



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**MISC. CIVIL APPLICATION NO. 1 OF 2017**

**ADRIANO WAMBUA KENZI**

**MUOO MWOLOLO**

**MUTISYA UVYU**

**DORCAS NZULA KENZI**

**JOSEPH KAMULA KAMWATHI**

**PHILIP NGEI NDIVO**

**MARY NTHAMBI NTHOME**

**PAUL MUTUNGA ULELO**

**JACKSON KITUKU MASUKALI.....APPLICANTS**

**VERSUS**

**PENINAH MUENI KAIPOON**

**JONATHAN KORUTA KAIPOON**

**BENJAMIN ASAAPE KAIPOON**

**(As the Administrators of the estate of**

**Koruta Kaipoon Tasiekuo – Deceased).....RESPONDENTS**

**RULING**

What is before Court for determination is the Respondents' application dated the 8<sup>th</sup> February, 2017 and filed on 14<sup>th</sup> February, 2017 as well as the Preliminary Objection dated the 15<sup>th</sup> February, 2017 respectively. The application which is brought pursuant to Section 1B, 3, & 3A of the Civil Procedure Act, Section 13 (1) of the Environment and Land Court Act and all the other enabling provisions of the law, seek inter alia:

1. That this Honourable Court be pleased to declare that the Respondents herein have no legal interest in the estate of the deceased pursuant to the Ruling of Hon. Justice Reuben Nyakundi delivered on 3<sup>rd</sup> February, 2016 in the Kajiado Succession Cause No. 47 of 2015.
2. That the Honourable Court be pleased to order that the issues being raised in the Miscellaneous Application are Res judicata and an abuse of the court process.
3. That this Honourable Court be pleased to Order that the Restrictions placed on the titles to Land Reference Nos. KAJIADO/KAPUTIEI – CENTRAL/ 4451 – 4454 pursuant to the orders of the Kajiado Senior Resident Magistrate's Court in Land Disputes Tribunal Cases No. 27 – 35 be forthwith withdrawn by the County Land Registrar.

4. That costs of the Application be provided for.

The application is supported by the affidavit of JONATHAN KORUTA KAIPOON who is one of the Administrators of the estate of KORUTA KAIPOON TASIEKUO where he deposes that the Respondents herein have been taken to a fishing expedition and are running from one court to another in search of orders in their favour yet their claim against the deceased's estate has already been heard and determined. He claims the Respondents through an application dated the 29<sup>th</sup> October, 2015 filed in the High Court at Kajiado in Succession Cause No. 47 of 2015 – **In the matter of the estate of Koruta Kaipoon Tasiyekou (Deceased)** sought to be joined in the succession suit as beneficiaries and/or creditors of deceased's estate. He contends that the learned Judge Hon. Reuben Nyakundi after directing himself to the application, observed that the respondents were claiming purchasers' interest; but they failed to comply with the mandatory legal requirements to ensure their interests were secured. He insists since the decision was not appealed from, it automatically reversed the decision of Kajiado SPM Court in Land Dispute Tribunal case no. 27-35.

The Preliminary Objection is raised by the Respondents, in respect of the Applicants' Notice of Motion dated the 8<sup>th</sup> April, 2016, where they seek the following orders:

- a) That the Application as filed is incompetent, bad in law, and ought to be struck out forthwith with costs to the respondents as against the applicants.
- b) That the question whether the Applicants have an interest in the deceased's estate is Res judicata having been determined by the Hon. Justice Reuben Nyakundi in his Ruling delivered on 3<sup>rd</sup> February, 2016 in Kajiado Succession Cause No. 47 of 2015. The learned Judge held that the applicants have no legal interest in the deceased's estate.
- c) That the Ruling was given by a Court of competent jurisdiction with the same status as this Court and as such the Ruling binds this Court and the Subordinate Courts.
- d) That as a result any applications filed by the applicants after the 3<sup>rd</sup> February, 2016 either in court or any other court claiming their interest in the deceased's estate are superfluous and ought to be dismissed forthwith.
- e) That our stand is anchored inter alia on the following decisions:
  - i. Machakos High Court Succession Cause No. 564 of 2010. Estate of Mututua Sirinket Sapokenya (Deceased).
  - ii. Kajiado Succession Cause No. 47 of 2015. Estate of Kaipon Koruta Tasiyekou (Deceased)
- f) That the Application as filed is an abuse of the Court process.

Both parties filed their respective submissions that I have considered.

#### **Analysis and Determination**

The only issue for determination is whether issues raised in the miscellaneous application are res judicata and an abuse of the court process.

I note the Plaintiffs' obtained various decrees in August 2007 in respect of land parcel number KAJIADO/ KAPUTIEI CENTRAL/ 452 which was owned by the deceased. I note there were various consents from the Land Control Board dated 7<sup>th</sup> December, 2011 and 6<sup>th</sup> June, 2012, respectively where the suit land KAJIADO/ KAPUTIEI/CENTRAL/ 452 was meant to have been subdivided into ten (10) portions to be transferred to the Plaintiffs in accordance with the various acreages they had purchased. Further, I note as per the Decree, the Executive Officer Kajiado Law Courts prepared Mutation Form dated 18<sup>th</sup> November, 2011 over the said land. I further note that the deceased transferred one of the resultant subdivisions of suit land to CHRISTINE NYAMBURA KARIUKI and MADRIN WANJIRU KARIUKI on 2014 after the Decrees had been extracted, Mutation Form signed and Consent Provided. This is indicative that the deceased did not have clean hands and was hell bent to defeat the Decree of the Honourable Court. It is the Respondents' contention that the suit herein is res judicata as Honourable Justice Nyakundi dismissed the Applicants' application to enjoin the succession cause. I however note that the applicants never appealed against the various decisions of the SRM's Court and as it stands, there are still Decrees, which are yet to be enforced as the Judgement debtor died and the administrators of the estate did not consider the Applicants herein as creditors to the estate. I have perused Justice Nyakundi's ruling and I note that he dismissed the application to enjoin the Applicants in the succession cause because the suit land had already been subdivided before the deceased died and the property in question did not bear the title of land claimed by the Applicants. He however did not set aside the lower courts decrees nor hear the matter on its merits.

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 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.**'

These provisions are very clear on what can be deemed to be res judicata. It is my finding that Justice Nyakundi's ruling cannot be deemed as Res Judicata as he did not delve into the issues in this suit. Further, the parties in this suit and the succession cause are different and the title in the succession cause is different from the title in the instant miscellaneous application. The Applicants' are seeking the enforcement of court decrees vide Kajiado Land Dispute No. 27 up to 35 of 2006, which still subsist over land parcel number KAJIADO/ KAPUTIEI CENTRAL/ 452 and they have a right to do so. It is my opinion that the Applicants have a right to initiate a substantive suit against the Administrators of the deceased estate to seek for enforcement of the aforementioned Decrees which required land parcel number KAJIADO/ KAPUTIEI CENTRAL/ 452 to be subdivided to the respective portions the Applicants had purchased and transferred to them. It is only in a

substantive suit that they will be able to seek for the reliefs of specific performance for enforcement of the aforementioned Decrees and not through this instant miscellaneous application, which is not the right avenue. Further, I note Justice Nyakundi states that the dispute herein could only be entertained by the Environment and Land Court and that in essence means suing the administrators' of the Judgement Debtors' estate.

Further, the overriding objective of this Court as enshrined in section 13 of the ELC Act and the Constitution requires the Court to grant substantive justice and not to dwell on technicalities. It is against the foregoing that I dismiss the Respondent's Preliminary Objection dated 15<sup>th</sup> February, 2017 and application dated the 8<sup>th</sup> February, 2017 and direct the Applicants to file a substantive suit to enforce the Decrees that were granted in their favour in the lower court vide Kajiado LDT 27 of 2006 up to 35 of 2006.

Costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 12th day of June, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**