of Succession Act.**

**(iii) THAT the Summons are incompetent as they offend Rule 63 of the Law of Succession Act on Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules.**

**(iv) THAT the Summons are premature as the deceased beneficiaries should be substituted first before any further steps are taken to administer the Estate.**

4. The Parties were directed to file written submissions in the Application dated 24.1.2019. The Applicant filed submissions dated 16.7.2019 while the Respondents' submissions are dated 7.8.2019 while the Respondents submissions are dated 7.8.2019.

5. The Applicants submitted that Respondents' summons for revocation was dismissed and the purpose of the restriction was to enable the Respondent to be heard on the issue as to whether they had purchased the suit property.

6. The Applicants also submitted that the doctrine of *lis Pendens* was applied when the order for restriction was granted and subsequently the summons for revocation was dismissed and on 13.7.2018, the Court dismissed the objector's Application for Stay of Execution.

7. The Applicant further submitted that the Court is now functus officio in the dispute between the parties herein and it is the Court of Appeal only that can stay the Judgment of this Court.

8. The Applicant relied on the case of **BRUCE JOSEPH ROCKLE V. COQUIRO LIMITED [2014] eKLR** where it was held as follows:

**“The doctrine of lis pendens applies during the pendency of a suit .....There was thus no pending suit for the doctrine to be applicable to during the transfer of the suit premises to the Respondent .....**”

9. The applicants further stated that in this case, the doctrine of *lis pendens* was ousted by the doctrine of *res judicata* the moment the prayer for Stay of Execution was dismissed and the Respondents have not moved the Court of Appeal to grant stay.

10. The Respondents stated in their submissions that this Application is *res judicata* as it raises similar issues to an application dated 2.2.2018 filed in the Environment and Land Division (ELC) in ELC suit No. 48 of 2018 which is pending between the same parties.

11. The Respondents further submitted that the Applicants are misleading this court by seeking orders to have this court sit on Appeal and to set aside the ruling in the ELC Division which they have not appealed against and neither have they disclosed the said decision to this Court.

12. The Respondents submitted that the Suit Property should be preserved under the doctrine of *lis pendens* and Section 45 of the Law of Succession Act. They relied on the Case of **Naftali Ruth IKinyua Vs. Patrick Thuita Gachere and another [2015] eKLR** in which the Court states as follows:

**“The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the Court cannot be gainsaid, as well as the orderly and efficacious disposal of Justice”**

13. The Respondents further submitted that the beneficiaries in the Certificate of Confirmation are now deceased and the Applicant has not made an application for substitution.

14. The Respondent also submitted that the Conduct of the Applicant on 17.7.2019 when the matter was adjourned is a classic case of sub judice and disrespect. The Applicant ridiculed this Court in an undeserving manner by uncalled for screams and insults aired on national televisions, radios and publicized in newspapers and social media with an elaborate coverage being on Citizen TV during prime News.

15. I have considered the submissions filed by the parties in the Application dated 24.1.2019. I find that it is not in dispute that the parties have another case pending in the ELC Division being ELC Suit No. 48 of 2018. The issues for determination in the Application dated 24.1.2019 are as follows:

**(i) Whether the Application is *res-judicata***

**(ii) Whether the doctrine of *lis pendens* is applicable to this case.**

**(iii) Whether the application dated 24.1.2019 is incompetent**

**(iv) Whether the Applicant is entitled to the orders she is seeking.**

**(v) Who pays the Costs for this application?**

16. On the issue as to whether the Application dated 24.1.2019 is *res judicata*, I find that the parties have a case pending before the ELC Court being Suit No. 48 of 2018 on the ownership of the Suit property.

17. For the doctrine of *res-judicata* to apply, the parties and the issues between the parties or parties litigating on their behalf must be the same. The relevant Section dealing with *res judicata* states as follows:

**“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 can 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.”**

The Civil Procedure Act also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

**“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.**

**Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

**Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”**

18. The applicant made an application before the ELC Court in which she contended that the Respondents are trespassers to the suit property who also have caused restrictions to be registered against the title to the suit property. She was seeking the removal of the restriction and an injunction to restrain the Respondents from entering, farming, trespassing, operating or continuing with dealings on the suit property.

19. The Ruling which was delivered on 16.5.2019 stated as follows:

**“The deceased was registered as owner of the suit property in trust of her children. It is some of her children who sold part of the property during their life time. If the documents filed herein are anything to go by. It follows that no injunction can be granted at this moment. Equally no order can be granted for the removal of the restrictions registered against the title.”**

20. I find that this particular application is *res-judicata* as it is seeking an order that had been declined in the above suit pending before the ELC Division which is for the purpose to determine ownership of the suit property.

21. The Court in the English case of HENDERSON VS HENDERSON (1843-60) ALL E.R.378, observed thus:

**“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”**

22. The Applicant did not disclose the existence of ELC Suit No. 48 of 2018 yet she is the one who filed it and was seeking the removal of the restriction amongst other orders.

23. I also find that the doctrine of *lis pendens* is applicable in this case as the suit for determination of ownership of the suit property is pending determination in ELC suit No. 48 of 2018.

24. On 13.7.2018, this Court said in its Judgment as follows:

**“In the Judgment delivered on 17.11.2017, this Court made a finding that it had no jurisdiction to determine the issue of possession or agreement as claimed by the Applicants and stated that the Court to determine the said issues was the Environment and Land Court (ELC). The Court stated that the objectors can pursue their claim in the ELC Court”**

25. I therefore find that this matter is still pending determination and the restriction cannot be removed until the case is determined at the right forum.

26. This is a Succession Court and it does not determine ownership of property. The mandate of this court is principally to protect estates of deceased persons which it has jurisdiction over and to oversee the transmission of those estates to the lawful beneficiaries and the alleged trust cannot be established in this succession cause.

27. In High Court Succession Cause Number 864 of 1996 [2015] eKLR Musyoka J stated as follows:

**“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to**

*file a substantive suit to be determined by the Environment and Land Court.*

*Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.*

*In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”*

28. It is in the interest of Justice that the Suit Property be preserved pending determination of the ownership or trust issues alleged by the Respondents.

29. I therefore find that the doctrine of *lis pendens* is applicable in this case.

30. On the issue as to whether the Application dated 24.1.2019 is incompetent, the Respondents stated that the Applicant is the only surviving Administrator and further that the deceased beneficiaries have not yet been substituted.

31. I find that the grant of letters of administration intestate was made to the Applicant JACINTA NDUTA and ELIZABETH WAMBUI on 5.5.2008. The Applicant JACINTA NDUTA stated in her Supporting Affidavit that her Co-administrator ELIZABETH WAMBUI is now deceased yet no summons for substitution has been filed. To that extent, the Application dated 24.1.2019 is incompetent as there is need to substitute the deceased co-administrator and also the deceased beneficiaries of the Estate.

32. Finally, on the issue as to whether the Applicant is entitled to the orders she is seeking, I find that the answer is NO. I find that the restriction placed on the suit property namely LR No. DAGORETTI/MUTUINI/92 cannot be removed for the following reasons.

**(i) The Application dated 24.1.2019 is *res judicata* since the issue of removal of the restriction was canvassed in before the ELC Division in ELC Suit No. 48 of 2018 and the Ruling was delivered on 16.5.2019 rejecting the said prayer.**

**(ii) This matter is still pending in ELC suit No.48 of 2018 where the ownership of the Suit property is yet to be determined and therefore it is in the interest of justice that the suit property be preserved pending the determination of the said suit.**

**(iii) The Applicant being the Sole surviving administrator requires to file a summons for rectification to remove her co-administrator who is now deceased and also to substitute the deceased beneficiaries of the Estate.**

**(iv) The application dated 24.1.2019 is accordingly dismissed with costs to the Respondents.**

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 11<sup>TH</sup> DAY OF OCTOBER, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**