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Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	William Musya Musyoka
Citation:	In Re Estate of James Karanja Alias James Kioi (Deceased) [2014] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Family
History Magistrates:	-
County:	Nairobi
Docket Number:	-
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Case Outcome:	Allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

SUCCESSION CAUSE NO. 1366 OF 1995

IN THE MATTER OF THE ESTATE OF JAMES KARANJA alias

JAMES KIOI (DECEASED)

MARY WANGUI KARANJA……………….……....…1ST APPLICANT

SALOME NJERI KARANJA………………..……............2ND APPLICANT

-VERSUS-

RHODA WAIRIMU KARANJA…………………..……1ST RESPONDENT

JOHN KIOI KARANJA………………….......………2ND RESPONDENT

RULING

1. The issues for determination are:

a. Whether the words that appear on Clause 4 of the Last Will and Testament of James Karanja Kioi dated 6th February 19992, that is: " I DEVISE my farm known as MUGUGA FARM and KWA-NJOROGE TOGETHER WITH houses and other buildings erected and being thereon to my said Three daughters in equal shares absolutely"

i. Sufficiently and adequately identify "Muguga Farm" as the property known as LR.No. 11595 (original number 7842/1 Kiambu) or does the same fail due to lack of adequate description in size, location and title number;

(ii) Sufficiently and adequately identify "Kwa-Njoroge" as LR Nos. Sigona/48; Sigona/180; Sigona/202; Sigona/300; Sigona/320 or does the same fail due to lack of adequate description in size, location and

land reference numbers.

b. Whether the words that appear on Clause 6 of the Last Will and Testament of James Karanja Kioi dated 6th February 1992, that is:

“I DEVISE all my rented properties in Nairobi except NAIROBI/BLOCK76/256 Buru Buru and Land Reference Number 209/7723 to my three daughters WANGUI WAMBUI and NJERI in equal shares absolutely:- i. Sufficiently and adequately identifies “rented properties in Nairobi” as Land Reference Numbers:-

(i) Nairobi Block 73/288

(ii) Nairobi Block 76/513

(iii) Nairobi Block 75/296

(iv) Nairobi Block 73/440

(v) Nairobi Block 75/253

(vi) Nairobi Block 73/448

(vii) Nairobi Block 75/255

(viii) Nairobi Block 76/119

(ix) Nairobi Block 93/322

(x) Kariobangi South No. 165D”

Or does the same fail due to lack of description in size, location, title, rental income, identity of tenants, the nature and extent of tenancies, and vacant properties etc.;

(c) Whether the allegation by Mary Wangui Karanja contained in her Affidavit sworn on 10th August, 2007 to the effect that she had discovered that numbers of immovable properties which are part of the residuary estate, that is:-

(i) Kikuyu Town/163

(ii) Karai/Karai/4

(iii) Kahuho Trading Center Plot No. 43

(iv) LR No. 10799- Muguga Water Limited

is apt; lawful; honest and prudent or is the same calculated to enrich her and her sisters known as Salome Njeri and Lucy Wambui unfairly, unjustifiably and to the exclusion of the other beneficiaries of

the estate of James Karanja Kioi.

2. The Applicants, submit that the Respondents are asking the court to determine the issue of ownership of L.R. No. 11595 an issue which has been addressed in the various rulings as outlined. It is the Applicants submission that the 2nd Respondent raising the same issue in the Land and Environment Court which raises the issue of *res judicata.* It is further their submission that the primary object of the 2nd Respondent is not to have determined the question as to whether the remains of his mother can be buried on LR No. 11595 as initially ordered by Honourable Justice Mutungi of the Environment and Land Court in 9th May, 2013, and that is why he has no problem raising the same issue over and over with total disregard for the law. Further, that the late 1st and 2nd Respondents have enjoyed the orders on confirmation of the grant delivered on 2nd December, 2005, and that they have enjoyed their 300 acre farm, a part of which they have sold. It therefore follows that they have no right to claim that they are entitled to a share of the suit property. It is further submitted that the 2nd Respondent is not a holder of grant to enable him administer the estate of the deceased, that it is only a holder of a Grant who could commence a suit for determination of the issues of ownership of any property of a deceased, and that the 2nd Respondent has not annexed to any of his affidavits any grant appointing him the administrator of his mother's estate. The decision in *Troustik Union International vs. Jane Mbeyu*, CA at Mombasa Civil Appeal No. 145 of 1990, is cited, where the court stated -

"The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does so, the action is incompetent at the date of its inception."

It is argued further, that it has been demonstrated that the court have in this cause held on many occasions that LR.No. 11595 was the property of the deceased alone, it was bequeathed to the Applicants and their sister, Lucy Wambui, and that there is no vagueness in the will of the deceased made on 6th February, 1992.

3. On their part, Respondents have submitted that the words "Muguga Farm" cannot be substituted or construed to mean property known as LR No. 11595 (original number 7842/1 Kiambu) because the said property is located in Sigona Location of Kikuyu Division (and not in Muguga Location of Kabete Division) and has not been described by its size, title number or even by the infrastructure that surrounds or traverses it. Further, that there are other properties that befit the description of "Muguga Farm" better than LR No. 11595 and that the words "Muguga Farm" could apply to any other property. On "Kwa Njoroge" the 2nd Respondent submits the words "Kwa Njoroge" are meaningless because "Kwa Njoroge" does not refer to any location or place known to the Respondent and the same cannot be substituted or construed to mean properties known as Sigona/48, Sigona/180, Sigona/202, Sigona/300 or Sigona/320. in any event, titles to the alleged "Muguga Farm" and "Kwa Njoroge" had been issued to the testator by the time he wrote his will on 6th February, 1992, and it is therefore the 2nd Respondent's argument that if the testator had intended to bequeath the said properties to the Applicants, he would have stated so clearly in his will. On issue no. 2(b), it is the 2nd Respondent's submission that although the Applicants have purported to list out the testator's "rented properties in Nairobi," they have failed to offer any elaboration or explanation as to how they identified the said properties as being the testator's "rented properties in Nairobi." Further, that in order to satisfy the criteria set out by the testator in his will; the Applicants were obliged to clearly identify the names and address of the tenants; the details of the tenancy, such as the term etc. and the date of commencement of the tenancy and the rents thereof. It is the 2nd Respondent argument that in the absence of such details then there was no basis for the Applicants to have assumed that all the testator's properties that are located within the City of Nairobi

were bequeathed to them only to the exclusion of other children and to have proceeded to transfer the same to themselves. On issue no. 2(c) the 2nd Respondent submits that the Applicants have construed his father's Will in such a manner that all the prime assets, including all his father's prime properties in Sigona and Nairobi are shared out by the Applicants and the peripheral assets of the deceased are regarded as "Residuary Estate" of the deceased to be shared out amongst all the deceased's children. It is the 2nd Respondent submission that since his father's properties in Sigona and Nairobi have not been properly identified in his father's Will and the same have not been bequeathed to the Applicants and their sister only, and the same ought to constitute part of the "Residuary Estate" of his father and the same ought to be available for distribution amongst all the children of the deceased. He argues that any other conclusion would have the effect of enriching the Applicants and their sister only to the detriment of the 2nd Respondent, his late mother and the other children, and that such a situation would not have arisen if the testator's Will had been clear, accurate and unequivocal. It is his submission that it is of uttermost importance for the purposes of a Will that bequests made in writing be as specific and accurate as possible especially if the Will is drawn by an Advocate. Further, that in the event that a specific bequest is so vague and uncertain that it cannot be put into effect, such a bequest shall fail unless a Court of law declares otherwise. He submits that previous decisions made by other Judges in this cause are not binding to this Court, and are of persuasive value, and this Honourable Court may depart from them if such a departure is in the interest of fairness and justice.

4. I have carefully considered the applications, the affidavits on record and the submissions. The issues for determination have framed as outlined above.

5. There is no doubt that the testator made a will dated 6th February, 1992. Grant of probate of that will was made to the Applicants in their capacity as administrates. The said grant was confirmed a certificate of Confirmation of Grant was duly issued to the executrices, Mary Wangui Karanja and Salome Njeri, pursuant to Section 71 of the Law of Succession Act. The same was issued on the 2nd December, 2005.

6. On whether the words that appear on Clause 4 of the said Last Will and Testament of James Karanja Kioi dated 6th February, 1992 are vague, the applicants contend that LR. No. 11595 was the property of the deceased and it was bequeathed to the applicants and their sister Lucy Wambui and that there is no vagueness in the Will of the deceased made on the 6th February, 1992. A close look at the said Clause No. 4, one will notice that it talks about "Muguga Farm and "Kwa-Njoroge" together with houses and other buildings erected and being thereon. i form the view that the said Clause is not void for vagueness as is claimed by the 2nd Respondent and that it sufficiently shows the intention of the testator. It is clear from the Certificate of Confirmation of Grant dated 2nd of December, 2005 that L.R. No. 11595 was bequeathed to the Applicants and their sister Luc y Wambui, and the Court at this stage cannot interfere with the Will of the wishes of the testator. It must be noted that the issue has been dealt with adequately before, the Respondents applied for reasonable provision on the basis that the suit property

belonged to the deceased and the said application was heard and a determination dismissing it was made on the 9th of May, 2005.

7. The law upholds the principle of freedom of testation. Thus, a person making a will can theoretically leave his or her assets to whoever he or she pleases. However the right is not absolute and the balance between the freedom itself and its limitations was formulated by Innes ACJ in the South African case of *Robertson vs. Robertson's Executors* (1914) as follows:-

"The golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them; unless it is prevented by some rule of law from doing so"

A Court will thus not lightly interfere with a testator's wishes. A bequest may produce results which are unfair, unreasonable or even ludicrous but this is legally acceptable and cannot be overruled or changed by a Court.

8. However, bequests which contain elements which are illegal or contrary to public policy are unenforceable, as are those which are too vague to be capable of implementation. In these circumstances, a Court may order that a specific bequest be totally disregarded, or alternatively may delete words and phrases that are inappropriate to ensure that the offensive content is removed. Similarly, there are times when the instructions contained in a Will for the Executor may be unclear, ambiguous or clearly a mistake. In such situations, Court's guidance may be sought as to the legal effect of the words and instructions contained in the Will, and in such circumstances the Court has the power to rectify errors in the Will. Patently, such circumstances do not exist in the present case. The facts of this case show that the Respondents had made an application for adequate provision which application was dismissed.

9. The long and short of it is that the 2nd Respondent has not convinced me that I ought to interfere with the free exercise of the Testator's will and intervene. I find that the words as contained in Clause 4 are not vague.

10. I have noted that the Respondents filed an application for revocation of the grant claiming that the expression Muguga Farm in the will was unclear among others. However, the said application was heard and dismissed by Justice Onyancha. i agree with the Applicants' argument that the matter is *res judicata,* as it is obvious even from the records that the matter had been dealt with by a competent Court. For

some strange reason only known to the 2nd Respondent, he states that the findings by other judges are not binding upon the Court, and that they are merely persuasive. In his affidavit dated 12th August, 2013, at paragraph 3 (c) he avers as follows:

“The issues that were identified by this Honourable Court for determination had not been previously adjudicated upon by any of the Judges. Hon. Justice Mutungi, Hon. Justice Kubo, Hon. Justice Koome and Hon. Justice Onyancha JJ did not adjudicate on the issue of the construction of my father’s Will or the identity of specific bequests. None of the said Judges identified the assets of the estate or the specific bequests thereof. The Applicants’ assertion to the contrary is not true. The Applicants are keen at blocking this Honourable Court from hearing and determining the outstanding issues once and for all.”

11. Section 7 of the Civil Procedure Act defines the doctrine of r*es judicata* as applying to a suit or issue in which matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. The said section is mandatory in its prohibition and provides that:

"No court shall try any suit 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."

12. Kuloba J, quoting Law Ag VP in *Kamunye and Others vs. Pioneer General Assurance Society Ltd* [1971] EA 263 at 265, stated the test whether or not a suit is barred by *res judicata* that:

"Is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon" If so, the plea of *res judicata* applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit for *res judicata* to apply."

The conditions for application of doctrine of *res judicata* were authoritatively laid down in *Willie vs. Muchuki and 2 others* (Plaintiff/Applicant's authorities' No. 8) to be three. The court in the case held:

"For the doctrine of *res judicata* to apply, three basic conditions must be satisfied. The party relying on it must show;

a. That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated.

b. The matter in issue in the latter suit must have been directly and substantially in issue in the former suit.

c. That a court competent to try it had heard and finally decided the matter(s) in controversy between the parties."

The court was upholding the ruling of Bosire J (as he then was) in *Caltex Oil (Kenya) Ltd vs. Mohamed Yusaf and Others* Nairobi HCCC No. 1322 of 1993. In *Bulhan and Another vs. Eastern and Southern African Trade and Development Bank* (Plaintiff/Applicant's authorities' No. 9), it was stated by the court that "matter in issue" under section 7 of the Civil Procedure Act does not mean any matter in issue in the suit but has reference to the entire subject in controversy. The court put it succinctly: "The subject matter must be covered by the previously instituted suit and not *vice versa.*" The court in the above case was clear that for *res judicata* to apply, the issues alleged to be similar must have been raised in the earlier suit, heard and finally determined or decided by the court. The Court of Appeal in *Pop-in (Kenya) Ltd & 3 others vs. Habib Bank AG Zurich* quoted the above passage held that:

"The plea of *res judicata* applies not only to points which the court was actually required by the parties to form opinion and pronounce judgment, but every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time."

13. Accordingly, from the aforementioned cases, i find that the issue of ownership of LR. No. 11595 had been previously addressed and a determination made.

14. I find that the application dated 6th May 2013, seeking to restrain the 2nd respondent from disposing the remains of the 1st respondent on LR No. 11595 on the basis that the said LR No. 11595 belonged to the applicants by dint of the certificate of confirmation of grant dated 2nd December 2005, is merited and I hereby allow it with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE

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