



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
SUCCESSION CAUSE NO.451 OF 1996
IN THE MATTER OF THE ESTATE OF
JAMES NYAMWEYA – DECEASED

GEORGE OMARI NYAMWEYAAPPLICANT

VERSUS

CHARLES RATEMO NYAMWEYA.....1ST RESPONDENT

JEMIMA NYABOKE NYAMWEYA.....2ND RESPONDENT

RULING

Background

1. James Nyamweya (hereinafter referred to as the "deceased"), died on 25th September 1995. Prior to his death, the deceased had executed a will dated 3rd April 1991 on which a grant of probate of written will was issued on 26th May 2000 and thereafter, a certificate of confirmation issued on the 27th November 2001. In the said will, the deceased had appointed his wives Tabitha Moige (1st wife), Jemima Nyaboke (2nd wife) and his son Charles Ratemo (the 1st respondent herein) to be his trustees, executors and guardians of his infant children when he dies. As fate would have it, Tabitha Moige Nyamweya died before the deceased on the 18th July 1995 thereby leaving behind Jemimah Nyaboke and Charles Ratemo as the trustees, executors and guardians in accordance to the aforesaid will.

2. Following the aforesaid confirmation of the grant, the deceased's property was distributed among the beneficiaries. Twelve years later, one Joyce Bochere Nyamweya (also a beneficiary to the subject estate) filed applications dated 31st July 2013 and 15th August 2013 in which she sought the revocation of the grant issued on 26th, May 2000. In a judgment delivered by Sitati J. on 17th December 2014 the said applications for revocation of grant were allowed thereby triggering the filing of not only an appeal to the Court of Appeal, but also a series of applications as follows:

- 1. Application dated 28th January 2015 (filed by the 1st Respondent herein- Charles Ratemo),**
- 2. Application dated 9th February 2015 (filed by Joyce Bochere Nyamweya), and**
- 3. Application dated 10th April 2015 (filed by the applicant herein George Omari Nyamweya), which is the subject of this ruling.**

4. Two other applications were recently filed by various parties to this succession cause on 23rd November 2016 and on 1st December 2016.

5. In the application dated 28th January 2016, the 1st Respondent herein sought to have the 'ex parte proceedings' conducted on 23rd & 24th October 2014, which resulted in the Judgment of 17th December 2014 by Justice Sitati, set aside in its entirety so as to allow the matter to proceed to hearing on its merits. The said application the dated 28th January 2015 was however dismissed by this court on 6th June 2016 and consequently an order staying the proceedings in this case was also lifted. The 1st respondent appealed against this court's said ruling of 6th June 2016.

6. From the background of the case as outlined hereinabove, it is apparent that as matters stand now, there are 3 applications pending before this court and two appeals pending in the Court of Appeal arising out of the judgment of this court delivered on 17th December 2014 and ruling made on 6th June 2016. My perusal of this relatively old case reveals that the parties and beneficiaries to the estate of the deceased have been intent on filing numerous applications, one after another with no end in sight and this has had the net effect of protracting the case which has been in court for more than two decades and still counting. This court is at a loss as to whether the parties to this case are really interested in having it finalized going by the zeal in which applications have been filed and the fact that attempts at an out of court settlement did not yield any fruits. One can only wonder for how long the parties to this case want to have their case in court or if the adage that litigation must come to an end rings a bell to them.

7. Having made the above observations, which I hope the parties to this dispute will take into account in their future interactions with the court in respect to this case, I will now direct my attention to the application that is before me and that is the subject of this ruling being the application dated 10th April 2015.

Pleadings

8. The applicant herein filed summons for revocation of grant dated 10th April 2015 under sections 63 to 65 & 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules seeking, *inter alia*, the revocation of the grant issued to the respondents on 25th May, 2000 and further, orders that the grant be issued to him.

9. The application is premised on the grounds that the respondents, who are the executor and executrix respectively of the deceased's estate, obtained the grant by making an untrue allegation to the effect that they would faithfully administer the estate of the deceased and further that the respondents have failed to proceed diligently with the administration of the estate. The applicant further states that the grant has become inoperative and useless due to subsequent developments.

10. The application is further supported by the applicant's affidavit sworn on 9th April 2015 in which he refers the court to the proceedings so far taken in this case and the contents of the numerous affidavits that have been filed since the inception of the case. The applicant also avers that the 2nd respondent is unsuitable to administer the estate of the deceased due to a conflict of interest as her sole objective is to help herself to his late mother's estate. He adds that the executors are not qualified to execute the will of the deceased according to the wishes of their parents. He accuses the respondents of plundering the estate thereby making them unqualified to be executors of the will.

11. The applicant further avers that some 17 parcels of land whose acreage is about 700 acres are still registered in the names of the deceased who died over 20 years ago despite the fact that the grant was issued to the respondents on 25th May, 2000. He further states that the respondents have not taken any steps to settle the debts of the estate.

12. The application was opposed by respondents through their respective replying affidavits. In the 2nd respondent's replying affidavit dated 7th October 2016 she states that contrary to the applicants allegations, the deceased estate had already been distributed with the applicants full participation as

beneficiary and as an advocate following the confirmation of the grant as follows:

- I. Kisii Town Block III/98 now registered in the name of Tanya Holdings Limited.**
- II. Kisii Town Block 111/156 was given to Jemima Nyaboke and Paul Nyamweya who have in turn transferred it to James Park Holdings Limited.**
- III. Kisii Municipality/ Block III/508 now registered in the name of Tanya Holdings.**
- IV. Kisii Municipality /Block III/509 now registered in the name Moige Gardens Limited.**
- V. Kisii Municipality Block III/510 now registered in the name of Hotel Phoenix Limited**
- VI. Kisii Municipality Block III/6 now registered in the name of Kisii Hotel Limited**
- VII. Nyaribari Chache /B/Boburi /2351 was distributed to Jemima Nyaboke Nyamweya and Paul Nyamweya who have in turn transferred it to James Park Holdings Ltd.**
- VIII. Matutu Settlement Scheme distributed as per the will to the applicant (Charles Ratemo), James Ogendi, Christopher Nyambane and Paulo Nyamweya.**
- IX. L.R 7288/12/Sotik Township distributed to Christopher Nyambane Nyamweya as per as per the will and I understand it has already has been sold to a 3rd party.**
- XI. Kitale Property L.R.No.4380 Trans Nzoia was bequeathed to several children including a grandchild Paulo Nyamweya Omari (a son to the applicant.) Each beneficiary has possession of their respective parcels even though transfers have not been effected because the beneficiaries have not raised the requisite stamp duty fees and have sold their shares to third parties.**

13. She further avers the applicant has interests as a director and shareholder in the three (3) companies mentioned hereinabove being Moige Gardens Limited, Tanya Holdings Limited and Hotel Phoenix Limited into which several properties were transferred with his knowledge and participation. She attached a bundle of documents marked as exhibit 2 to confirm the directorship of the said companies. She reiterates that the deceased's properties were distributed in accordance his wishes of the deceased and that at no time, prior to the filing of an application dated 31st July 2013 by the applicant's sister one Joyce Bochere Nyamweya, did any of the beneficiaries object to the process of administration of the estate.

14. It is thus the 2nd respondent's contention that since the deceased's properties were distributed in accordance to the deceased's will and that the allegations by the applicant that the respondents control majority of the deceased estate are untrue.

15. The 1st respondent swore a replying affidavit dated 15th November 2016 in which he termed the instant application as vexatious, frivolous and an abuse of the court process. He contends that the said application is a duplicity, *res judicata* and at the same time against the principle of *res sub judice* in view of the fact that a similar application had been heard and determined by this court the outcome of which is the subject of an appeal that is pending appeals before the Court of Appeal. He attached copies of the Notices of Appeal marked as "**CRN1(a), (b), (c)**".

16. The 1st respondent termed the applicant a dishonest person in view of the fact that prior to the issuance of the grant of probate, he (applicant) obtained **AD COLLIGENDA BONA** Limited grant and that contrary to the purpose of the said limited grant, the applicant sought court orders to complete the sale of some 200 acres of land comprising the deceased's estate for purposes of allegedly settling the deceased's debts but that the applicant has not accounted for the proceeds of the sale to date. He further contends that the summons for confirmation of grant and indeed the entire succession proceedings were conducted by the firm of Nyamweya Osoro & Nyamurongi Advocates in which the applicant is a partner

and hence the applicant had full knowledge of the same.

17. He accuses the applicant of making fraudulent demands for legal fees to the tune of about Kshs. 29,775.909 for alleged work done on behalf of the deceased's estate which amount he says is unlawful, exaggerated and not payable to him. It is the 1st respondent's contention that should the applicant's summons for revocation of grant be allowed, the applicant shall use the grant of letters granted to him to fraudulently appropriate, sell and waste the entire estate under the guise of recovering his legal fees.

18. He insists that the administration and distribution of the estate of the deceased herein is largely over and what is left is the formal registration of the transmission of titles to the beneficiaries and adds that the wishes of the deceased, as captured in the will, have been obeyed and actualized.

19. The applicant filed a further affidavit dated 11th November 2016 in which he also counter accused the respondents of administering the estate of the deceased for the benefit of their own nuclear families while leaving out the other beneficiaries.

20. When the application came up before me on the 15th of August 2016, parties agreed that it canvassed by way of written submissions. All the parties thereafter filed their respective submissions which upon perusal, I note consist of a highlight of the contents their respective affidavits in support of or against the application.

Determination.

21. Upon perusing the previous proceedings, rulings and judgment so far delivered in this case and after considering the instant application brought by way of summons for revocation of grant, the replying affidavits by the 1st and 2nd respondent, and the parties' respective written submissions, I note that the only issues to be determined by this court to be whether the applicant's summons for revocation of grant is *res judicata* and whether the applicant should be appointed an administrator of the deceased's estate.

22. In the case of **Willie vs Muchuki & 2 Others (2004) 2KLR 357** the application of the doctrine of *res judicata* in succession proceedings was discussed. My view is that in succession cases, a court of law is clothed with wide discretion to ensure that justice is done in the matter. However, this does not mean that a party can make an application to revoke grant when it had already been revoked.

23. **Section 7 of the Civil Procedure Act (Cap 21 of the Laws of Kenya)** established the principle of *res judicata* thus:

“No court shall try any suit or issue in which the matter 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.”

24. In the case of **Kamunye & Others Vs Pioneer General Assurance Society Ltd [1971] E.A 263 at 265**, the court of Appeal had the following to say on the *res judicata* principle:

“the test whether or not a suit is barred by Res Judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court in another way and in the form of a new cause of action a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If so, the plea of Res Judicata applies not only to points upon which the first court was actually required to adjudicate, but every point which properly belonged to the subject of litigation and which might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit for Res Judicata to apply.”

25. The case of **Henderson Vs Henderson (1843) 67 ER 313** summarized *res judicata* principle as

follows:

“... where a given matter becomes the subject of litigation in, and 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 matters 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 cases, 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 parties exercising reasonable diligence, might have brought forward at the time.”

26. The test for determining whether a matter is res judicata was also stated in the case of **Benard Mugo Ndegwa vs James Nderitu Githae & 2 others [2010] eKLR** as follows:

- 1) That the matter in issue is identical in both suits.***
- 2) The parties in the suit are the same.***
- 3) Sameness of the title/claim.***
- 4) Concurrence of jurisdiction and***
- 5) Finality of the previous decision.***

27. In the instant case, as I have already stated in this ruling, Sitati J. in her judgment rendered in this very succession cause on 17th December, 2014 revoked the grant issued to the respondents herein 26th May, 2000. In essence therefore the current application seeks orders which have already been granted. Justice Sitati had the following to say in her said judgment;

"In the circumstances and for the reasons given hereinabove, I am satisfied that there are cogent reasons why the grant issued herein should be revoked. I therefore allow the applicants main prayer to the effect that the confirmation of the made herein on 26th May 2000 be and is hereby revoked."

28. Following the delivery of the said judgment, a notice of appeal was filed by one Paul Nyamweya, also a beneficiary of the estate of the deceased. It was not disputed by the parties herein that the said appeal is still pending before the Court of Appeal. I have also stated in this ruling that an application dated 28th January 2015 that sought the setting aside of the proceedings that culminated in the judgment of 17th December 2014 was also dismissed by this court on 6th June 2016. Clearly therefore, as matters stand now, this court's impugned judgment of 17th December 2014 still stands as the same has not been quashed, reviewed, varied and/or set aside. It is therefore my finding that it is not open for the applicant in the present application to take the court back to an issue which it had already heard and determined. My humble view therefore is that the application dated 10th April 2015 is misconceived and amounts to an abuse of the process of court.

29. On the applicant's second prayer that the grant of letters of administration be issued to him, I note that as much as the applicant accused the respondents of plundering the estate of the deceased, the respondents, on their part countered the applicant's accusations by averring that the applicant was guilty of all manner of misdeeds including the making of fraudulent claims and misappropriating monies due to the said estate. I note that the allegations made by the respondents were not denied or rebutted by the applicant in his further affidavit sworn on 11th November 2016. Considering the serious which cast serious allegations leveled against the applicant, which this court finds to be quite serious and tantamount to intermeddling with the estate of the deceased thereby casting serious aspersions on the applicant's suitability to be appointed an administrator of the said estate. I am therefore hesitant to allow the

applicant's prayer to be appointed an administrator of the estate of the deceased.

30. Furthermore Section 63, 64 65 and 76 of the Law of Succession Act, and Rule 44 of the Probate and Administration Rules under which this application has been brought provide for the circumstances under which letters of administration may be granted to a universal or residuary legatee. Section 76 specifically deals with the grounds upon which a grant may be revoked.

31. The said Sections provide as follows:

“63. Grant of administration to universal or residuary legatee

When a deceased has made a will, but—

(a) he has not appointed an executor; or

(b) the only executors appointed are legally incapable of acting, or have renounced their executorship, or have died before the testator or before receiving a grant of probate of the will, or have failed within the

time limited by a citation to apply for probate thereof; or

(c) all proving executors have died before completing administration of all the property to which the will applies, a universal or residuary legatee may be admitted to prove the will, and letters of

administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.”

“64. Right to administration of representative of deceased residuary legatee

When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative shall have

the same right to administration with the will annexed as the residuary legatee.”

“65. Grant of administration where no executor nor residuary legatee nor representative of legatee

When there is no executor, and no residuary legatee or representative of the residuary legatee, or if every such person declines or is incapable of acting, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or the Public Trustee, or any

other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.”

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the

provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

32. In the instant case, as I have already stated in this ruling, the deceased appointed three (3) executors of his will two (2) of whom are still alive and are the respondents herein. The applicant has not demonstrated to this court that the respondents are legally incapable of acting, have renounced their executorship, declined to act, or cannot be found so as to entitle this court to issue him with letters of administration.

33. Having found that the application dated 10th April 2015 offends the principle of *res judicata*, does not meet the conditions of the provisions of Sections 63, 64 and 65 of the Law of Succession Act and having found that the applicant's suitability to be an administrator of the estate of the deceased is in serious doubt, the order that commends itself to me is the order to dismiss the said application with costs to the respondents.

34. It is so ordered.

Dated, signed and delivered in open court this 9th day of February, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

N/A for the Petitioner

Mr. Anyona for Onyinkwa for the 1st Respondent

Mr. Kaburi for Omosa for the 2nd Respondent

Omwoyo: court clerk