In re Estate of Ndeto Mulae (Deceased) (Succession Cause 320 of 2002) [2024] KEHC 5179 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5179 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

SUCCESSION CAUSE 320 OF 2002

FR OLEL, J

APRIL 25, 2024

BETWEEN

EMMANUEL MZOMO NDETO ..... 1ST PETITIONER

RAPHAEL NDETO MULAE ..... 2ND PETITIONER

AND

ALBANUS DAVID NDETO ..... BENEFICIARY

RULING

A. Introduction

1. Before court for determination is the summons for revocation of grant dated 1st November 2022 filed by the Beneficiary/Applicant, pursuant to provisions of section 47 & 76(b) of the *Law Of Succession Act*, and Rule 44(1) of the *probate and administration Rules*. The applicant seeks for orders that;

    a. That the grant of administration(intestate) made to the administrators/Respondents by this Honourable court in this cause on 19th day of November 2020 and confirmed on 21st day of July 2022 be revoked.

    b. That costs of this Application be paid out of the Estate

2. . The said application is supported by the supporting affidavit of the said Applicant Albanus David Ndetoalso dated on the even date. This application is opposed by the Administrator/Respondent through the replying affidavit of the 2nd Administrator/Respondent one Emmanuel Nzomo Ndeto dated 19th July 2023.

B. The Application

3. It was the applicant's contention that the grant herein was obtained by making of a false statement, misrepresentation, concealment of material facts and without the consent of the beneficiaries.

The deceased had five (5) wives and before he died, he had bequeathed parcel No Matungulu/Kyaume/1509 (hereinafter referred to as the suit property) to the 3rd wife, whilst sharing his other inheritance amongst all the five houses. The apportionment was done since the homestead of the said 3rd wife was premised in the said subject land, the 1st and 2nd wife were given parcel No Matungulu/Kyaume/1508, the 4th wife was given Plot 268 on L No 11930 and finally the 5th wife stayed at Manjala and she was not given a portion of land in Matungulu or Mwea.

4. It was the applicant's contention that the 1st family were wrongly claiming the suit parcel of land on the basis that it was big and therefore should be divided amongst the five houses. This raised a dispute which was adjudicated upon by the Assistant chief through to the District commissioner, after which, he filed a case before the Embu lands dispute tribunal, which tribunal made a determination in his favour that the suit parcel belonged to the 3rd family. An Appeal was filed at the Embu provincial land's Appeal committee, which committee overturned the District lands tribunal finding and held that the suit parcel ought to be shared by the families of the deceased.

5. The applicant further averred that as at the time the Embu provincial lands disputes Appeal committee was proceeding with the Appeal, he had been arrested and incarcerated for allegedly wounding animals and the subsequent succession proceedings were instituted without him signing the necessary consent as a beneficiary. The consent filed herein only had the signatures of the beneficiaries from the 1st, 2nd, 4th, and 5th families and blatantly disregarded the interest of the 3rd house especially as regards their ownership of the suit parcel of land.

6. After he was released from prison, the Applicant averred that he went to the General clan chairman (Atangwa clan) who faulted the distribution of the estate as effected and wrote a letter in support of his contention that the suit parcel, belonged to the 3rd house. His sibling one Anne Ndinda Mulae proceed to file this succession without informing the entire family and later called for a family meeting to hood wink them into supporting this process. He therefore prayed that the grant herein be revoked and the court awards the 3rd family the entire suit parcel, Matungulu/Kyaume/1509.

C. The Response

7. The Respondents did oppose this application through the replying Affidavit of the 2nd respondent dated 19th July 2023. It was not true that the suit parcel of land had been exclusively given to the 3rd wife/family and to the contrary, it was the deceased who had sub divided the same and apportioned it to other family members. The applicant had clandestinely and unknown to other family members filed Machakos High court succession Cause No 10 of 2012, without involving the other family members and when they discovered this fact, they successfully applied to have the grant issued therein, to the applicant to be revoked, and the suit parcel registration be revered to the deceased.

8. Further in pursuit of his selfish agenda, the applicant had filed a suit before the Embu land disputes tribunal, which awarded him the said suit parcel of land. The 1st respondent did file an appeal before the Embu provincial lands Disputes Appeal committee (Being Embu provincial lands Appeal No 238 of 2002), which overturned the decision of the Embu District lands dispute board and declared that all the properties of the deceased be awarded to Anne Ndinda Mulae, to share with the rest of the family. This ruling was subsequently adopted as an order of the court on 27th October 2011. The applicant did not file an appeal as against this decision and it remains binding. It is for this reason that the said Anne Ndinda Mulae did proceed to file this cause and shared the deceased property as directed.

9. The issue raised by the applicant on who owns the suit property, had been determined by a competent tribunal and could not be reopened and litigated upon again before this court. The suit parcel had

been sub divided amongst all families, and the applicant had taken his portion, constructed his home thereon and leased a part of the remaining portion to a Chinese company.

10. The re spondent urged the court to find that the applicant had moved court with unclean hands in equity, given that he had secretly filed Machakos High court succession cause No 10 of 2012 and had on the basis of grant obtained proceeded to cause the suit parcel to be sub divided to his exclusive benefit and to the detriment of the deceased family. Further there was no evidence that the applicant had been arrested and incarcerated during these proceedings. During the family meeting the applicant did not attend, but the minutes arrived at thereof, were taken to him and he refused to sign on the basis that the suit parcel could not be distributed as it was not part of the estate. It should also be noted that in the subsequent family meeting of 28.07.2022 and 03.08.2022, the applicant was present and signed the minutes generated from the said meetings.

11. The respondents reiterated that Anne Ndinda Mulae did not file this succession matter secretly as alleged and she did involve all family members, who consented to this process. The suit property never exclusively belonged to the 3rd family and was therefore rightly apportioned to each family. The letter purported to be generated by the clan elder was not binding to this court as the clan elder had no role in determining succession matters. Finally the deceased 3rd wife one "Syombua Ndeto" had passed on and the applicant was not an administrator of her estate and therefore had no legal capacity to bring this application on her behalf.

12. The respondents thus urged this court to find that this application had no merit and proceed to dismiss the same with costs.

D. Analysis and Determination

13. I have considered all the pleadings filed with respect to the summon for revocation of grant dated 1st November 2022 , the submissions made by the parties before this court and primarily note that the only issue for determination is whether the application disclosed proper grounds the basis upon which the order sought can be granted

14. Section 76(a), (b) and (c) of the *Law of Succession Act* provides as hereunder:

> A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
>
> (a)that the proceedings to obtain the grant were defective in substance;
>
> (b)that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
>
> (c)that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

15. That section provides that a grant of representation may at any time be revoked or annulled as long as the court is satisfied that the facts contemplated under the said section are proved. It is therefore clear that there is no limitation in so far as matters revocation or annulment of grant are concerned.However, it is not in every situation where transgressions are alleged that the grant must be revoked.

16. This position was adopted in the case of *Albert Imbuga Kisigwa v Recho Kavai Kisigwa* [2016] eKLR Succession Cause No.158 of 2000, Mwita Where it was held that;-

> " Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice."

17. Similarly, *in Re The Estate of the Late Suleman Kusundwa* [1965] EA 247, it was held that:

> " The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased's property as he was entitled to dispose of by will under the applicable law of inheritance."

18. This position was also clearly appreciated by Khamoni, J *in Re Estate of Gitau (Deceased)* [2002] 2 KLR 430 where he expressed himself as hereunder:

> " Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the *Law of Succession Act* should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them."

19. The applicant alleges that there was fraud and misrepresentation/ concealment of material facts in this succession process. The 3rd family had exclusively been bequeathed the suit parcel Matungulu/ Kyaume/1508, by the deceased before he died, but during confirmation of the grant, the same was wrongly sub divided amongst all the deceased five (5) families.

20. I do not find any merit in the applicant's contention for the simple reason that no scintilla of evidence has been placed before this court to indeed prove that indeed the deceased did exclusively bequeath land parcel Matungulu/Kyaume/1508 to his 3rd wife and/or her family. Secondly in a bid to claim this parcel, the applicant did file a claim over this suit parcel at the Embu lands dispute tribunal. The same was heard on merit and he was awarded the said parcel of land vide a verdict delivered on 29.01.2002.

21. The respondents filed an appeal at Embu provincial lands dispute Appeal committee (Case No 238 of 2002), which appeal was heard on merit and the decision of the Embu district lands dispute tribunal, giving the applicant the suit parcel was overturned and the Appeal committee did direct that the suit parcel be awarded to Anne Ndinda Mulae, who was to share the deceased properties with the rest of the

family. The said decision was subsequently adopted as an order of the court on 27.102011 in Machakos CMCC No 111 of 2006.

22. Rule 63 of the *probate and Admistration rules* allows for the importation of the civil procedure rules, where applicable in succession matters. 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."

23. 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.

24. As regards the rationale of the doctrine of res judicata, the Court of Appeal in *Independent Electoral & Boundaries Commission v 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."

25. Further the Maina Kiai case (supra), the Court quoted with approval the Indian Supreme Court in the case of *Lal Chand v 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."

26. This dispute regarding who should own the suit parcel was squarely determined by the lands tribunal and their final order adopted as an order of the court. The afore-stated case involved the beneficiary/ applicant herein, the 1st respondent and his other siblings. 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 suit parcel belonged to the deceased and should be distributed amongst his family. This application is filed by the applicant 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 application as filed.

D.Disposition

27. The upshot is that the summons for revocation of grant dated 1st November 2022 is wholly unmerited and the same is dismissed with costs to the respondents.

28. The said costs are hereby assessed at Kshs.40,000/= payable to the respondents within the next 30 days. In default execution to issue.

29. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF APRIL 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 25th day of April, 2024.

In the presence of;

No appearance for Administrator/Respondent

No appearance for Beneficiary/Applicant

Sam Court Assistant