



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 194 OF 2017

PAUL ONSONGO.....1ST PLAINTIFF/RESPONDENT

MARK MAIKO MACHONGO.....2ND PLAINTIFF/RESPONDENT

VERSUS

ANDREW NYAKUNDI MACHONGO....DEFENDANT/APPLICANT

R U L I N G

1. The pleadings filed herein reveal that the plaintiffs and the defendant are brothers and sons of the late John Machongo (deceased), the distribution of whose estate amongst them is the bone of contention in the instant suit. The estate of the parties deceased father was subject of succession proceedings in Kisii HC Succession Cause No. 264 of 2000. A certificate of confirmation of a grant was issued on 9th October 2009 in favour of Andrew Nyakundi Machongo the defendant herein. The certificate of confirmation of grant carried a schedule respecting how the deceased estate comprising land parcel **Nyaribari Masaba/ Bonyamasicho/289** was to be distributed amongst the beneficiaries who included both plaintiffs. The land has been subdivided as per the schedule of distribution to the beneficiaries but the plaintiffs aver that the subdivision failed to take account of the developments the beneficiaries had effected on the ground and/or to honour the demarcations that had been effected on the ground in regard to portions occupied by the respective beneficiaries. The plaintiffs vide the plaint dated 4th October 2017 sought judgment against the defendant for:-

a. An order that the Kisii County Land Registrar and Surveyor do subdivide land parcel No. Nyaribari Masaba/Bonyamasicho/289 in accordance with the demarcations and developments already on the ground.

b. A permanent injunction restraining the defendants by themselves, their agents and/or servants or any person claiming through them from interfering with the demarcations and/or developments of the plaintiffs as it exists on the ground.

c. Costs

2. The defendant by a defence and counterclaim dated 14th June 2018 filed in court on 21st June 2018 stated that his late father's estate was subdivided and distributed in terms of the confirmed certificate of grant issued in Kisii HC Succession Cause No. 264 of 2000 and that the distribution to the beneficiaries was in accordance with the directions and wishes of their deceased father. The defendant further stated that the land parcel **Nyaribari/Masaba/Bonyamasicho/289** was demarcated in 2013 to create 6 subtitles and therefore ceased to exist as a distinct property. The defendant asserted that the suit was defective and bad in law and constituted an abuse of the court process.

3. By way of counterclaim the defendant reiterated that land parcel **Nyaribari Masaba/Bonyamasicho/289** was duly distributed in terms of the grant issued in the succession case aforesaid and that each beneficiary including the plaintiffs got their share. He affirmed that the plaintiffs land parcels were **Nyaribari Masaba/Bonyamasicho/1861** and 1859 respectively and sought that they be required to restrict their activities to the said portions distributed to them. The defendant stated further all the other beneficiaries had taken possession of their respective portions after the subdivision and distribution and prayed that the plaintiffs be restrained from in any manner interfering with the other beneficiaries parcels of land.

4. Against the foregoing background, the defendant vide a Notice of Motion dated 26th July 2018 filed in court on 1st August 2018 sought the following orders:-

1. That this Hon. Court be pleased to decline to adjudicate over this suit for being res judicata.

2. That this Hon. Court be pleased to order to be struck out the plaintiffs plaint dated 4th October, 2017 on the ground that:

a) It discloses no reasonable cause of action or

b) It is otherwise an abuse of the process of the court.

3. That this Hon. Court be pleased to find that the applicant executed his mandate in accordance with the provisions of the law and in accordance with the WILL OF JOHN MACHONGO OMORI deceased.

4. That this Hon. Court be pleased to make a finding that this suit has been overtaken by event in issuance of title deeds to the beneficiaries.

5. That the plaintiffs/respondents be condemned to pay costs of this application and the entire suit.

5. The application was supported on the grounds set out on the face of the application and the affidavit sworn in support by the defendant/applicant dated 26th July 2018. The defendant/applicant avers that the matter in issue in the present suit were directly and substantially in issue between the same parties in Kisii High Court Succession Cause No. 264 of 2000 and therefore contends the instant suit is *res judicata*. The defendant/applicant further avers that he administered the “will” of their deceased father in terms of the Will and that he complied with the terms of the confirmed grant issued in Kisii HC Succ. Cause No. 264 of 2000 and distributed the estate of the deceased as mandated by the grant and hence the plaintiffs have no basis to sue him for performing a duty that he was obligated to do as the administrator of the deceased estate. The defendant further averred that the plaintiffs like the other beneficiaries had their parcels of land parceled out and their titles are available for them to collect from the lands office and that the defendant having performed his duty as the administrator of their late father’s estate he has no further role as such administrator unless by order of the court that issued the grant.

6. The plaintiffs filed grounds of opposition dated 24th September 2018 and filed no replying affidavit. The plaintiffs averred that the defendants application was misconceived and an abuse of the court process and that the same lacked any merit.

7. The application was argued by way of written submissions. The defendant/applicant filed his submissions on 15th October 2018 while the plaintiffs/respondents filed their submissions on 20th March 2019.

8. The defendant/applicant in his submissions restated that the plaintiffs instant suit was *res judicata* as the issues raised were the same issues that arose in Kisii HC Succ. Cause No. 264 of 2000 where the Will of their late father was proved and his estate distributed to all his beneficiaries according to his wishes. The defendants in particular submitted that the plaintiffs together with all the other beneficiaries were all present in court when orders for the confirmation of the certificate of grant setting out how the distribution of the deceased estate was to be effected was made on 9th October 2009. As per the certificate of confirmation of grant each of the deceased sons including the plaintiff was to get 7.0acres out of **LR No. Nyaribari Masaba/Bonyamasicho/289**. The defendant/applicant further submitted that the subdivision of the land was carried out as per the directions of the deceased in his Will. The land has since been subdivided and each of the beneficiaries has had a title allocated in their respective names. The plaintiffs’ parcels are **LR No. Nyaribari Masaba/Bonyamasicho/1861** and **1859** respectively measuring 7.0acres each.

9. The plaintiffs vide an application dated 16th December 2013 in Kisii HC Succ. Cause No. 264 of 2000 sought orders inter alia that the Kisii County Land Registrar and Surveyor be ordered to partition the estate property according to the demarcation already obtaining on the ground. Honourable Justice Karanja while dismissing the application observed thus:-

“The appropriate schedule to the said certificate of confirmation of grant clearly specifies the agreed mode of distribution of the estate property. Therefore, this court cannot interfere with what was agreed by the parties on how to share the estate property among the beneficiaries of the estate.”

Seemingly Hon. Justice Karanja was of the further view that the implementation/execution of the grant of letters of administration had given rise to fresh issues and he observed thus in respect to addressing those issues:-

“The best the applicants can do is to file a land case against the petitioner/respondent in the Land Court or move this court altogether for the revocation of the material grant and/or the material certificate of confirmation of grant or both. It is only in that way the question touching on the distribution or subdivision of the estate property would be treated as being incidental to the main succession case.”

10. The applicant contends that this court has no jurisdiction to interfere with the grant issued in the succession court and submits the respondents instant suit is not only *res judicata* but is also an abuse of the process of the court.

11. The respondents in their filed submissions contended that the present suit is not *res judicata* HC Succ. Cause No. 264 of 2000. The respondents referred the court to the case of **Nguruman Limited –vs- Jan Bonde Nielsen & Another [2017]eKLR** where the court (R.E. Aburili, J.) reviewed various court decisions in determining whether the plea of *res judicata* taken up in the matter was merited. Simply put, the doctrine of *res judicata* bars the institution of a new suit where there has been a previous suit involving the same parties and where the issues can be said to have been directly and substantially in issue in the former (previous) suit and had been finally determined by the court. Section 7 of the Civil Procedure Act, essentially codifies the *res judicata* principle and provides as follows:-

“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.”

The doctrine of *res judicata* applies to both issues upon which the court was actually required by parties to form an opinion and pronounce

judgment and to such issues which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time. In the case of **Mburu Kinyua -vs- Gachini Tutu [1978] KLR 69** Madan, J. quoted with approval **Wilgram V. C.** in the case of **Henderson -vs- Henderson [1843] 67 ER 313** where he stated:-

“Where a given matter becomes the subject of litigation in, and of 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 in special circumstances) permit the same parties to open the same subject matter of litigation in respect of a matter which might have been brought forward as part of the subject matter of 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 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.”

12. In the authorities cited to me by the applicant and the respondents notably the case of **Kenya Commercial Bank Limited -vs- Benjoh Amalgamated Ltd [2017] eKLR** and **Ngurumani Limited -vs- Jan Bonde & Another [2017] eKLR** the above passage was cited with approval by the Court of Appeal Judges and Aburili, J. respectively.

13. In the case of **E. T. -vs- Attorney General & Another [2012]eKLR** at paragraph 57 the court stated as follows:-

The courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of **Omondi -vs- National Bank of Kenya Limited and Others [2001] EA 177 the court held that, “parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.” In that case the court quoted **Kuloba J.**, in the case of **Njangu -vs- Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported)** where he stated, “If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*”**

14. In the present matter, it is not in dispute that there was succession suit Kisii HC Succ. Cause No. 264 of 2000 where the plaintiffs were named amongst the beneficiaries of the estate of John Machongo Omori and that a certificate of confirmation of a grant was issued in the cause on 9th October 2009 pursuant to Section 71(1) and (3) of the Law of Succession Act. As per the certificate of confirmation the estate of the late John Machongo Omori who was the father of the plaintiffs and the defendant in the present suit the estate comprised of only one property **LR No. Nyaribari Masaba/Bonyamasicho/289** which was the subject of confirmation. The confirmation of the grant was to facilitate the distribution of the property and the beneficiaries sanctioned the distribution in terms of the schedule endorsed in the certificate of confirmation of grant.

15. In my view, the succession court was properly seized with all aspects touching on the distribution of the estate of the deceased. The beneficiaries before the court were the only beneficiaries of the estate and they agreed on how the property would be shared. The deceased had himself expressed his desire respecting how the land would be subdivided in his written Will dated 18th December 1984. As per the translated Will attached to the defendant’s bundle of documents the deceased directed as follows:-

“The lower part of the land to be given to three of my sons namely:-

- 1. P. Mageto**
- 2. P. Onsongo**
- 3. Mark Machongo**

The upper part of the land to be given to two of my sons namely:-

- 1. M. Ondieki**
- 2. A. Nyakundi**

My sons M. Ondieki and A. Nyakundi shall take my tea bushes absolutely.”

16. The defendant who was named administrator has asserted that he strictly followed the wishes of his deceased father in the distribution of the land. If the plaintiffs had any issue with the proposed distribution, the appropriate forum to have voiced their objection was before the succession court and it cannot be before this court. The confirmed grant which provided how the property was to be distributed has been given effect, and the subdivision has been effected and each of the beneficiaries have been allocated their respective parcels of land. This court cannot vary, review and/or set aside the certificate of confirmation of grant as it lacks the jurisdiction to do so as that mandate can only rest with the succession court which issued the same.

17. The duty of the defendant as the administrator of his late father’s estate, I think came to an end when he gave effect to the certificate of confirmation of grant unless there is an application made in the succession cause file Kisii HC Succ. Cause No. 264 of 2000 by any party respecting the subject matter of the succession. This court cannot undo what was done pursuant to orders/directions given in the said

succession court. The plaintiffs cannot also properly sue the defendant for actions arising from exercise of his duties as an administrator without reverting to the court that dealt with the succession. In the premises, it is my holding that the suit before this court is unsustainable.

18. The instant suit is *res judicata* as the issues raised were directly and substantially in issue or ought to have been raised for determination in Kisii HC Succ. Cause No. 264 of 2000. Further, this court would have no jurisdiction to interrogate, vary, review and/or revoke the grant issued in the succession court. The suit was filed in abuse of the process of the court and the same is hereby ordered struck out in its entirety.

19. The costs of the application and the struck out suit are awarded to the defendant.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 13TH DAY OF MAY 2019.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Ondeyo for the 1st and 2nd plaintiffs

N/A for the defendant

Ruth Court assistant

J. M. MUTUNGI

JUDGE