



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCC.CAUSE NO. 51 OF 1998

IN THE MATTER OF THE ESTATE OF RUMURI KIRERA – DECEASED

REBECCA MUNGA SOKERA1ST APPLICANT

STEPHEN KAAI 2ND APPLICANT

V E R S U S

LAZARUS MUKINDIA PROTESTOR

RULING

1. The Administrators herein Rebecca Munga Sokera and Stephen Kaai were appointed as joint administrators by this court in its judgment dated 26th June 2014 after it had heard their summons for revocation of grant issued to the respondent Lazarus Mukindia on 6th October 1998 and confirmed on 19^h September 2001. The court directed that the two to file an application for confirmation of grant within 60 days from the date of judgment.
2. The Administrators filed their application for confirmation of grant on 30th June 2014. Lazarus Mukindia Erera filed a protest on 8th August 2014 urging that the court ought to consider him in the confirmation of the grant as a dependant as he had filed his succession cause on 13th March 1998 in respect of the estate of the late Rumuri Kireri and his late father as the only heir to the estate of Rumuri Kireri having been given the land parcel no. Nyaki/Thuura/1165 by the deceased during his life time. He contended the deceased under Ameru customary rites, as he had only daughters, he had adopted his father as his son.
3. The administrators counsel Mr. Gikunda Anampiu, learned advocate, filed a preliminary objection dated 3rd October 2014 setting out the following grounds:-

(a) That the protestor was heard and his claim decided and therefore can not file a further claim on protest since it amounts to an appeal in disguise.

(b) That the protester's claim if any is Res Judicata

(c) That the affidavit of protest amounts to abuse of the court process, vexatious, frivolous and otherwise meant to frustrate the due process of the law.

(d) That the affidavit of protest by the protestor ought and deserve to be struck

out with costs.

4. The court gave directions that the Preliminary objection be determined by way of written submissions. Mr. Gikunda Anampiu learned counsel for the Administrators filed his submissions dated 15th October 2014 – whereas M/s Jane W.G. Ndorongo & Co. Advocates filed submissions on behalf of the protestor.
5. The court has carefully considered the pleadings, the counsel submissions and judgment dated 26th June 2014. The issue for consideration is whether the Preliminary Objection is merited and further whether the protestor's claim is *res judicata*?
6. There is no dispute in the counsel submissions that before grant issued to the protestor was revoked the matter before this court was heard by way of *viva voce* evidence. The parties called their witnesses. Each and every party in this matter had his day in court and all were offered an opportunity to adduce evidence that was relevant and supporting their respective positions. The protestor in his affidavit of protest pleaded with court to put into consideration the developments he had done in the estate as the grant is yet to be confirmed. That his right as a dependant has not been exhaustibly considered and that his claim is based on equity since he has intensively developed the estate. That in view of the above the protestor submitted the protest was not *res judicata*.
7. In this suit it is conceded that this court delivered a lengthy and exhaustive judgment dated 26th June 2014 in which the court partly held inter alia as follows at page 9 under paragraph 17 and 18 of the said judgment.

“17 In view of the above I have no hesitation in stating that the grant in this cause was obtained fraudulently by making a false statement and concealment of facts material to the making of the grant.

“18 Further in view of my findings that there is no relationship between the deceased and father of the petitioner and that there was no adoption under Kimeru custom or any adoption under any other known law, I am bound to hold that the petitioner is a stranger to the family of the deceased Rumuri Kirere”.

8. In the protestor's affidavit of protest dated 18th August, 2014 under paragraphs 3; he has deponed inter alia; that the court ought to consider him as a dependant despite this court having ruled vide its judgment of 26th June 2014 that the protestor herein was a stranger to the family of the deceased. This court fully addressed the issue of the protestor being not a dependant of the deceased estate. Similarly the issue of adoption of the protestor and/or his father once again is raised in the affidavit of protestor under paragraphs 12 and 14. This court in its judgment dated 26th June 2014 on page 8 and under paragraph 15 held inter alia as follows:

“15 Further I find that the petitioner had failed to call a Meru customary expert to prove that the custom of adoption and that his father was adopted by the deceased and was entitled to his land in exclusion of the children the deceased who included PW2 and their closed family members of the deceased by virtue of slaughtering a goat for the deceased. That if such custom would have been proved then this court would have gone on to find out whether such customs which would deprive the dependants the right to the property would be repugnant to justice and morality and since such custom has not been proved as required I do not find it necessary to deal with the said issue. I further find therefore and hold that the petitioner failed also failed to prove Kimeru customary law of adoption in favour of the adoption of his father and the petitioner's assertions that he is grandson of the deceased through adoption of his father by the deceased through Kimeru customary law is which any basis and the same is rejected”.

9. I have carefully considered the issues raised in the protester's affidavit of protest dated 18th August 2014 and noted that the issues raised in the protesters protest are the same issues which were raised during the hearing of the summons for revocation of the grant by way of viva voce evidence. The same reasons are substantially the same ones the protester is now raising in his affidavit of protest. I do agree with the counsel for the administrator that the protest as filed amounts to an appeal through the back door and by proceeding to hear the protest in my view would amount to sitting on an appeal in my own judgment. That if the protester was dissatisfied with the judgment of this court he ought to have filed an appeal in the court of appeal. In view of the foregoing I am satisfied that the protester's affidavit of protest is res judicata as the matters raised were substantially brought to this court and were fully addressed by the court vide its judgment of 26th June 2014.

10. Consequently and from the above reasons I have come to the conclusion that the issues that the protester is raising are now res judicata, I therefore find and hold the administrators Preliminary objection is meritorious and I uphold the same. I accordingly struck out the protester's affidavit of protest with cost to the administrators.

11. This is an old succession cause and I order an early date be taken at the registry for confirmation of the grant.

DATED and signed at Meru this 4th day of June, 2015.

J.A. MAKAU

JUDGE

4.6.2015

Delivered in open court at Meru in the presence of;

Mr. Gikunda Anampiu & Co Advocates for Administrators

Mr. Mulingu for protestor

Court clerks – Penina/Mwenda

J.A. MAKAU

JUDGE

4.6.2015