



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 28 OF 2009**

**IN THE MATTER OF THE ESTATE OF BENJAMIN MWANGANGI MUUNDA – DECEASED**

**BETWEEN**

**ESTHER MBULA MWANGANGI.....RESPONDENT**

**VERSUS**

**1. NELSON MUTISYA MUUNDA.....RESPONDENT**

**2. JOSEPHINE MUTINDI MULI.....RESPONDENT**

**3. JOSEPH MUSYOKA MUUNDA.....RESPONDENT**

**4. BONNY MAKAU.....APPLICANT**

**RULING**

**Applicant's Case**

1. By Chamber Summons dated 27<sup>th</sup> August, 2014, expressed to be brought pursuant to the provisions of section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules*, the applicant herein, **Bonny Makau**, seeks the following orders:

**a) Spent**

**b) Spent**

**c) That the resultant titles from Land Title No. Mavoko Town Block 3/1970 be returned to the land registrar and cancelled.**

**d) That this honourable court be pleased to determine the share of the applicant in Land Title No. Mavoko Town Block 3/1970.**

**e) That costs be awarded to the Applicant.**

2. According to the applicant, he is the administrator of the estate of his later father **Joshua Mwilu Muunda** whose estate owned 1/5<sup>th</sup> share of Land Title No. 3/1970 which was registered in the names of **Benjamin Mwangangi Muunda, Samuel Muli Muunda, Nelson Mutinda Muunda, Joseph Musyoka Muunda and Joshua Mwilu Muunda**. It was averred by the applicant that for the purposes of resolving the issue of the Land Title No. Mavoko Town Block 3/1970, a consent was entered for the land to be registered jointly in the names of all those who had interest therein. Accordingly, this Court ordered that the said land currently registered in the names of **Benjamin Mwangangi Muunda-Deceased, Samuel Muli Muunda-Deceased, Nelson Mutinda Muunda, Joseph Musyoka Muunda and Joshua Mwilu Muunda-Deceased** be transferred and registered in the names of **Esther Mbula Mwangangi, Josephine Mutindi Muli, Nelson Mutisya Muunda, Joseph Musyoka Muunda and Bonny Makau Mwilu**. However, the applicant averred, the Court did not determine each party's share of the said property including the estate share of the same.

3. It was disclosed that the parties went before the Chief, Lukenya Location and agreed as that the property would be divided in the following manner: **Benjamin Mwangangi Muunda- 5 acres; Samuel Muli Muunda- 5 acres; Nelson Mutinda Muunda – 5 acres; Joseph Muniyao Muunda – 5 acres; Joshua Mwilu Muunda – 10 acres; and Joseph Musyoka Muunda – 10 acres**. However when the land was subdivided, the applicant averred that h was given 6-5 acres instead of the agreed 10 acres. He therefore contended that the parties reneged on the said agreement and instead gave him land that was less than what was agreed. He therefore was of the view that in his interest, there

ought to be stay of dealings with the said land and that the resultant titles be cancelled.

4. It was the applicant's submissions that this Court has jurisdiction to issue the orders sought since the land herein belonged to the estate and the distribution is a resultant of the consent ordered entered on 18<sup>th</sup> June, 2012

5. In opposition to the application the 1<sup>st</sup> Respondent relied on the following grounds of opposition:

- 1) That this Honourable Court has become functus officio having confirmed the Grant and distributed the entire estate.
- 2) The issues raised by the 4<sup>th</sup> Respondent in the application dated 27<sup>th</sup> August, 2014 are the same issues raised by the Petitioner, **Esther Mbula** Mwangangi in her application dated 14<sup>th</sup> August, 2013 in respect of which a replying affidavit dated 15<sup>th</sup> November, 2013 and preliminary objection dated 27<sup>th</sup> September, 2013 were filed and the court is set to make a ruling.
- 3) The issues raised in the current application are the same issues raised in the following cases:
  - a) Nairobi High Court ELC No. 1260 of 2013 (**Esther Mwangangi vs. Daniel Ongera & Anor.**)
  - b) Machakos HCCC No. 359 of 2013 (**Esther Mwangangi vs. Daniel Ongera.**)
- 4) That the application dated 27<sup>th</sup> August, 2014 is an afterthought, bad in law and amounts to abuse of the court process.

6. It was the 1<sup>st</sup> Respondent's submission that following the delivery of the judgement, this Court became functus officio which in his view share the common objective of bringing finality to litigation. Based on the authority of Meru High Court Succession Cause No. 139 of 1998 – Estate of Justus Kiruma M'rutere, it was contended that this Court has no jurisdiction to entertain the current application as this being a succession matter which had been concluded, the applicant ought to have filed a fresh matter before the ELC so that the issue of ownership is addressed. It was further submitted that since the applicant herein is the Petitioner, he cannot seek to cancel the Title Deeds or revoke her own confirmed grant.

7. It was disclosed that the subject matter of the suit was owned by five brothers and the applicant was entitled to her husband's share which was granted pursuant to the grant issued by this Court.

8. The Court was therefore urged to dismiss the Applicant's application with costs.

9. I have considered the application filed herein. It is true that on 18<sup>th</sup> June, 2012 the parties recorded a consent by which it was ordered that the said land title No. Mavoko Town Block 3/1970 currently registered in the names of **Benjamin Mwangangi Muunda-Deceased, Samuel Muli Muunda-Deceased, Nelson Mutinda Muunda, Joseph Musyoka Muunda** and **Joshua Mwilu Muunda-Deceased** be transferred and registered in the names of **Esther Mbula Mwangangi, Josephine Mutindi Muli, Nelson Mutisya Muunda, Joseph Musyoka Muunda and Bonny Makau Mwilu**. Following the recording of the said consent, the application dated 27<sup>th</sup> May, 2011 was marked as settled. By that application, the applicant therein, **Nelson Mutisya Muunda** sought an order that the Grant of the Letters of Administration issued to **Esther Mbula Mwangangi** and confirmed on 27<sup>th</sup> July, 2009 be revoked. By a certificate of confirmation of grant dated 29<sup>th</sup> July, 2009, the said property as well as Mavoko Town Block 3 No. 107 were to be registered in the names of the said **Esther Mbula Mwangangi**.

10. Although the consent did not expressly nullify the confirmed grant, it is clear that by that consent the terms of the said grant were thereby varied. Accordingly by a certificate of confirmation of grant dated 31<sup>st</sup> December, 2012, Mavoko Town Block 3/1970 was to be transferred and be registered in the names of **Esther Mbula Mwangangi, Josephine Mutindi Muli, Joseph Musyoka Muunda, Bonny Makau Mwilu** and **Nelson Mutisya Muunda**.

11. There was another application dated 14<sup>th</sup> August, 2013 filed on behalf of **Esther Mbula Mwangangi** by which she was seeking inter alia an order that her shares in Mavoko Town Block3/1970 be determined by the Court. From the record, this application does not seem to have been heard and determined. However, it seems that the parties entered into some out of court transactions by which the said land parcel was subdivided. It seems that it is the said subdivision that has aggrieved the applicant and has provoked the instant application.

12. The applicant herein does not deny that there was some agreement to subdivide the suit land. What the applicant herein is complaining about is that in the process of the implementation of the said agreement he was cheated and got a lesser portion than the one agreed. In my view, if the applicant's case is correct, then it may well be a case of fraud. The parties having agreed, on the manner of distribution of the land, which mode the applicant herein does not contest, there is no basis for seeking an order that this Court determines the share of the applicant. What ought to be determined is whether the applicant herein was defrauded in the process of apportioning the shares. That, in my view, is not an issue for the Succession Court but one that ought to be determined by the Environment and Land Court. This was the position of **Nyamu, J** (as he then was) in **Stephen Waitthaka Gatumbi vs. Frumence Kariuki Murui Nairobi HCCC NO. 1757 of 2001** where he held that issues of fraud and forgery cannot in law be raised in a succession cause and therefore the matter cannot be *res judicata*.

13. It is therefore my view that whereas *res judicata* may well be invoked in succession cause where appropriate, (see **In the Matter of the Estate of William Murage Irungu Nakuru HCSC No. 405 of 1996**), this applicant cannot, in the absence of the pending pleadings alluded to and in light of the clear admission that the same are still pending, be said to *res judicata*. As was held by **Kimaru, J** in **Willie vs. Muchuki & 2 Others Nakuru HCCS No. 163 of 2004 [2004] 2 KLR 357**,

**“The doctrine of *res judicata* applies where there are three basic conditions. The party relying on it must firstly, show that**

**there was a former suit or proceeding in which the same parties as in the subsequent suit litigated. Secondly, the matter in issue in the later suit must have been directly and substantially in issue in the former suit. Thirdly, that a Court competent to try it had had heard and finally decided the matter(s) in controversy between the parties in that former suit.”**

14. Similarly I am unable to find that this Court is functus officio. I am however convinced that this is not the right forum for the applicant to ventilate his grievances. In the result the application dated 27<sup>th</sup> August, 2014 fails and is dismissed but with no order as to costs.

15. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 16<sup>th</sup> day of July, 2018.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Musyimi for Mr Kamanda for the applicant**

**CA Geoffrey**