



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 111 OF 2007**

**IN THE MATTER OF THE ESTATE OF MOHAMMED BILALI DECEASED**

**ASHA SWALEH.....1ST PETITIONER**

**SALIM KIPRONO LANGAT RUTO.....2ND PETITIONER**

**VERSUS**

**YUSUF MOHAMMED & OTHERS.....RESPONDENTS/OBJECTORS**

**AND**

**LEONARD MUTUKU SESI.....INTERESTED PARTY**

**R U L I N G**

1. The Interested Party/Applicant herein filed an application dated 8-11-2016 and seeks the following prayers:

- a) *This court be pleased to strike out this matter for being an abuse of court process and is res judicata.*
- b) *This court be pleased to lift and suspend the orders dated 7th October 2009 vesting the deceased's property to the Public Trustee.*
- c) *Costs be in the cause.*

2. The application is supported by the affidavit of the applicant Leonard Mutuku Sesi sworn on 8-11-2016 and further on the following grounds namely:

- i) *The applicant is the registered owner of the property namely House No. B72/2 (D).*
- ii) *Matters relating to the deceased herein were finalized vide Succession Cause No. 66 of 1998 at Machakos and therefore these proceedings are a nullity and an abuse of the court process.*
- iii) *That the correct facts had not been brought to the court's attention when it made orders vesting the property in the Public Trustee.*

3. The application was opposed by the respondents who raised the following grounds of opposition:

- i) *That the letters furnished by the Interested Party regarding ownership of plot number B7/2D are forgeries since the estate is yet to be distributed and further the applicant is not a beneficiary to the estate.*
- ii) *That the respondents are strangers to the alleged affidavit of one "Abdala Mohamed" who is purported to have consented to confirmation of plot B7/2D in favour of the Interested Party herein yet he had no authority whatsoever.*
- iii) *The said "Abdala Mohamed" is a stranger and an inter meddler in the deceased's estate and should be cross examined on the matters in his affidavit if at all he exists.*
- iv) *That matters concerning the administration of the estate were put under the mandate of the Public Trustee so as to avoid*

*intermeddling and wastage by strangers such as the Interested Party/Applicant and also to allow more beneficiaries to come out and deal with the issue of distribution of the estate.*

*v) That the applicant's request to have the order vesting the property in the Public Trustee lifted should not be allowed as it will give a chance to the applicant to inter meddle with the estate yet he is a stranger and not a dependant.*

*vi) That this matter is not res judicata as pertinent issues regarding the distribution of the estate have not been concluded by this court yet the applicant is a busy body.*

*Vii) That the application is an abuse of the process of the court and ought to be dismissed as the applicant has embarked on a systematic exercise to disinherit the rightful heirs of the deceased.*

4. Parties agreed to canvass the application by way of written submissions.

#### **Interested Party's Submissions**

5. It was submitted that the petitioners and objectors herein do not rank higher than wife or children of the deceased as they are strangers to the estate and therefore the applicant who dealt directly with the wife and children ranks higher and the application should be allowed. It was also submitted that the present cause is *res judicata* in that the wife of the deceased had already filed for confirmation of grant vide **Machakos High Court P&A 66 of 1998** and same was confirmed on the 21-7-2009 by Mwera- J and should not be rehearsed again in these proceedings. It was also submitted that the surviving widow of the deceased Mwawawa had a life interest in the residue in the estate and sole discretion to bequeath by way of gift to the applicant.

Finally, it was submitted that the petitioners through their affidavits have affirmed that they do not possess any interest in the property but that they together with the objectors ought to have challenged the grant in succession cause No. 66 of 1998 and not to file another cause. It was also submitted that the property in issue is not subject to succession and hence the orders issued by this court should be vacated forthwith and allow the applicant to enjoy rights to his property.

#### **Respondents/Objectors Submissions**

6. It was submitted that the succession cause 66 of 1998 had been fraudulently filed by a stranger going by the name Mwawawa Mohamed who was not a wife to the deceased Bilali Mohamed and therefore any purported transactions by the said lady in favour of the applicant were clearly fraudulent. It was submitted that the interested party/applicant herein who knew the families of the deceased crafted a strategy to disinherit the rightful beneficiaries by using proxies to purport to be wife and son of the deceased and lodged the succession cause 66 of 1998 after which he had himself accepted as the owner of plot B7/2D Pumwani. It was also submitted that the names used in the **P & A 66 of 1998** were not those of the deceased, his wife and son and further there was irregularity in that the alleged son to the deceased is indicated as surety by guarantor which was irregular. Again the applicant's claim that he had bought the property from Mwawawa is further put into doubt when he again claims the same was a gift and further goes ahead to claim that the son of the alleged Mwawawa one Abdalla Mohamed had consented to him taking over the plot yet documents availed by the respondents/objectors showed that the said Abdalla Mohamed is alleged to have signed Power of Attorney instruments in favour of two other persons at different times and which resulted in civil dispute vide **Nairobi Milimani Court and cases numbers 1947 of 2006 and 106 of 2003.**

It was finally submitted that the applicant is a fraudster as all the documents he has used are forgeries and he should be banned from inter meddling with the estate.

7. I have considered the interested party's application as well as the rival affidavits. I have also considered the submissions presented by the learned counsels for the applicant and the objectors. It is not in dispute that another succession cause being Machakos High Court P & A 66 of 1993 had already been lodged prior to this one in which the applicant herein obtained access to one of the deceased's properties namely plot No. B7/2D Pumwani Nairobi and which is contested by the objectors herein. It is also not in dispute that this court had on the 16-12-2009 ordered that the estate herein be administered by the Public Trustee until further orders and that evidence was to be taken on the beneficiaries of the estate. It is also not in dispute that this court subsequently received the evidence of some of the beneficiaries as at 30-5-2011 and was to continue receiving the said evidence when the interested party filed the present application dated 8-1-2016. The issues necessary for determination are as follows:

**i) Whether the present suit is Res Judicata.**

**ii) Whether the applicant has presented sufficient reasons to warrant the lifting of orders vesting the administration of the estate of the deceased in the Public Trustee.**

8. As regards the first issue, I note that the person who had petitioned for letters of grant in Machakos High Court Succession Cause No. 66 of 1998 is one Mwawawa Mohamed and that the deceased therein is described as Mohamed Ndolo alias Mohammed Bilali *alias* Mzee Mohamed. The grant was later confirmed and a certificate of confirmation of grant issued. In the present cause No. 111 of 2007, the name of the deceased is described as Mohamed Bilali and the petitioners are Salim Kiprono Langat Ruto and Asha Swaleh. The objectors herein have maintained that the deceased was Mohamed Bilali and his wife was Mwana Hawa Mohamed. It is therefore quite clear that the parties in the two cases are completely different and hence the issue of *res judicata* does not at all arise. The principle of *res judicata* is only applicable where similar parties have had their dispute substantially determined and resolved and are thereafter barred from lodging the same dispute for determination. The objectors herein have maintained that the parties in succession cause No. 66 of 1998 are strangers and unknown to the family of the deceased Mohamed Bilali and they contend that the said petitioner and her alleged son were fictitious persons created by the interested party herein with the sole aim of grabbing one of the assets of the deceased Mohamed Bilali. Again the objectors have maintained that all the assets of the deceased were not dealt with in the said cause as the interested party was only after one of the properties and hence

the matter was not fully concluded if at all. In any event I find the applicant should not be permitted to seek refuge under the *res judicata* rule and to prevent the objectors from raising questions as to how the succession cause No. 66 of 1998 had been instituted and to challenge the applicant to explain the circumstances surrounding his claim to one of the assets of the deceased. A perusal of the pleadings in succession 66 of 1998 as well as the annexures in the objectors supporting affidavit reveals that there is a lot more than meets the eye as far as the issue of the authenticity of the said cause and the persons who lodged the same are concerned. This then calls for a thorough scrutiny and which will come to the fore once the reception of the evidence of the beneficiaries is concluded. In the premises I find the filing of this matter by the objectors is not an abuse of the process of the court as the matter is not *res judicata*.

9. As regards the second issue, this court being a succession court endorsed a consent entered between the parties to the effect that the administration of the estate of the deceased be vested in the Public Trustee until further orders as evidence of the beneficiaries of the estate is received. So far some of the beneficiaries have turned up and tendered their testimonies and that the same is yet to be concluded. The said order was made on the 16-12-2009. The applicant herein filed the present application about seven years later. No reasons have been given by the applicant for that long delay yet he had been in the picture all along as can be seen from the various documents annexed in the rival affidavits. The parties in this matter appear to accuse each other as strangers to the estate of the deceased. Under those circumstances it is fair and just for this court pursuant to the provisions of Rule 73 of the Probate and Administration Rules to ensure that the properties of the deceased are safeguarded for the benefit of those due to legally benefit. Vesting the administration of the estate in the Public Trustee was and is still appropriate in the circumstances as the rival claims are addressed by the court in the meantime. To lift those orders would be prejudicial to the estate of the deceased as the assets might be wasted or intermeddled with and which is forbidden under section 45 of the Law of Succession Act. There will be no prejudice suffered by any of the parties since each will be given an opportunity to ventilate their respective claims before the court.

10. In view of the foregoing observations, I come to the finding that the interested party's application dated 8-1-2016 lacks merit. The same is dismissed with costs to the objectors/respondents.

Orders accordingly.

**Dated and delivered at Machakos this 19<sup>th</sup> day of July, 2018**

**D.K. KEMEI**

**JUDGE**

**In the presence of:-**

Tamata for the Applicant/Interested party

Kahuthu- for the objectors

Josephine - court Assistant