Ithili (Suing as the legal representative of the Estate of Elijah Mithire - Deceased) v John & 12 others; Pancras (Applicant) (Environment & Land Case E023 of 2022) [2024] KEELC 7309 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7309 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE E023 OF 2022

CK NZILI, J

OCTOBER 23, 2024

BETWEEN

MARITHA KIELU ITHILI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ELIJAH MITHIRE - DECEASED) ..... PLAINTIFF

AND

NEWTON THURANIRA JOHN ..... 1ST DEFENDANT

MONICA MUKIRI ..... 2ND DEFENDANT

MUTABARI JOHN ELIJAH MIRIANGA ..... 3RD DEFENDANT

MOSES MUTUA GITONGA ..... 4TH DEFENDANT

MWITI ROGGERS ..... 5TH DEFENDANT

MATHIU ELIJAH SOLOMON ..... 6TH DEFENDANT

KABERIA KEN MUTABARI ..... 7TH DEFENDANT

GRACE KAGENDO KAUMBUTHU ..... 8TH DEFENDANT

LAND REGISTRAR URUU LAND REGISTRY ..... 9TH DEFENDANT

LAND SURVEYOR URUU LAND REGISTRY ..... 10TH DEFENDANT

LAND REGISTRAR ISIOLO LAND REGISTRY ..... 11TH DEFENDANT

LAND SURVEYOR ISIOLO LANDS REGISTRY ..... 12TH DEFENDANT

THE ATTORNEY GENERAL ..... 13TH DEFENDANT

AND

MONICA MAKENA PANCRAS ..... APPLICANT

RULING

1. The court, by an application dated 17.9.2024, is asked to:

    i. Stay the proceedings.

    ii. Grant leave to join Monica Makena Panrcas as the legal representative or guardian ad litem for the plaintiff herein and proceed with the suit.

    iii. Allow for the amendment of the plaint to reflect the changes.

    iv. Grant leave for the intended plaintiff to file further lists of documents and, lastly;

    v. Review or set aside the proceedings of 6.5.2024 in which the plaintiff testified and grant leave to the intended plaintiff to tender fresh evidence.

2. The application is based on the grounds on the face of it and in a supporting affidavit of Monica Makena Pancras sworn on 17.9.2024.

3. The applicant avers that she was appointed a legal representative of the estate of Elijah Mithire as well as the guardian ad litem of the initial plaintiff in both Tigania P.M.C. Misc. Succession Cause No. E026 of 2024 and in Meru Misc Application No. E020 of 2024 copies of the grant are attached as M.M.P. "1" & "2". The applicant avers that the plaintiff has been declared as suffering from a mental disease, making it inevitable to substitute her.

4. Further, the applicant avers that on 6.5.2024, the court ordered the plaintiff to give evidence, yet she had already been diagnosed with a mental health condition way back in February 2024 as per the medical report annexed as M.M.P. "3". The applicant avers that the evidence given by the plaintiff was prejudicial to the case and the estate; hence the same needed to be set aside, while at the same time staying the proceeding in the best interest of justice.

5. The applicant also avers that as the court may have noted in the pleadings, there were open, fraudulent and illegal dealings with the estate of the deceased and therefore; there was a need to allow the application in order to safeguard the properties herein by adducing cogent evidence by filing further list of documents otherwise the respondents will not be prejudiced in any way because they will have an opportunity to respond and examine any fact, evidence, and document presented before the court. The applicant avers that the court noted that the plaintiff was sick, elderly and in dire need the court's protection.

6. The application is opposed by a replying affidavit of Monica Mukiri, the 2nd respondent, sworn on 25.9.2024. It is averred that the application lacks merits; the plaintiff gave evidence before the court after the court satisfied itself that she was eminently sound to give evidence and ordered the matter to proceed, that the medical reports dated 23.2.2024 and 27.2.2024 were an afterthought and were prepared after the hearing on 6.5.2024 and therefore do not reflect the mental status of the plaintiff as of the date of hearing.

7. It is averred that there is no explanation given why the applicant did not avail to the court the medical report when the matter came up for hearing, if at all the said reports were prepared before the hearing date. The 2nd respondent avers that the evidence given by the plaintiff, which the applicant wants to be expunged for not being favorable to her, is actually a reflection of the actual or correct position in this matter and should not be set aside.

8. The 2nd respondent avers that the further evidence that the applicant wishes to tender is intended to seal the loopholes that were left in the evidence of the plaintiff, which will gravely prejudice the 2nd respondent's case; otherwise, the plaintiff was of sound mind.

9. Again, the 2nd respondent avers that it was not legally tenable, that the applicant, who is a daughter-in-law of the plaintiff, to be joined in his matter as the 2nd plaintiff has already given evidence in this matter, which the court will consider in determining the real issues in controversy in his matter.

10. Further, the 2nd respondent avers that the applicant was conflicted in this matter, given that the 2nd respondent is her husband and the 1st, 3rd and 7th respondents are her biological children whom the deceased Elijah Mithire also gave portions of the suit land and therefore respondent was not legally suitable to be joined as plaintiff.

11. The application was canvassed by way of written submissions.

12. The applicant relied on a written submission dated 30.9.2024. It is submitted that following the plaintiff being diagnosed with a mental sickness, the plaintiff needed to be replaced as ordered by the family court. Again, the applicant submits that as of 6.5.2024, the medical reports were available, but instructions to appoint guardian ad litem were still unavailable but now have been issued, which application the respondents have not challenged.

13. Further, the applicant submitted that the 2nd respondent explored the mental vulnerability of the plaintiff at the hearing, which evidence only elicited a yes answer as the court may have realized, hence making the evidence highly prejudicial, unfair, discriminatory and unconstitutional for the plaintiff was denied a fair hearing and also deprived the right to protection of property.

14. In additionally, the applicant submitted that the plaintiff testified when her right senses were in doubt; hence, the more reason in doubt, the more reason that the proceedings should be set aside; otherwise, it is only a court that can declare a party mentally unsound.

15. The applicant submitted that she has grant ad litem as per the limited grant, hence the need to join the suit, amend the plaint and other pleadings, and file additional documents to reflect the changes and streamline the issues; otherwise the 2nd respondent wants the status quo to continue so as to exploit the plaintiff's mental health condition which would be not only unlawful but also inhuman.

16. The 2nd respondent relied on written submissions dated 26.9.2024. It is submitted that the applicant has not given reasons why the medical report was not availed on 6.5.2024. The 2nd respondent submitted that the proposed plaintiff has also not disclosed the nature, relevance, context, or extent of the evidence she intends to adduce further and how it will assist the court in reaching a fair determination on the matter.

17. Further, the 2nd respondent submitted that the applicant has already testified and therefore has not offered a sufficient reason why she should give additional evidence and also whether the said evidence could not have been obtained by use of reasonable diligence before she testified on 6.5.2024. Reliance was placed on Kingori vs Chege & others (2002) eKLR, on the principles to apply in determining whether the applicant was a necessary party. The 2nd respondent submitted that the applicant being a daughter-in-law of the plaintiff was not a legally suitable party to be joined as a plaintiff for she was conflicted, given her husband and children were the 1st, 3rd and 7th respondents.

18. This suit was brought under a certificate of urgency on 8.12.2022, following which an order to maintain the status quo was issued on 18.1.2023. An order of temporary injunction and inhibition was eventually issued on 1.3.2023 to last for one year. Through an application dated 30.3.2023, the

2nd and 6th respondents urged the court to vary, review and discharge the interim orders, given that the two were occupying the suit land and could negatively impact on them all being beneficiaries to the estate of the deceased

19. The court, by a ruling dated 19.7.2023, declined to vary, set aside, or discharge the interim order of inhibition and injunction. Parties were, therefore, directed to attend the case conference on 3.10.2023. On 3.10.2023, parties were given 30 days to comply with Order 11 of the Civil Procedure Rules.

    By 7.11.2023, when the matter came up, the plaintiff told the court that the 6th defendant was deceased and there was a need to replace him through a grant issued to the 2nd respondent. Parties were given 21 days to comply with Order 11 of the Civil Procedure Rules with a mention for 28.11.2023 to fix a hearing date.

20. The plaintiff, therefore, filed an application dated 7.11.2023, seeking a default judgment against the 3rd, 4th, 5th, 7th, and 8th respondents who had admitted the claim and for the plaintiff to file further documents. The plaintiff was the deponent to the supporting affidavit. Further, the applicant sought entry of judgment against the 9th – 13th respondents, who had not entered an appearance.

21. By consent, the plaint was allowed to amend the plaintiff within 15 days, with the respondents was given 30 days upon service with the amended plaint to file any amended defenses. Pray number 2 for entry of default judgment was rejected. Parties were also encouraged to attempt Alternative Dispute Resolution before 29.1.2024.

22. When the matter came up on 29.1.2024, learned counsel for the plaintiff stated that he had served the amended plaint and was going to call six witnesses at the hearing. A hearing date for 29.2.2024 was taken by consent.

23. Come 29.2.2024, learned counsel for the plaintiff told the court that he was ready to proceed with the hearing save that his colleague for the 1st defendant had requested for an adjournment for personal reasons. The plaintiff did not mention a medical report dated 27.2.2024. The court listed the matter by consent for 6.5.2024. When the matter came up for hearing on 6.5.2024, learned counsel for the plaintiff told the court that the was ready for a hearing with two witnesses. The court gave a time indication for 11:00 am when Monica Makena PW 1 (now applicant) was put on the witness box at the instance of the plaintiff's counsel.

24. There was no application for adjournment made on account of any mental sickness or a diagnosis on account of mental disorder regarding the plaintiff. The record shows that learned counsel for the applicant did not put it on record before the court that his client was in possession of a medical report dated 27.2.2024.

25. PW 1 was led in examination in chief by her lawyers on record and extensively cross-examined by the 2nd defendant's counsel, with no mention at all that the plaintiff was mentally sick. PW 1 did not refer to any additional documents. After her evidence, the plaintiff testified as PW 2. There was equally no application made based on a medical report dated 27.2.2024, that she had been diagnosed with dementia. It is the plaintiff who produced all the exhibits in her list of documents from P. Exh Nos. 1-23 (a) – (d). The 2nd defendant equally extensively cross-examined her.

26. The court also put questions to her, which she sufficiently answered. When the court resumed at 2.30 pm, Nehemia Mutembei Tharimba, Mary Kagwiria and Dr. Gitura Dickson testified as PW 3, 4 & (5), respectively. None of those witnesses mentioned any existence of a medical report dated 23.2.2024 and 27.2.2024 relating to the plaintiff.

27. An affidavit by the plaintiff verified the amended plaint dated 6.12.2023, accompanied by a further list of documents dated 6.12.2024. It was the plaintiff who appeared in court on 29.1.2024 and 29.2.2024 and took a hearing date of 6.5.2024.

28. That was barely two days after the medical report was made on 27.2.2024. It remains unclear why learned counsel for the plaintiff and the applicant, if aware of the mental condition, would have been carrying the medical records to court and perhaps decline to disclose, avail, or serve them upon the rest of the parties, before the court on the morning of 6.5.2024. It is the applicant who took the witness stand first. If she knew that her mother-in-law had no legal capacity to institute the suit, she would disclose the fact before PW2 was called to testify. PW1 would even have been the one to produce the exhibits.

29. Similarly, if the applicant knew, as a matter of fact, that there was a medical report of such a magnitude, it beats logic why she did not avail the report between 9:00 am and 4:30 pm when the matter was adjourned or awaited to apply almost four months down the line.

30. The suit came twice for a hearing on 17.6.2024 without such medical report being availed. It was only during the second hearing on 2.7.2024, when learned counsel for the plaintiff mentioned the medical condition of the plaintiff.

31. The orders by the High Court took effect from 18.7.2024. They were not to act retrospectively. The order is not specific to the suit and the suit properties herein. Concerning the limited grant ad litem, the plaintiff came to court pursuant to the limited grant ad litem issued in Tigania Misc Succession Case No. 61 of 2022 issued on 2.11.2022, which was produced as P. Exh No. (10) The applicant has a limited grant for the same estate dated 12.7.2024 in Tigania Misc Succession Cause No. E026 of 2024 for the same estate.

32. Equally in this file, there is a certificate of confirmation of grant and an amended grant of letters of administration for the same estate issued to Mwiti Roggers, the 5th defendant, on 4.2.2022 and 18.3.2022 in Meru H.C No. Succession Case No. 78 of 2021, for the same estate produced as P. Exh No. 15(a) & (b). There is also a certificate of confirmation of grant dated 25.10.2022 issued to the 2nd defendant produced as P. Exh No. (21).

33. If the applicant is replacing the plaintiff on both accounts, there is a procedure in law for replacing a personal representative. The procedure is not through a separate limited grant ad litem.

34. There is already a confirmed grant for the estate from the High Court. Locus standi to sue and represent the estate of the deceased must be clear. Whoever appears in court must have the capacity to represent the estate. The 2nd respondent has pleaded on oath that the applicant, if allowed to appear for the plaintiff, would be conflicted. The applicant has not denied those facts and addressed the issue of conflict and capacity to replace the plaintiff, mainly on account of capacity to sue and if the court can determine who has the valid grant of letters of administration.

35. In view of the conflicting certificates of grant for the estate of the deceased and given that the jurisdiction to revoke a confirmed certificate of grant lies elsewhere, I decline to allow the applicant to replace the plaintiff. The applicant equally has no better capacity to represent the estate of the late father-in-law, in view of a certificate of confirmed grant by a superior court as well as another one in the lower court; otherwise, two wrongs do not make a right.

36. Coming to the issue of stay of proceedings, substitution, and the re-opening of the plaintiff's case, the capacity of the plaintiff, the intended plaintiff, and her complicity in the matter have been challenged by the 2nd defendant, who says that given the cause of action alleged by the plaintiff, the intended party

is not legally competent to advance it. A cause of action refers to acts on the part of the defendant that raise a complaint on the part of the plaintiff to file a claim.

37. In this suit, I note that the 2nd defendant had raised a preliminary objection in paragraph 7 of the statement of defense on time limitation, no cause of action disclosed, sub-judice and res judicata. In paragraph 6 of the reply to the defense, the plaintiff admitted that the alleged illegalities on the title registers for the suit properties occurred in 2017. The plaintiff, in her testimony, produced P. Exh No. 15(a) & (b) & 21, which confirm that the suit properties were dwelt with under the probate and administration court. The plaintiff, in paragraph 2 of the amended plaint avers that she has brought the suit as a legal representative of the estate of the deceased for herself and the other beneficiaries.

38. She was silent on whether she has the capacity, given the disclosed confirmed certificate of a grant by the High Court and in the lower court at Tigania Law Courts, which was admitted in paragraph 5A of the amended plaint. In paragraph 12 of the amended plaint, the plaintiff avers that the illegal dealings over the suit parcel of land occurred between 2017 and 2022. The deceased passed on, on 16.8.2018. The plaintiff pleads in paragraph *13* that the defendants have schemed to deprive her and the family of their land. Evidence is available that the probate and administration process was undertaken over the estate by courts of competent jurisdiction.

39. The plaintiff and, by extension, the intended plaintiff now want the court to nullify and cancel changes in the suit parcel of land when she has not challenged the confirmed certificate of grants that the defendants used to effect the changes by way of appeal, review, or revocation of a grant obtained through fraud. The plaintiff and the intended plaintiff term the entries to the title registers as fraudulent and illegal, yet they have not questioned the probate and administration decrees or orders, issued by courts with jurisdiction over the estate of the deceased.

40. Of importance to this court is paragraph 13 (h) of the amended plaint, where the plaintiff pleads that there was a forgery of a grant of representation of the estate of her deceased husband and other documents for transmission of the estate of the deceased. That issue falls squarely on the probate and administration court. The plaintiff has not invoked Section 76 of the *Law of Succession Act* for revocation of those grants on account of forgeries or non-involvement of her as the widow of the deceased and other beneficiaries as dependants. See in Re-estate of Gathuku Gathuma (deceased) 2020 eKLR and Mary Ruguru Njoroge vs Peter Murithi Gichuru (2016) eKLR.

41. Prayer (b) of the amended plaint seeks that the cancellations be effected for the suit parcels of land to revert to the name of the deceased husband to enable proper administration of the estate. The plaintiff has, in her pleadings and evidence, raised issues that her matrimonial home has been subdivided and transferred and was at the risk of an eviction, or her quiet use, development, and occupation was at risk. She even obtained interim orders to preserve her occupation.

42. The jurisdiction to hear and determine whether any property forms part of matrimonial property equally lies elsewhere. All these issues are intertwined and go to the jurisdiction of the court. Jurisdiction is everything, and without it, a court downs its tools. The issue of jurisdiction can be raised and determined anytime. I, therefore, agree with the replying affidavit by the 2nd respondent that the intended plaintiff is conflicted as a daughter-in-law, and more so, when the 1st, 3rd, 4th, and 7th defendants, who are her children and husband alongside the 1st, 4th, 5th and 8th defendants in their statements of defense are in unison that the issues raised herein, revolve around succession law and not ownership per se. The cumulative effect of all these is that the suit parcel of land appears to have been distributed, subdivided, and registered by virtue of a certificate of confirmation of grant dated 18.3.2022 in Meru H.C Succession Cause No. 78 of 2021.

43. The plaintiff has not applied for the revocation of the certificate mentioned earlier of confirmation of the grant to which the initial parcels of land belonging to the deceased husband were subjected to the probate court and administration process and distributed without her knowledge or approval. The court has no jurisdiction to deal with probate and administrative matters. Issues of who is a bonafide beneficiary and who is not, what was the free property of the deceased at his death and what was not are the predominant issues in this suit and must be determined by a competent court before the court can determine whether there was fraud or illegality in the process of subdividing, transferring and registering the suit parcels of land by the 10th – 13th respondents.

44. In the Re-estate of Alice Mumbua Mutua (deceased (2017) eKLR, the court observed that it is the jurisdiction of the probate court to determine the assets of the deceased, the survivors of the deceased, and the person with a beneficial interest and finally the distribution of the assets amongst the survivors and the persons with beneficial interest.

45. The applicant has asked for a stay of proceedings. In Republic vs Paul Kihara Kariuki & others Exparte Law Society of Kenya (2020) eKLR, the court observed that a matter filed later ought to be stayed to await for determination of the earlier suit. The predominant issues in this suit fall under the probate and administration court. See Re-estate of M'Murianki Mugwika (deceased) 2019 eKLR. It is only after the probate court determines if the certificate of grant of letters of administration was regularly and procedurally obtained that this court can determine the equitable interest of the plaintiff. The case ideally is between the wife of the deceased and her children and grandchildren, whom she avers that they subdivided and transferred the estate of the deceased husband without involving her or the probate court. There is evidence that the High Court and the Tigania Law Courts, were involved in the distribution of the estate. Succession matters do not fall under the ambit of the Environment & Land Court. See Isaac Kinyua & others vs Hellen Kaigongi (2018) eKLR Re-estate of Julius Ndubi Javan (deceased (2018) eKLR. Further, in Diasproperty Limited & 5 Others vs Githae & 10 Others (2024) KECA 318 KLR, the court pronounced itself on the interplay between the environment and land matters with those under the probate and administration court, that either court can refer a matter to the other in the interest of justice.

46. Jurisdiction is everything, and without it, a court down its tools as held in Owners of Motor Vessel M.V Lilian "S" vs Caltex Oil (K) Ltd (1989) K.L.R. (1). The 2nd respondent has objected that the applicant is conflicted. The 1st, 2nd, 3rd, 4th, 5th, 7th & 8th defendants are all in agreement in their statements of defense, that the dispute is on the fair distribution of the estate of the deceased, among the beneficiaries or dependants. In paragraph 7 of the 2nd defendant's statement of defence dated 3.2.2022 a preliminary objection on sub judice and res judicata has been raised due to a pending suit in Tigania Law Courts.

47. The net effect of a preliminary objection is that if upheld, it renders any further proceedings before the court impossible or unnecessary. To discern such a point, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed as agreed as they are prima facia presented in the pleadings on record.

48. A court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction. See and in S.K Macharia & another vs. K.C.B. Ltd (2012) eKLR.

49. The court is also asked to stay the proceedings, set aside the proceedings of 6.5.2024, to allow the amendment and give room to file additional documents. The principles to consider in stay proceedings were set out in Global Tours and Travel Ltd Nairobi Winding Up Case No. 43 of 2000. It is a discretionary power to be exercised in the interest of justice. The sole question is whether it is in the

interest of justice to order a stay and, if so, on what terms. The court has to weigh the pros and cons of granting or not granting the order.

50. In this suit, the matter is part heard up to PW 5. The reason for the stay is to determine the capacity of the plaintiff to be replaced by the applicant, who was PW 2. The court is asked to stay so that the plaintiff can be substituted, the plaint to be amended, fresh evidence to be taken, the evidence by the plaintiff to be vacated and the applicant to file additional documents.

51. Substitution of a party was considered in Pravin Bowry vs John Ward and another (2015) eKLR. It is a discretionary power. The party must reasonably be affected by the pending litigation as per Order 1 Rule 10 of the Civil Procedure Rules. The party must disclose his take and the necessity of his appearance in the matter Efficient use of available judicial and administrative resources is a consideration as to amendments the party must disclose what new issues he intends to bring under Order 8 Rule 5 of the Civil Procedure Rules.

52. A proper party must meet the threshold of a plaintiff or defendant under Order 1 Rule 1 & 2 of the Civil Procedure Rules. See Zephir Holdings Ltd vs. Mimosa Plantations Ltd & others (20140 eKLR and William Kiprono Towett & 1597 others vs Farmland Aviation and others (2016) eKLR. The applicant has not annexed the draft intended plaint or mentioned the further documents and evidence she intends to adduce. The adduction of fresh evidence must meet the test in Republic vs Ahamad Abolfathi Mohammed & Another (2019) eKLR.

53. The 2nd respondent has expressed her reservation that the alleged new documents and additional evidence are to fill in gaps or holes poked during the hearing of PW 1 – 5 and hence shall prejudice the statement of defense. The applicant has not, by way of a further affidavit, addressed the said issues as to the nature context, relevance, credibility, and the failure to exercise due diligence and avail the said evidence or documents during Pre–Trial Conference, before the hearing or at the hearing of PW 1 – 5. The 2nd respondent terms the intention by the applicants suspect an afterthought and ill-intention to stifle or steal a match on the statement of defense raised.

54. The 2nd respondent has already put on notice the plaintiff that the suit discloses no cause of action, is res-judicata, and therefore, the court has no jurisdiction to hear and determine it, in view of previous or pending succession cause(s). The apprehension by the 2nd defendant on the motives behind the filing of fresh evidence and the replacement of the evidence so far tendered by PW 1 – 5 is not without basis in the circumstances.

55. Put another way, the 2nd respondent urges the court to find the application is likely to change the context, as malafides and would gravelly be detrimental to the 2nd respondent and also the 1st, 3rd, and 7th respondents.

56. So if the applicant wants to step in place of the initial plaintiff and change the voyage midway, the 2nd respondent urges the court to find her competence. The 2nd respondent and the rest of the respondents had pleaded the issues on res-judicata and the jurisdiction of this court and the implications of the former decision(s) on the distribution of the estate to the defendants by the probate and administration court.

57. Can the intended party sidestep the preliminary objection by trying to bring a fresh suit to replace the plaintiff's suit in the name of a joinder? Res judicata and sub-judice cannot be evaded by merely adding or substituting parties as was held in Africa Oil Turkana Ltd & others vs Permanent Secretary Ministry of Energy and others (2016) eKLR.

58. Opening the window for additional evidence may equally not be used to evade the preliminary objection based on Section 7 of the *Civil Procedure Act*. The doctrine applies to both the application and suits. See Abok James Odera vs J.P Machira Nairobi Civil Application No. 49 of 2001 and Independent Electoral Boundaries Commission and others vs Maina Kiai and others (2017) eKLR.

59. In Apondi vs Canuald Metal Packaging (2005) 1 E.A.L. 12, the court observed that a party is at liberty to choose a forum that has the jurisdiction to adjudicate his claim or choose to forego part of his claim and he cannot be heard to complain about the choice after the event and more so when the choice is oppressive or prejudicial to other parties and an abuse of the court process.

60. In this suit, the plaintiff has already testified and produced exhibits showing that courts of competent jurisdiction, dealt with the issues on the distribution of the suit properties. She has not moved to challenge the certificates of grant, issued to identify the free properties of the deceased, identify the beneficiaries and distribute the same to the defendants. She terms the 10-13 defendants as a part of the alleged fraud or illegality, yet the same was done in furtherance perhaps of valid probate and administration decrees. The said decrees or orders have not been challenged under Section 76 of the *Law of Succession Act*. The intended plaintiff's application is being challenged for lack of capacity and complicity in the dispute. To my mind, the issues raised by the 2nd respondent are not idle. A party without capacity may not pass capacity to another. A nullity is a nullity, as held in Macfoy vs. United African Co. Ltd (1961) 3 ALL E.R 1169.

61. The applicant wants the court to find her both a legal representative and guardian ad litem. Both hats are like Siamese twins. The court cannot isolate one if it is found wanting and proceed with the other. The substratum does not change even if the incoming plaintiff is allowed on board. The court's jurisdiction to entertain the incoming plaintiff based on a limited grant ad litem in the face of the several confirmed certificates of grant and the one by the existing plaintiff must be looked into in the context of the court's overall jurisdiction in the dispute.

62. It is the applicant who has stirred the still waters and the storm and cannot run away from jurisdictional issues already raised in the suit, she intends to assume or undertake on the estate of the initial owner of the land. The court has to determine whether the center can hold even if the amendments and the substitution are to be allowed. The applicant wants to peg her claim on the same substratum. The court must look into whether the intention of the applicant is for decoration and dressing only, without changing the goalposts.

63. In Mburu Kinyua vs Gachini Tuti (1978) K.L.R. 69 and Churanji Lal & Co. vs Bhaijjee (1932) 14 K.L.R. 28, the courts observed that caution must be taken to distinguish between the discovery of new facts and fresh happenings and that the former may not necessarily escape the application of the doctrine, since parties cannot face-lift the pleadings to evade the doctrine of res judicata as a party cannot in subsequent proceedings, raise a ground of claims or defense which has been decided or which was open for determination in the former suit.

64. In Nancy Mwangi t/a Worthline Marketer vs Airtel Networks (2014) eKLR, the court said that it must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action to seek the same remedy or conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit. In S.K Macharia and another vs Kenya Commercial Bank. (supra), the court held that jurisdiction is conferred by either *the Constitution* or statute, and a court of law cannot arrogate itself jurisdiction exceeding what is conferred upon it by the law.

65. There is no basis to stay the proceedings. The cause of action by the plaintiff and which the applicant wants to take over is based on matters falling under the *Law of Succession Act* and which have been handled by a concurrent court or court of competent jurisdiction. This court cannot sit on an appeal of a succession cause by a lower court or a decision rendered by a sister court under the *Law of Succession Act* or determine property placed under guardianship management under the *Mental Health Act* by the High Court.

66. The proposed amendments have not been attached to the application. The proposed documents to be filed have not been mentioned or attached and an explanation has not been given for the inordinate delay or non-availability.

67. As regards reviewing and setting aside the proceedings of 6.5.2024, there was no medical report availed or mentioned before the court on that day or order placing the plaintiff on guardianship before or on the said day. The orders issued on 18.7.2024 and 12.7.2024, do not operate retrospectively to invalidate the said proceedings. To allow such a prayer would be prejudicial to the respondents. There was inordinate delay in applying for review, the circumstances surrounding the taking of a hearing, date during the hearing and after the hearing militate against the setting aside of the proceedings, and lastly; it would serve no purpose to reopen the suit in view of the findings that the court is bereft of jurisdiction to handle it. Consequently, I find the suit incompetent and incurably defective to be allowed to be amended and or cured through the replacement of the plaintiff, by the applicant. It is dismissed with costs to the 2nd respondent. Any inhibition orders or interim orders in existence, are as a result of this vacated.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 23RD DAY OF OCTOBER, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu/Mukami

Thangicia for plaintiff

Ngumato for Gitonga for 2nd & 6 defendants

Juma for 9th-13th defendants