



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 857 OF 1992

IN THE MATTER OF THE ESTATE OF CLEMENT MUNGA MUNA (DECEASED)

ANN NJOKI MUNGA.....APPLICANT/OBJECTOR

VERSUS

CLEMENT SOLOMON MUNA.....1ST RESPONDENT/ADMINISTRATOR

SAMUEL NG'ANG'A.....2ND RESPONDENT/ADMINISTRATOR

RULING

1. The deceased Clement Munga Muna died on 27th July 1990. A grant of letters of administration intestate was made to Milkah Mwhiki Munga (deceased), Clement Solomon Muna (the 1st respondent) and Samuel Ng'ang'a (the 2nd respondent) on 12th November 1992 and confirmed on 3rd December 1996.

2. The applicant brought the present application dated 4th January 2017 and amended on 5th June 2017 seeking the following orders:

a) that the grant of letters of administration made to the respondents on 12th November 1992 and confirmed on 3rd December 1996 be revoked and instead the grant be made to the applicant;

b) that the respondents be restrained by the court's injunctive orders from selling, transferring and/or dealing in any way with the deceased's estate through themselves or their agents pending the hearing and determination of this application; and

c) that the administrators be ordered to deposit all the income generated from the deceased's estate pending the hearing and determination of this application.

The application was based on the grounds that the grant was issued and confirmed by making a false statement and concealment of facts material to the case from the court; that the grant was obtained by untrue allegations in relation to the true and correct list and numbers of the dependents of the deceased and the properties and assets of the deceased; and that the administrators defrauded and disinherited the female beneficiaries of the deceased.

3. The application was supported by the affidavits of the applicant dated 4th January 2017 and 5th June 2017. It was her case that in the petition for the grant of letters of administration, seven female beneficiaries who were all adults were left out from the list supplied to the court; that the seven beneficiaries were Elizabeth Wacheke, Loice Wangui, Priscilla Wangechi, Penina Wanjiku, Mary Muthoni, herself and Naomi Wanjiru; that a prime property namely LR No. 209/3531/1 belonging to the deceased was excluded and concealed from the list of assets listed to form part of the estate of the deceased; that the petitioners failed to disclose that there was a dispute in court at Kitale where the mode of distribution of the deceased's estate had been deliberated upon by the elders, filed and confirmed by the Principal Magistrates Court at **Kitale** in **PM Land case No. 25 of 1994** and the female beneficiaries of the deceased's estate had been given a portion of his estate; that the petitioners did not obtain the consent of the female beneficiaries of the estate of the deceased contrary to **Rules 26 and 40(3) of the probate and administration rules**; and that the estate of the deceased has substantially been administered in accordance with the certificate of confirmation of grant except L.R No. 1800/5 which is now Waitaluk/Kapkoi Block1/Gatongoria Nos. 54, 53, 57, 58, 70 and 71 which has 200 acres still in Clement Solomon Muna's names and L.R. No. 207/3531/1 Nairobi.

4. The application was opposed by the respondents through the replying affidavit of Clement Solomon Munga dated 8th December 2017. It

was his case that the application was fatally and irredeemably defective, *sub judice* and *res judicata*; that the application was an afterthought having been filed 20 years after the confirmation of grant; that the applicant is his sister; that the estate of the deceased was distributed in accordance with the deceased's wishes as expressed in his written memorandum dated 21st March, 1988 which was adopted by this court during the confirmation of the grant; that their deceased mother having been appointed as one of the administrators of the estate oversaw the distribution of the estate in accordance to the wishes of the deceased; that he was the registered owner of L.R. No. 209/353/1 which was transferred to him in 1989 prior to the death of the deceased and the same was not part of the estate of the deceased; that the deceased did not at any time own any parcel of land known as L.R. No. 1800/5 or L.R. 207/3531/1; that he was the lawful owner of Waitaluk/Kapkoi Block 11/Gutongoria Nos. 54,53,57,58 and 71 having acquired the same subsequent to the distribution of the deceased's estate; that purported adoption of the elders' decision in **Kitale No. 25 of 1994** was quashed in **Eldoret Judicial Review Miscellaneous Application No.76 of 1995**; that the present application is *res judicata* since the applicant filed a similar application seeking to revoke the grant in **Eldoret Miscellaneous Application No. 193 of 1994**; that the present application is also *sub judice* because there presently exists in the High Court in Kitale **Petition No. 5 of 2012 –Anne Njoki Munga & 3 Others vs Clement Solomon Munga & Another** in which the same applicant is challenging the distribution of the estate of the deceased which petition is pending determination; and that the applicant was not disinherited as the deceased provided for all his children.

5. Parties filed their written submissions which I have considered.

6. The applicant submitted that she had demonstrated sufficient grounds for the court to revoke the grant as provided for under **section 76 of the Law of Succession Act**; that the respondent did not disclose the existence of his sisters as required by **Section 29 of the Law of Succession Act** and did not notify them of the succession proceedings as is required by **Rule 26 (1) of the Probate and Administration Rules**; that the respondents did not include their sisters in the distribution of the estate of the deceased; that an application under **section 76 of the Law of Succession Act** is not time bound; and that the grant was defective from the onset as it failed to give accurate and factual information in relation to the surviving dependents of the deceased and the properties comprising of his estate.

7. It was the respondent's submission that the present application was *res judicata*, the applicant having filed similar suits involving the same parties as those in the present application relating to the same issues as those in the present application and which issues were directly and substantially heard and determined in the former suits by courts of competent jurisdiction. The former suits were **Eldoret Miscellaneous Application No. 193 of 1994** which case sought the annulment of the grant made to the respondents, which case was dismissed; and **Land Dispute No.23/944/B** filed in the Saboti Land Dispute Tribunal which decision was adopted by the **Principal Magistrates Court at Kitale in Land Case No. 25 of 1994**, which decision to redistribute the estate pursuant to the elder's decision was quashed in a judicial review application in **Eldoret Miscellaneous Application No. 76 of 1995**.

8. The respondent also submitted that the suit was *sub judice* since there presently exists a further suit filed in the **High Court at Kitale, Petition No.5 of 2012 (Anne Njoki Munga & 3 Others vs Clement Solomon Munga & Another)** where the applicant is challenging the distribution of the deceased's estate and which petition is still pending determination. It was the further submission of the respondents that the applicant is guilty of laches since there has been an inordinate delay of 26 years in filing the present application, that the applicant's pleadings are devoid of any reasonable explanation or excuse, and that due to the inordinate delay the 1st respondent shall be unfairly prejudiced.

9. On the issue of *res judicata*, I note **section 7 of the Civil Procedure Act** which 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 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.”

10. **Land Dispute No.23/944/B** was filed by the applicant against the respondents in the Saboti Land Dispute Tribunal in which suit the applicant sought the redistribution of the estate of the deceased. The tribunal found in favour of the applicant. The decision was then adopted by the **Principal Magistrates Court at Kitale in Land Case No. 25 of 1994**. The decision to redistribute the estate pursuant to the elder's decision was however quashed in a judicial review application in **Eldoret Miscellaneous Application No. 76 of 1995**. Then there was **Eldoret Miscellaneous Application No. 193 of 1994** brought by the applicant against the respondent seeking annulment of the grant made to the respondents and redistribution of the estate of the deceased. The application was dismissed by the court. It is clear that in the instant case, the applicant, who ought to have appealed the two decisions by the Eldoret High Court, has come to relitigate before this court. This court finds that the present application is *res judicata*.

11. Lastly, its worth noting that filing of several suits or applications before the same court or in different courts seeking the same orders is an abuse of the process of the court (**National Bank of Kenya Ltd –v- John Odawa Oluoch HCCC No. 205 of 1997 at Kisumu; Theluji Dry Cleaners Ltd –v- Muchiri & Others [2002]2 KLR 764 and Charles Mugunda Gacheru –v- The Senior Resident Magistrate & Others [2005] LLR 7602**). The applicant is aware that he is making a similar claim against the respondents in the High Court at Kitale.

12. In conclusion, I find that the application is both *res judicata* and an abuse of the process of the court. It is dismissed with costs.

DATED and SIGNED at NAIROBI this 10TH day of DECEMBER 2018

A.O. MUCHELULE

JUDGE