

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU

SUCCESSION CAUSE NO. 8 OF 2016

HANNAH WANGARI KIBUGI.....APPLICANT

VERSUS

ANN WANJIRU MBUGUA.....1ST

RESPONDENT

SARAH WARUCHU MBUGUA.....2ND

RESPONDENT

SUSAN WANGARE MBUGUA.....3RD

RESPONDENT

RULING

1. The Respondents herein have filed two (2) Notice of Preliminary Objections the first one is dated 4/11/2024 and the other is dated 18/06/2024 both seek that the application seeking Revocation of the Grant dated 24th April, 2024 be struck out with costs to the Respondents on the grounds;-
 - a) **THAT** the application is bad in law as the Applicant has no ***locus standi*** and that she has no right to appear or be heard in this proceedings.
 - b) **THAT** the application is *Res Judicata*
 - c) **THAT** this Honourable Court lacks the requisite jurisdiction to entertain the application as it offends Rule 41(3) of the Probate and Administration Rules and Section 47 of the Law of Succession Act.

d) **THAT** the Applicant's application dated 24/04/2024 ought to be dismissed with costs to the Respondents.

2. The parties were directed to canvass the Preliminary Objections by way of filing and exchanging written submissions.

OBJECTOR'S SUBMISSIONS ON P.O. DATED 4/11/2024 and 18/06/2024

3. The Preliminary Objections are raised against an application for Revocation of Grant filed by one **HANNAH WANGARI KIBUGI** as the administratrix of the Estate of **KIBUGI GICHUKI KIHUI alias JOHN KIBUGI (DECEASED)**. The Applicant seeks to have the **Estate of KIBUGI GICHUKI KIHUI alias JOHN KIBUGI (DECEASED)** be included as a beneficiary of the Estate of **JOHN WAINOHO**.
4. The first objection raised is that the Applicant and the Estate of **KIBUGI GICHUKI KIHUI alias JOHN KIBUGI (DECEASED)** are strangers to the Estate of **JOHN WAINOHO**.
5. The said **KIBUGI GICHUKI KIHUI alias JOHN KIBUGI (DECEASED)** is not new to these proceedings and it is clear from his claim that he is not in any degree of consanguinity to the deceased **JOHN WAINOHO**. He is not a family member and hence his family are not beneficiaries in the **Estate of JOHN WAINOHO**.
6. The second Objection raised was on jurisdiction and res judicata. On the issue of jurisdiction it was submitted that during his lifetime the deceased **KIBUGI GICHUKI KIHUI**

alias JOHN KIBUGI filed **ELC Case No. 743 of 2013 (OS)** at **Milimani** where he sought adverse possession as against the widow of the proprietor.

7. On the 7/10/2021 the *Hon. Lady Justice (Rtd) Mary Kasango* rendered a decision on the jurisdiction of the Probate Court and stated that it is incumbent upon the Applicant to first prove whether the subject matter of the claim was acquired through a sale agreement or adverse possession and this can only be done in the ELC court and not in this Probate Court.
8. This Court cannot therefore sit as an appellate court of its own Ruling or that of its predecessor. The prayers sought in the Revocation of Grant and inclusion of the Applicant as a beneficiary can now only be handled in an Appeal to the Court of Appeal which the Applicant had initiated by filing a **NOTICE OF APPEAL** and then abandoned it on 28/10/2021. Thus this application was *res judicata* and the court lacked jurisdiction to entertain a claim for ownership. Which application is mischievous, bad in law and a gross abuse to the process of the court and the Objectors prayed the application be dismissed.

APPLICANTS SUBMISSIONS IN OPPOSITION TO THE POS

9. The Applicant opposed both Preliminary Objections and submitted that the Objections though clothed as points of law invite the Court to engage in a factual inquiry and falls afoul of the renowned case of **MUKISA BISCUIT MANUFACTURING**

CO. LIMITED VS WEST END DISTRIBUTORS LTD [1969]
EA 696.

10. The 1st Preliminary Objection on *locus standi* and the Applicant submitted that she was the administrator of the estate of **KIBUGI GICHUKI KIHUI alias JOHN KIBUGI (DECEASED)** and was in possession of the Grant of Letters of Administration of his estate and therefore she has the *locus standi* and has the duty of getting in all the free property of the deceased including debts owing to him and moneys payable to his personal representatives as provided under Section 82(a) of the Law of Succession Act. The Objectors allegation that she was a stranger to the estate was therefore erroneous;
11. The objection of *res judicata* was also erroneous as the application where a Ruling was rendered was filed by one **SARAH WARUCHU MBUGUA** the 2nd Respondent herein and not the Applicant. The application was a Protest and the parties in this Protest were different and the Applicant never participated therein.
12. All the elements of the doctrine of *res judicata* as provided under Section 7 of the Civil Procedure Act were not fully fulfilled for the doctrine to be invoked.
13. The Objections were bereft of merit as neither meet the threshold of pure points of law nor does it advance the interests of justice. The ends of justice would best be served by allowing the application for Revocation of the Grant to proceed to full ventilation on its merits.

ISSUES FOR DETERMINATION

14. Having considered the Preliminary Objections and the submissions by the parties, the main issue for determination is whether the Preliminary Objections herein should be upheld.

ANALYSIS

15. A proper preliminary objection must be on a pure point of law. In ***MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1969) EA 696***, the *locus classicus* on preliminary objections in this region, Law JA stated:

***“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.*”**

16. For a preliminary objection to succeed it must satisfy the following tests in that it should only raise a pure point of law, it is argued on the assumption that all the facts pleaded by the other side are correct and lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should dispose of the suit if successful.

17. The first Preliminary Objection relates to the Applicant having no *locus standi*. It is an undisputed fact that the said **KIBUGI GICHUKI KIHUI alias JOHN KIBUGI (DECEASED)** is not new to these proceedings and it is clear from his claim that he is not in any degree of consanguinity to the deceased **JOHN WAINOHO**. He is not a family member and hence his family members inclusive of the Applicant are not beneficiaries in the **Estate of JOHN WAINOHO**.
18. It is noted that during his lifetime the deceased **KIBUGI GICHUKI KIHUI alias JOHN KIBUGI** filed **ELC Case No. 743 of 2013 (OS)** at **Milimani** where he sought adverse possession as against the widow of the proprietor. It is therefore incumbent upon the Legal Representatives to the Estate to first prove whether the subject matter of their claim was acquired through a sale agreement or adverse possession and this can only be done in the ELC court and not in this Probate Court.
19. The upshot therefore, is this court is satisfied that the Applicant's application seeking Revocation of Grant dated 24/04/2024, has been brought prematurely before this Court, as there is an ELC case which is still pending determination on ownership as such she lacks *locus standi* to be heard before this Court.
20. The second Preliminary Objection relates to res judicata and jurisdiction. The doctrine of *res judicata* which is stipulated in the Civil Procedure Act at Section 7 reads 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 can 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.”

21. This Court opines that for the doctrine of *res judicata* to apply, in this instance, there should be demonstration that the same issues have been heard and determined by a court of competent jurisdiction, same parties litigated under the same title and issues have been raised once more in this application for the Revocation of the Grant

22. In the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, it was held that:-

“for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms; a) The suit or issue was directly and substantially in issue in the former suit. b) That former suit was between the same parties or parties under whom they or any of them claim. c) Those parties were litigating under the same title. d) The issue was heard and finally determined in the former suit. e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

23. The Civil Procedure Act provides explanations with respect to the application of the *res judicata* rule. Explanations 1-6 states thus:

“Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

24. Having perused the proceedings attached to the Application, it is clear that the 2nd Respondent filed a Protest and obtained a Ruling dated 7/10/2021 that touched on a common claim by the beneficiaries of the Estate of
25. The Applicant is from the same family and her other sibling fully participated in the proceedings and indeed she applied for the Estate to be included as a beneficiary.
26. On the 7/10/2021 the *Hon. Lady Justice (Rtd) Mary Kasango* rendered a decision which stated that this Court was a Probate Court and had no jurisdiction to handle claims relating to ownership and adverse possession. The Court best suited was the Milimani ELC Court where there was a suit by the Estate of **KIBUGI GICHUKI KIHUI alias JOHN KIBUGI (DECEASED)**

pending determination. The Court proceeded to dismiss the claim by the Applicants sibling and the Court proceeded to confirm the Grant.

27. It suffices to say that the Applicants arguments in respect of inclusion of the Estate of the deceased were already addressed by this courts predecessor and the Ruling conclusively dealt with the issues and therefore the Applicant herein is barred under the principle of "*res judicata*".
28. In this instance filing other proceedings by a member of the same family over the same subject matter is an attempt to circumvent the principle of *res judicata* and amounts to an abuse of due process.
29. The Preliminary Objections are therefore, upheld to the extent that the application is found to be premature as the Applicant lacks *locus standi* and she must await the hearing and determination of the pending ELC case.

FINDINGS AND DETERMINATION

30. For the forgoing reasons this Court makes the following findings and determination: -
 - (i) This Court finds both Preliminary Objections on ***Locus Standi*** and ***Res judicata*** have merit and both are hereby upheld.
 - (ii) The Application for Revocation of Grant dated 24/04/2024 is hereby struck out.
 - (iii) The Applicant to bear the costs of both the Preliminary Objections and the application dated 24/04/2024.

Orders Accordingly

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU
THIS 28TH DAY OF NOVEMBER, 2025.**

**A. MSHILA
JUDGE**

In the presence of;

Sanja - Court Assistant

Mbira -h/b for Kimiti - For Applicant

N/A -For Ireri - for Respondent/ Objectors

N/A - For Kamuyu - for Respondent/Objectors

ORIGINAL