



REPUBLIC OF KENYA



In re Estate of Ignatius Ndirangu Kamau (Deceased) (Succession Cause 8 of 2023) [2024] KEHC 7058 (KLR) (Family) (24 April 2024) (Ruling)

Neutral citation: [2024] KEHC 7058 (KLR)

FORMERLY NYAHURURU HIGH COURT SUCCESSION NO. 28 OF 2017)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA**

FAMILY

SUCCESSION CAUSE 8 OF 2023

CM KARIUKI, J

APRIL 24, 2024

IN THE MATTER OF THE ESTATE OF IGNATIUS NDIRANGU KAMAU (DECEASED)

BETWEEN

DAVID MACHARIA NDIRANGU APPLICANT

AND

ZACHARY NGANYE NDIRANGU RESPONDENT

RULING

1. By Application dated 27/7/2022 the applicant seeking orders
 - a. That this application be certified as urgent and service be dispensed with in the first instance
 - b. That pending inter partes hearing and determination of this application, there be a stay of execution of judgment and orders made by the Honourable Court on 11th June 2020 together with all other consequential orders.
 - c. That the orders of confirmation of grant issued on the 11th of June 2020 and the 4th of July 2022 be set aside, reviewed, and/or vacated.
 - d. That known as Nyandarua/ Mawngo/438 be taken into account while determining the ultimate entitlement of each beneficiary in this estate.
 - e. That this Honourable court be pleased to issue any order it deems mete and just in the circumstances
 - f. The cost of this application be in the cause.



2. The grounds upon which this application is based are as follows:
 - i. That judgment in this matter was delivered on the 11th of June 2020 whereupon the court issued the following orders: -
 - a. I find the deceased died intestate and the impugned will is null and void
 - b. The deceased property shall be shared equally between the two houses.
 - c. The objector, Zachary Nganye, and petitioner Josephine Wamwathi are hereby appointed as administrators of the estate to represent each house, and grants be issued to the two accordingly;
 - d. The government surveyor to carry out the subdivision which should take into account where the beneficiaries have settled.
 - e. Each party will bear their costs
 - ii. Subsequently, a Grant of Letters of Administration Intestate and certificate of confirmation of grant was issued on the 11th of June. 2020.
 - iii. That the 2nd administrator Josephine Wamwathi passed away on 29th August 2020.
 - iv. That the respondent filed an application dated the 5th of April, 2022 where he sought among other orders that the letters of administration intestate and certificate of confirmation of grant be reviewed by removing the name of Josephine Wamwathi and appointing the respondent as the sole administrator.
 - v. That on 4th July 2022, the court issued among other orders that the respondent and Peter Kamau Ndirangu be joint administrators of the deceased estate.
 - vi. That the said Certificate of confirmation of grant issued on 11 June 2020 and subsequently reissued on 4th July 2022 is defective for want of procedure as there was no application and/or proceedings for confirmation of grant.
 - vii. That the deceased during his lifetime had bequeathed a parcel of land known as Ny Andarua / MawIngo/438 to the 1st house.
 - viii. That the said gift has not been taken into consideration in the certificate of confirmation of the grant.
3. The application is supported by the affidavit of David Macharia Ndirangu sworn on 27/7/2022 reiterating the grounds.
4. The same is supported by the Affidavit of Zachary Nganye Ndirangu sworn on 13/10/2022.
5. The parties were directed to canvass applications via submissions.
6. Applicant submissions.Same not on record.

7. Respondent Submissions.

8. Before the honorable court is a summons, dated 27th July 2023 in which the Applicant is seeking in material part for orders of confirmation of grant issued on the 11th June 2020 and 4th July 2022 be set aside, reviewed, and/or vacated. He also seeks land parcel No. Nyandarua/Mawingo/438 be taken into account in determining the ultimate entitlement of each beneficiary in the estate.



9. The application is supported by the Applicant's affidavit sworn on even date and the grounds on the face thereof. The basis of the application is that the certificate of confirmation of the grant issued on 11th June 2020 and subsequently re-issued on 4th July 2022 is defective for want of procedure as there was no application and/or proceedings for confirmation of the grant.
10. It is the Applicant's case that the deceased during his lifetime had bequeathed land parcel No. Nyandarua/Mawingo/438 to the 1st house and that the said gift had not been taken into consideration in the certificate of confirmation of grant. As such, he contends that it was in the interest of justice that the prayers sought ought in the application.
11. The application is opposed through the Respondent's replying affidavit sworn on 13th October 2022 wherein it is attacked for being incompetent, bad in law, and an abuse of the court process.
12. It is the Respondent's case that the issues sought to be re-litigated were litigated by way of *viva voce* evidence and a judgment rendered thereon by Lady Justice R.P.V Wendoh.
13. A certificate of confirmation of grant was issued on 11th June 2020 according to the said judgment.
14. On 9th November 2020, the Applicant's brother Peter Kamau Ndirangu filed a summons dated 5th November 2020 seeking a stay of execution of the judgment and orders of 11th June 2020 pending appeal.
15. The Respondent filed a notice of preliminary objection to the said application on 9th November 2020 which is annexed thereto.
16. The application came up for ruling on 27th January 2022, and the same was dismissed by this honorable court.
17. The issues raised in the instant application ought to have been raised during the hearing of the main cause or subsequent application dated 9th November, 2020 if the Applicant's family members had been diligent and failed to do so, the matter is now '*res judicata*'.
18. In this regard, citing the decision in *John Florence Maritime Services Limited & another vs Cabinet secretary for Transport and Infrastructure & 3 others* [2015] eKLR

“..... where a given matter becomes the subject of litigation in 3 a court of competent jurisdiction, the patties to that litigation to bring forward and will not (except under special the same parties to open the same respect of a matter which might have been brought forward, as part of the subject in the contest, but forward, which was not brought forward only because they have, from negligence, inadvertence, or even accident,m omitted part of their case.
19. It may be argued by the applicant that the doctrine of *res judicata* does not apply to this matter as what was previously determined was an application but that argument cannot hold any water by dint of the decision in *Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others* [1996] eKLR wherein it was held at page 8 as follows:

“That can only mean that interlocutory proceedings come within the purview of the word “suit” for the issue of *res judicata* by section 89 of our *Civil Procedure Act.*”
20. The Respondent contends that this court is '*functus officio*' in so far as the question of determination of shares of beneficiaries of the estate is concerned having delivered Its judgment and subsequent ruling thereon on merit.



21. A party is supposed to bring his whole case before the court in any litigation at once and cannot be allowed to litigate in installments.
22. The Respondent contends that the alleged wishes of the deceased contained in annexure 'DMN 5' are unknown to him and were never presented at the hearing of the instant cause and it contradicts the purported will which was Invalidated by the honorable court.
23. The Applicant and members of his family have been introducing new issues at every turn in this cause in a clear attempt to overturn the honorable court's judgment through forum shopping.
24. According to the Respondent, it is not true that land parcel. No. Nyandarua/Mawingo/438 was gifted to the 1st house in terms of annexures "DMN 4 & 5' upon subdivision into 11 portions. He deposes that the deceased had a history of selling his land to third parties as follows:
 - i. In 1984, he sold Seventy (70) acres to one Onesmus Mutinda
 - ii. In 1985, he sold Five (5) acres to one Jessee Njuguna Kuria
 - iii. In 1988, he sold Fifteen (15) acres to one Mr. Mbithi
 - iv. In 1989, he sold Ten (10) acres to one Mr. Waititu.
25. Around 1997, the deceased wanted to sell more land out of Title No. Nyandarua/Mawingo/438 and asked all his family members willing to buy from him to do so and as a result, several of the Respondent's family members including him bought portions of the land according to which transfers were affected based on the sale as evidenced by annexure marked ZNN 7 being a bundle of documents confirming the transfers on sale.
26. According to the Respondent, one of the subdivisions measuring two (2) acres out of the said land parcel was sold to one Samuel Kimani and a portion of five (5) acres remained in the name of the deceased L.R No. Nyandarua/Mawingo/1524 which is part of the estate property listed in the grant issued herein.
27. All the documents including applications for land control board consents, land control board consents, and transfers indicate that they were made according to sale and not a gift as contended by the Applicant.
28. The land registers for all subdivisions of the land parcel indicate that transfers thereof were affected under the sale which explains why the applicant failed to exhibit them before the honorable court.
29. In the premises, the application before the court is a belated afterthought intended to reopen this litigation without any legal justification or jurisdiction.
30. The application is also attacked for being incompetent and bad in law on the ground that it was filed by a firm of advocates which is not properly on record. The application was notably filed after judgment without the current advocate seeking leave to come on record under Order 9 Rule 9 of the Civil Procedure Rules.

31. Issues, Analysis and The Determination

32. The issues arising are whether the application is *res judicata*. If in negative does the application have merit and orders as to costs?
33. It is the Applicant's case that the deceased during his lifetime had bequeathed land parcel No. Nyandarua/Mawingo/438 to the 1st house and that the said gift had not been taken into consideration



in the certificate of confirmation of the grant. As such, he contends that it was in the interest of justice that the prayers sought ought in the application.

34. The application is opposed through the Respondent's replying affidavit sworn on 13th October 2022 wherein it is attacked for being incompetent, bad in law, and an abuse of the court process.
35. It is the Respondent's case that the issues sought to be re-litigated were litigated by way of *viva voce* evidence and a judgment rendered thereon by Lady Justice R.P.V Wendoh.
36. A certificate of confirmation of grant was issued on 11th June 2020 according to the said judgment.
37. On 9th November 2020, the Applicant's brother Peter Kamau Ndirangu filed a summons dated 5th November 2020 seeking a stay of execution of the judgment and orders of 11th June 2020 pending appeal.
38. The Respondent filed a notice of preliminary objection to the said application on 9th November 2020 which is annexed thereto.
39. The application came up for ruling on 27th January 2022, and the same was dismissed by this honorable court.
40. The issues raised in the instant application ought to have been raised during the hearing of the main cause or subsequent application dated 9th November 2020 if the Applicant's family members had been diligent and failed to do so, the matter is now '*res judicata*'.
41. in the case of John [*Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 others*](#) [2015] eKLR

“..... where a given matter becomes the subject of litigation in a court of competent jurisdiction, the parties to that litigation to bring forward and will not (except under special the same parties to open the same respect of a matter which might have been brought forward, as part of the subject in the contest, but forward, which was not brought forward only because they have, from negligence, inadvertence, or even accident omitted part of their case”

42. It may be argued by the applicant that the doctrine of *res judicata* does not apply to this matter as what was previously determined was an application but that argument cannot hold any water by dint of the decision in [*Uburu Highway Development Limited vs Central Bank of Kenya & 2 others*](#) [1996] eKLR wherein it was held at page 8 as follows:

“That can only mean that interlocutory proceedings come within the purview of the word “suit” for the issue of *res judicata* by section 89 of our [*Civil Procedure Act*](#).”

43. The Respondent contends that the court agrees, that this court is '*functus officio*' in so far as the question of determination of shares of beneficiaries of the estate is concerned having delivered Its judgement and subsequent ruling thereof on merit.
44. A party is supposed to bring his whole case before the court in any litigation at once and cannot be allowed to litigate in installments. In any case, the application was notably filed after judgment without the current advocate seeking leave to come on record under Order 9 Rule 9 of the [*Civil Procedure Rules*](#).
45. That issue having succeeded, the court need not allude to the merit of the application. Thus, the court makes the following orders;



i. The application is struck out with no orders as to costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 24TH DAY OF APRIL 2024.

.....

CHARLES KARIUKI

JUDGE

