



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 57 OF 2015

[FORMERLY CHUKA CM'S CAUSE NO. 110 OF 2014]

**IN THE MATTER OF THE ESTATE OF M'IRUBIA MUITA ALIAS M'NDEREBA M'MWITA –
DECEASED**

AND

PATRICIA CIAMBUBA1ST APPLICANT

CIRIAKA CIANTHUNI.....2ND APPLICANT

VERSUS

PASKWALE MUTEGI NTHIIRI.....ADMINISTRATOR/RESPONDENT

RULING

1. PATRICIA CIAMBUBA and CIRIAKA CIANTHUNI the applicants herein have moved the court under **Rule 49 and 73** for the following orders against **PASKWALE MUTEGI NTHIIRI** (the respondent and administrator in the estate of the late **M'Irubia Muita alias M'Irubia M'Mwita** deceased) namely

i) That pending the hearing of revocation of proceedings the respondent, **Daniel Mbaka Charles** and **Lawrence Murangi Njagi**, their agents or servants and anybody working under them be restrained from evicting, entering working or any other manner interfering with portion occupied by the 2nd applicant in land parcel No. **KARINGANI/MUIRU/72**.

ii) That pending the hearing and determination of revocation proceedings herein this Hon. court be pleased to issue a prohibitory order to be registered against Land Parcel No. **KARINGANI/MUIRU/72**

iii) That pending the hearing and determination of revocation of proceedings this honourable court do stay any sub division, transfer waste, dealing or any alteration in respect of the current registration and status quo in Land Parcel No. **KARINGANI/MUIRU/72**.

2. The application is grounded on the following grounds namely;

a) That the respondent has began implementing the grant as the administrator,

b) That the grant was fraudulently obtained and issued vide Chuka **Succession Cause No.110/14**.

- c) That the respondent might transfer the property to other beneficiaries or dispose off the portions and evict the 2nd applicant from the estate where she resides.
- d) That the applicant will suffer irreparable loss if the land is disposed off because they will be disinherited.
- e) That the order sought should be granted in order to preserve the estate.

3. In her supporting affidavit sworn on **31st March, 2017**, the **1st applicant** has deposed that she and the **2nd applicant** are daughters of the deceased the **late M'Iruba Muita** and that the respondent is their nephew. The applicants have further expressed fears that the respondent may dispose off the property which they have stated is now in his hands courtesy of the grant confirmed vide **Chuka PMCC Succession Cause No. 110 of 2014**.

4. Miss Muthoni learned counsel for the applicant contended that the estate should be preserved pending the determination of summons for revocation of grant dated **31st March, 2017**.

5. The respondent has opposed this application vide his replying affidavit sworn on **23rd May, 2017**. He has contended that the issues surrounding the instant application were exhaustively dealt with and determined by the judgment of this court delivered on **9th March, 2016**. He has further deposed that the applicants filed a Civil Suit No. **Chuka High Court No. 3 of 2016** raising the same issues but that the suit was dismissed as per the decision of **9th March, 2016**.

6. The respondent has further pointed out that the respondent did not appeal against both the cited decisions if they felt aggrieved. He has also denied that any of the applicants resides on the suit land and faulted them for abuse of court process.

7. **Mr. Muthomi** learned counsel for the respondent opposed the application arguing that the issues raised are *res judicata*. He contended that the suit land was not available for distribution because this court rendered itself on the issue and the issue cannot be revisited.

8. I have considered this application the grounds upon which it has been made and the submissions by learned counsel. I have also considered the response made. I have keenly looked at the proceedings in this cause and noted the following salient issues.

9. The estate in this cause involves the estate of the late **M'Iruba Muita** who died on **19th December, 1989** resident at **Muiru, Meru South** (now **Tharaka Nithi County**). The only asset comprising the estate was the property described as **KARINGANI/MUIRU/72** measuring approximately **1.3 ha**.

10. The respondent herein petitioned for letters of administration vide Chuka PMCC Succession Cause No. **110 of 2014**. Two days later another petition was presented by **M'Ndereba M'Iruba** (now deceased) vide Chuka PMCC Succession Cause No. **113 of 2014** and was also granted a grant. The respondent herein filed an application dated **31st August, 2015** to have the grant revoked on grounds that the same was issued in error because of existence of another grant in respect of the same estate and the same deceased person.

11. This Hon. Court entertained the application and heard all the parties including the applicants herein who testified staking their claim as the children of the deceased herein. The court upon hearing all the parties rendered its decision vide a judgment delivered on **9th March, 2016**. I have gone through the judgment delivered by my predecessor. The same in my view comprehensively addressed all the issues raised including the issues raised not only in the present application but in the substantive application or summons for revocation of grant dated **31st March, 2017**. The issues were well framed by the Hon. Judge in his judgment as follows:

- a) Who were the beneficiaries of the estate of **M'Iruba Muita (deceased)**
- b) Whether there as any asset of the estate available for distribution
- c) Whether there was basis to nullify the grant in Chuka PMCC Succession Cause No. **113 of 2014**.

12. The court rendered its decision on all the issues above and found that the respondent, **Daniel Mbaka**, the applicants and 4 other children named were beneficiaries of the estate of the deceased. The court further rendered its decision on who were to benefit from the estate observing that the deceased had given out the suit land (n..... the estate) to the respondent and **Daniel Mbaka** as gift during his lifetime. The court further observed that the applicants had not challenged the decision of the deceased in his lifetime and had not staked any claim on the estate for **20 years**. The court was not convinced that there was any portion of **1.2 acres** "reserved by the deceased for his daughters." The court then nullified the grant in Chuka **PMCC No.113 of 2014** and the grant in Chuka **PMCC No.110 of 2014** stood. The court clearly found no evidence that the respondent herein had petition for letters of administration in Chuka **PMCC No.110 of 2014** with a view to disinheriting the children (including the applicants herein) of the deceased.

13. The applicants have now moved this court substantively for revocation of grant in Chuka **PMCC No.110 of 2014** citing *inter alia* that the petition was secretly filed without making any provision for them. The applicant has made this application after attempting in vain to re-open the matter vide **O.S No.3 of 2016** in this same court. I have seen the ruling of this court it is clear that the applicants herein are intent at abusing the court process. If they were aggrieved by the judgment of this court delivered on **9th March, 2016** and / or the ruling of this court delivered on **20th December, 2016**, the avenue open for them was to file an appeal in the court of appeal. This court having rendered its decision on all the issues brought up again in the present application and summons for revocation of grant dated **31st March, 2017**, is now *functus officio*. This court lacks the competence and mandate to sit on appeal against its own judgment.

14. The provisions of section 7 of the civil procedure Act provides 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 the parties under whom they or any of them claim, litigating under the same title in a court competent to try subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court." This is the principle behind the rule on **res judicata** which bars a party or parties from relitigating matters that have finally been determined by competent courts. This principle applies in all civil disputes including succession /probate matters.

15. The applicants' counsel at the hearing of this application insisted upon being prodded by this court that the applicants were not parties in the former application. But the proceedings clearly show that both the applicants were heard and gave their evidence not only supporting their late brother M'Ndegwa M'Iruba but also staked their claim stating that they were also interested in that right or claim made by their brother. They are deemed in law to have had their say in court. The court rendered its decision in a very clear way determining all the claims made and the respective rights of all the parties. **Res judicata** therefore properly applies. The word **res judicata** is a latin word described by Black's Law Dictionary as "a thing adjudicated" or "an issue that has been definitely settled by judicial decision." There are three essential ingredients or elements in this principle which are as follows:-

- 1) An earlier decision on the issue
- 2) A final judgment on the merits
- 3) Involvement of the same parties or parties in privity with the original parties.

The essence of this rule is that litigation must come to an end in order to have a fore closure and enable

parties to move on particularly when parties have chosen not to appeal like in the present instance.

In the premises, this court finds that both the applications dated **31st March, 2017** and the summons for revocation dated **31st March, 2017** are incompetent and improperly before court because the issues raised are res *judicata* and further, this court is now *functus officio*. The same are an abuse of court process and cannot be entertained for the said reason. This court has no other option but to strike them out which I hereby do with costs to the respondent.

Dated and delivered at Chuka this **12th day of June, 2017**

R.K. LIMO,

JUDGE.

12/6/2017

Ruling dated signed and delivered in the presence of Kimathi holding brief for applicants and Respondent in persons.

R.K. LIMO

JUDGE

12/6/2017