



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF
KENYA AT NYERI
ELC NO.130 OF 2014 (O.S)

LYDIA WATHANU MAINA

PETER GAKAHU MUTHARA.....RESPONDENTS

VERSUS

IRUNGU KARUKU.....APPLICANT

RULING

Background

1. The notice of motion dated **22nd August, 2014** brought under **Section 7** of the Civil Procedure Act, seeks dismissal of the suit herein on the ground that it is *Res judicata* **Nyeri Succession Cause No. 195 of 1995** relating to the estate of **Kabecha S/O Munyonyo**.
2. The application is premised on the grounds that the subject matter in this suit, **LR. GITHI/IGANA/85** was the matter directly and substantially in issue in Nyeri High Court Succession Cause No.195 of 1995; that the parties in this suit were also claiming the same land and that the Succession Cause was determined on **23rd August, 2013**.
3. The application is further supported by the affidavit of the applicant sworn on **22nd August, 2014** where he has, *inter alia*, deposed that he was the protestor in the Summons for confirmation of the grant issued in the said Succession Cause; that his co-administrator in the Succession Cause, **Joseph Muthara Mwangi**, who was claiming part of the estate of the deceased (Kabecha s/o Munyonyo) is a son of his late brother, **Mwangi Karuku**. Further that the 1st respondent (Lydia Wathanu Maina) who is the wife to his said late brother (Maina Karuku) was, in the Succession proceedings, claiming a share of the estate on behalf of her son, **David Muthara Maina**.
4. He explains that the 2nd respondent, **Peter Gakahu Muthara**, is a son of the 1st respondent's deceased son (David Muthara Maina) in respect of whom the 1st respondent was claiming a share of the deceased's estate. Further, that the estate in the Succession Cause comprised of the property which is the subject matter of this suit; that in the Succession proceedings, the 1st respondent swore an affidavit proposing that the suit property be shared equally amongst herself; Joseph Muthara Mwangi and himself and that he swore an application opposing that proposal.
5. It is pointed out by the trial judge in the Succession Cause that the entire land was bequeathed to him by the deceased. Consequently, the grant issued in the succession proceedings was confirmed in his favour.

6. In support of his case, the applicant has annexed to his supporting affidavit a copy of the judgment in the Succession cause herein.

7. Other than the application sworn in support of the main suit, the respondents did not file any reply to the application herein.

8. When the application came up for hearing on **11th February, 2015** counsels for the respective parties agreed to have the application disposed off by way of written submissions.

Submissions by the Applicant

9. In the submissions filed on behalf of the applicant, it is reiterated that the suit is *Res judicata* the Succession Cause herein. In that regard reference is made to the judgment in the succession cause where it was held:-

“...After a careful consideration of the rival averments and submissions, I have come to the conclusion that the evidence clearly point that the deceased bequeathed his entire land to the protester during his lifetime. I find the affidavit evidence filed by the protester to be credible. I do not believe the affidavit evidence tendered by the petitioner. Consequently, I decline to confirm the grant as proposed by Joseph Muthara Mwangi (Petitioner) but instead order that the grant be confirmed in terms of the schedule of distribution by Irungu Karuku (protestor).” (emphasis supplied).

10. In the confirmation proceedings referred in the judgment herein, the applicant’s submission was that the petitioner, one Joseph Muthara Mwangi and David Muthara Maina (replaced by Lydia Wathuna Maina) were not entitled to the estate of the deceased to wit, L.R NO. Githi/Igana/85 (the suit property herein) because the deceased had bequeathed the property to him *inter vivos*.

11. The petitioner, on the other hand, based his claim on the fact that he was the appointed attorney of Mwangi Muthara and that elders had proposed that the land be shared equally between himself, David Muthara and the applicant herein.

12. Maintaining that the subject matter in the Succession Cause was the same as the suit property herein and that the parties in the current suit were parties in the Succession proceedings or represented in those proceedings, the applicant maintains that the current suit is *res judicata*. The following reasons are advanced for that contention:-

- a. The subject matter in the current suit to wit, L.R NO. Githi/Igana/85 was the matter directly in issue in the succession proceedings;
- b. Except the 2nd respondent who was claiming a share of the suit property through the 1st respondent, the parties in the Succession Proceedings are the same as the parties in the current suit;
- c. That the succession cause finally determined how the estate of the deceased would be distributed between parties in this suit.

13. Asserting that **Section 7** of Civil Procedure Act, applies to this suit, the applicant prays that the suit be dismissed with costs to him.

Submissions by the respondents:

14. As earlier noted, the respondents did not file any reply to the motion dated 22nd August, 2014. Their Counsel however filed written submissions on behalf of the respondents on 20th February, 2015 contending that the current suit is not *res judicata* because of the following reasons:-

- i. The court which handled the succession cause had no jurisdiction to decide on the issue of trust. In this regard it is submitted that under **Rule 43(2)** of the Probate and Administration Rules,

whenever a question of trust arises within the succession cause, the court handling the matter should set aside the property subject of such question to abide the determination of the question in proceedings like the present ones, under **Order 37 Rule 1** of the Civil Procedure Rules. In support of the foregoing contention reference is made to **Re Estate of Richard Karanja Javan (DCD) 2012 eKLR; Tapnyobi Leldayet v. William Kimibei Koromicha (2011) eKLR and Re Estate of Julius Wachira (Deceased) (2013) e KLR;**

- ii. That administration of the estate of a trustee does not nullify a trust. In this regard it is submitted that the death of a sole or a last surviving trustee does not nullify the trust. The same devolves to his personal representatives upon administration of such a trust. In this regard reference is made to Halbury Laws of England Vol. 48, Paragraph 626 and submitted that the respondents in their suit have pleaded that the deceased to which the previous succession proceedings relate had created a trust over the suit property. That being the case, it is submitted that the applicant continued to hold the suit property in trust for the respondents upon administration of the estate of the deceased.
- iii. Cause of action herein is distinct from administration of the estate. It is contended that the pleaded cause of action is declaration and determination of trust. The cause of action in this suit is said to attach to beneficiaries of a trust as opposed to administration of the estate. Referring to Halbury's Laws of England, Volume 48, Para. 646 counsel for the respondents has submitted that the current cause of action accrues to the beneficiaries of the trust *sui juris* and entitles them to put to an end to the trust.
- iv. It is also contended that the respondents were not parties to the succession proceedings.

Analysis and determination:

15. In determining this application, although the respondents filed their written submissions whose contents has been enumerated above, i will take into consideration only the issues of law raised in the written submissions.

16. The suit/application herein seeks determination of the following questions:-

1. Whether the deceased had created a customary trust over parcel **L.R NO.Githi/Igana/85** in favour of David Muthara Maina (deceased) to the extent of half share thereof?
2. Whether the 2nd applicant being a son of David Muthara Maina is a beneficiary of the pleaded customary trust?
3. Whether the pleaded customary trust should be determined by registration of half share of the suit property in the name of the applicants (respondents in this application) contemporaneously with or upon administration of the estate of the deceased person herein (Kabecha s/o Munyonyo)?
4. Who should bear the costs of the suit?

17. It is not in dispute that the suit property herein was subject of adjudication in the succession cause herein. As pointed out above, upon hearing and considering the representations in that succession cause, the trial judge made the following determination concerning the entitlement of petitioner in that cause (David Muthara Maina):-

“...the petitioner was not entitled to a share of the suit property because the deceased had bequeathed it to the applicant herein *inter vivos* (during his lifetime)”.

18. The import of the decision of the Succession court was that the suit property did not form part of the free estate of the deceased at the time of his death. In this regard see **Section 2** of the Law of Succession Act, Cap 160 Laws of Kenya.

19. In the judgement delivered on 23rd August, 2013, by **Sergon J.**, the respondents were represented by the petitioner in the Succession cause by one, David Muthara Maina.

20. Although the question of trust pleaded in the current suit was not raised in the Succession Cause, given the fact that the court in the Succession court made a determination as to the parties entitlement to

the suit property, it would be an abuse of the court process to allow the respondents' to circumvent the said determination on the guise that the doctrine of res judicata does not apply to succession proceedings. In this regard see the decision in the case of **Samuel Njau Wainaina v Commissioner of Lands & 6 others** [2012] eKLR where **Majanja J.** stated:-

“In this respect, I would do no better than quote the case of *Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2012 (Unreported)* where the court stated, “ [57] 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 v 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 v 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 I am of the firm view as that of Justice R. Kuloba in his book, *Judicial Hints on Civil Procedure, 1984 (Vol 1)* at page 46 in a paragraph headed, “Guard against attempts to evade the doctrine [of res-judicata]” where he states that, “One of the greatest difficulties which face those courts which try land suits is the disposition of the disappointed litigant to dress up a suit which has failed in a new guise and to try his luck once more Once a man has had his say, has taken his case as far as the law permits him, and has failed, he must be stopped from re-litigating the same matter.”*

21. Similar sentiments were expressed in the case of **Madede & Another vs Fita & 2 Others** (1988) KLR 211 where it was stated:-

“The appellants were sons of the 2nd respondent. They had sued their father and the 1st and 3rd respondents to claim land that was registered in the names of the 1st and 3rd respondents. There had been a suit over the same land between the 1st and 2nd respondents which had been decided. The 2nd respondent lost the suit. The sons of the 2nd respondent now sued to recover the land from the 1st respondent alleging a trust. It was held that the suit was *res judicata*. This was despite the position that the parties in the second suit were not the same parties in the first suit, the court reasoning that the subject matter, being an issue of ownership, had already been decided in the previous suit. (Emphasis supplied).

22. Having found that the issue of the respondents' entitlement to the suit property was heard and determined in the succession Cause herein, I reiterate my view that to allow the respondents' to reopen the question of entitlement to the suit property would be an abuse of the process of the court. Consequently, I find the application herein to be merited and allow it as prayed.

Dated, signed and delivered in open court at Nyeri this 27th day of March, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kiminda for the respondent/applicant

Mr. Ombongi holding brief for Mr. C.M. King'ori for the applicant

Lydia – Court Assistant