In re Estate of Mwangangi Nthanga alias Mwangangi Nthanga Nguyo (Deceased) (Succession Cause 2 of 2019) [2024] KEHC 519 (KLR) (29 January 2024) (Ruling)

Neutral citation: [2024] KEHC 519 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

SUCCESSION CAUSE 2 OF 2019

FR OLEL, J

JANUARY 29, 2024

IN THE MATTER OF THE ESTATE OF MWANGANGI NTHANGA ALIAS MWANGANGI NTHANGA NGUYO

(DECEASED)

MUSYIMI MATI.....1ST PETITIONER/RESPONDENT

PHILOMENA KATUMBI MUNYAO.....2ND PETITIONER/RESPONDENT

VERSUS

CHARLES MBWIKA MUSEE.....OBJECTOR/APPLICANT

RULING

A. Introduction

1. Before court for determination is the summons for revocation of grant dated 18th October 2021 filed by the Objector/Applicant. The said application is supported by the affidavit of the said Objector Charles Mbwika Musee also dated on the even date. This application is opposed by the petitioners/ respondents through the replying affidavit of the 1st petitioner/Respondent one Musyimi Mati dated 23rd June 2022 and further Replying Affidavit dated 18th July 2022.

B. The Application

2. It was the applicant's contention that the grant herein was obtained by making of a false statement and concealment of material facts. The applicant did contend that he was beneficiary of the estate having bought part of the estate, being L.R No.Machakos/Mua Hills/165, yet the petitioners did not seek his consent and/or include him by noting his purchaser's interest in the estate. As a result, and due to their deliberate omission, the petitioners were not people who could be trusted with the assets of the estate and thus it was necessary to revoke the grant issued herein and a new grant be issued including the objector herein as a beneficiary.

C. The Response

3. The Respondents did oppose this application and stated that the said application was frivolous, scandalous and meant to waste this courts precious time. It was the applicant who had initiated this succession cause by filing a citation as against them and could not be heard to allege that he was unaware of the subsequent filing of this succession cause. The applicant was not their relative or beneficiary of the estate and further had not proved that indeed he purchased any parcel of land from the deceased. He therefore had no valid claim as against the estate.

4. Further the issue of ownership of L.R No. Machakos/Mua hills/165 as between the objector herein and Mwangangi Nthanga alias Mwangangi Nthenga Nguyo (deceased) was heard and determined on merits in Machakos HCCC no.220 of 1996 (Charlse Mbwika Musee vrs Settlement Fund Trustee and Mwangangi Nthenga Nguyo, and as a final determination the objector's suit/claim over the suit parcel was dismissed.

5. The Objector/Applicant did file an appeal as against the said decision at the court of appeal being Civil Appeal No. 192 of 2004 (Charles Mbwika Musee vrs Settlement fund Trustee and Mwangangi Nthanga Nguyo which appeal was later withdrawn with no orders as to costs. This dispute having been determined by a court of competent jurisdiction, could not again be properly canvased before this court as it offended the doctrine of Res Judicata. The applicant did pray that this objection therefore be dismissed.

D. Parties Submissions

i. Objector/Applicant submissions

6. The applicant/objector did submit that Section 76 of the *law of succession Act* did provide that grant could be revoked and/or annulled if the same was obtained fraudulently by making a false statement or by concealment from court of material facts related thereto. Further grant could also be revoked/ annulled if the proceedings to obtained the grant were defective in substance and if the grant issued had become useless and/or inoperative through subsequent circumstances. The objector did contend that the grant issued to the Respondent on 24th June 2021 fell foul of all the above parameters as enumerated under Section 76 (a)- (e) of the *law of succession Act* . Reliance as placed on *Estate of Obedi Ndwiga Rubarita (deceased) (2021)*eKLR.

7. The Objector further urged that court to note that when the Respondents petitioned for grant on 16th January 2019. In the P &A 5 form and /or the affidavit made in support of the petition for letters of administration intestate sworn on the said 17th January 2019, the petitioners/Respondents had included the objector/applicant interest as a liability to the estate and this made him a genuine creditor/ purchaser to the suit property/beneficiary to the estate. Under the probate and administration rules, it was envisaged that debts and liabilities had to be settled first and thereafter the petitioners could move on to distribute the net estate. The petitioners/respondents could therefore not turn their back and abandon the initial stand taken at this late juncture. Reliance was paced on *Re Estate of Nasotokini Ole Sane alias Nasotokini Lesane (deceased) 2019* eKLR.

8. Based on the afforested prevailing facts, it was therefore unlawful on the part of the petitions/ respondents to share out the estate amongst themselves and leave out the objector/applicant who was a genuine purchaser of the suit property from their deceased father. To that extent the grant was procured fraudulently and without full disclosure. The objector thus prayed that the confirmed grant herein be cancelled and his interest be included as part of the Estate.

9. The objector/applicant did file further submissions dated 6th October 2023, where he reiterated the historical facts relating to how he bought the suit property, and took possession in 1984 after paying the whole of the purchase price. This fact was amply proved by the various sale agreement/ acknowledgements annexed in his application. Since the petitioner father had died before effecting transfer to him, the present case simply presented a proper dispute to be determined in the context of this succession cause due to the fraudulent conduct of the petitioners/Respondents who unlawfully succeed the estate property that was not freely available to them for distribution.

10. To prevent this outrightly fraudulent act of the petitioners/Respondents, the court had inherent powers under rule 73 of the probate and administration rules to correct the injustice being occasioned as there existed an equitable and/or constructive trust for the benefit of the objector/applicant over the estate of the late Mwangangi Nthangi Alias Mwangangi Nthanga Nguyo (deceased) as the objector/ applicant had proven the sale and long exclusive, uninterrupted occupation of the entire parcel of land known as L.R No Machakos/Mua Hills/165.

11. Finally, it was submitted that there was no loss whatsoever which the petitioners/Respondents would suffer as they would not lose their home and/or be rendered destitute if the suit parcel remained with the objector/Applicant. The decree issued in the earlier suit had expired by virtue of section 4(4) of the *limitation of Actions Act* as it was issued more than 18 years ago, and therefore nothing barred this court from relooking at the issue raise herein and proceeding to determine the objection on its merits.

ii. The petitioners/Respondents Submissions

12. The Petitioners/Respondents did oppose this objection application on ground that this application was res judicata as the issue of whether the objector/applicant did purchase L.R No. Machakos/ Mua hills/165 from the deceased had been determined absolutely in Machakos HCC no 220 of 1996 (Charles Mbwika Musee vrs Settlement Fund Trustees & Mwangangi Nthenga Nguyo). It was therefore not open for the objector/applicant to attempt to reopen the same issue for re-determination before a court with Concurrent jurisdiction. He's only option was to file a new suit before the Environment & Land court (ELC) to claim compensation. The current objection as filed was therefore res judicata and fatally defective.

13. Finally, respondents submitted that, there was no evidence of wrong doing, the basis upon which the court could invoke the provisions of Section 76 of the *Law of Succession Act* and therefore the said application was ripe for dismissal. Reliance was placed on *Albert Imbugu Kisigwa vrs Recho Kavai Kisigwa (2016)* eKLR.

E. Analysis and Determination

14. I have considered all the pleadings filed with respect to the summon for revocation of grant dated 18th October 2021 and the submissions made by the parties before this court and primarily note that the issues for determination is whether the said application is Res judicata, and/or whether the objection as filed is merited.

15. Section 7 of the *Civil Procedure Act*, 2010 provides as hereunder:

> " 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."

16. It is now old hat that the said doctrine applies to both suits and applications as was held in Abok James Odera vs. John Patrick Machira Civil Application No. Nai. 49 of 2001. If a party was, to rely on the defence of res judicata there must be:

(i). a previous suit in which the matter was in issue;

(ii) . the parties were the same or litigating under the same title;

(iii). a competent court heard the matter in issue;

(iv). the issue had been raised once again in a fresh suit.

17. As regards the rationale of the doctrine of res judicata, the Court of Appeal in *Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017)* eKLR.

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

18. Further the Maina Kiai case (supra), the Court quoted with approval the Indian Supreme Court in the case of Lal Chand vs. Radha Kishan, AIR 1977 SC 789 where it was stated;

> " The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

19. In the case of Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:

> " The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, , that that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should

> be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application."

20. Unfortunately for the objector the dispute regarding the purchase of L.R No. Machakos/Mua hills/165 was heard on merit and determined in Machakos HCC no 220 of 1996 (Charles Mbwika Musee vrs Settlement Fund Trustees & Mwangangi Nthenga Nguyo). The afore-stated case involved the objector/applicant herein and the father of the petitioners herein, the same issues raised in the previous suit are the same issues raised before this court, and eventually after hearing all parties the court in the previous suit did determine that the "deceased" had no capacity to sell what did not belong to him. This objection is filed by the objector as a party who has been unsuccessful in a previous suit and by law, he cannot be allowed a window to regurgitate the same facts in this objection as filed.

21. No doubt based on the evidence filed, it does indeed show that the objector bought the suit parcel L.R No. Machakos/Mua hills/165 from the deceased Mwangangi Nthenga Nguyo and has settled thereon, but the determination made in Machakos HCC no 220 of 1996 (Charles Mbwika Musee vrs Settlement Fund Trustees & Mwangangi Nthenga Nguyo) holds and could only have been reversed on Appeal.

22. All this court can do is to urge the petitioners/Respondents who are children of the deceased Mwangangi Nthenga Nguyo, to search their conscious and reach a compromise with the objector for it is wise and just to do so.

C. Disposition

23. The summons for revocation of grant application dated 18th October, 2021 therefore has no merit and the same is dismissed with no orders as to cost.

24. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 29TH DAY OF JANUARY, 2024.

In the presence of;

Ms Mutua for Objector/Applicant

Mr. Mutinda for Petitioner/Respondent

Sam - Court Assistant