



**In re Estate of Charles Peter Angwenyi (Deceased) (Succession Cause E580 of 1991) [2023] KEHC 17937 (KLR) (Family) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17937 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**FAMILY**  
**SUCCESSION CAUSE E580 OF 1991**  
**MA ODERO, J**  
**MAY 5, 2023**  
**IN THE MATTER OF THE ESTATE OF CHARLES PETER ANGWENYI (DECEASED)**  
**BETWEEN**  
**PETER SIRO NYARIKI ..... APPLICANT**  
**AND**  
**SUSAN NJERI ANGWENYI ..... RESPONDENT**

**RULING**

1. Before this Court is the Chamber Summons dated November 7, 2022 by which the Applicant Peter Siro Angwenyi seeks the following orders:-
  1. Spent.
  2. Spent.
  3. That preservative orders do issue restraining the Respondent either by herself, her servants or any other person acting under her authorization or control from intermeddling with the estate by constructing structures of any kind, carrying on business, leasing to third parties, developing, undertaking or continuing to undertake any further developments on the following properties (all together the “suit properties”) namely:-
    - a Land Reference Number 12146/31 (Original Number 12146/5/2) Karen and;
    - b Land Reference Number 12146/32 (Original Number 12146/5/3) I R No 161604;
    - c Land Reference Number 12146/31 (Original Number 12146/5/4) I R No 161605;
    - d Land Reference Number 12146/31 (Original Number 12146/5/5) I R No 161606;



- e Land Reference Number 12146/31 (Original Number 12146/5/6) I R No 161607;
  - f Land Reference Number 12146/31 (Original Number 12146/5/7) I R No 161608;
  - g Land Reference Number 12146/31 (Original Number 12146/5/8) I R No 161609;
  - h Land Reference Number 12146/31 (Original Number 12146/5/9) I R No 161610;
  - i Land Reference Number 12146/31 (Original Number 12146/5/10) I R No 161611;  
and
  - j Land Reference Number 12146/31 (Original Number 12146/5/11) I R No 161612  
until the Letters of Administration are obtained and the Grant confirmed.
4. That this Honourable court be pleased to commit the Respondent to prison for a period not exceeding one year or pay a fine not exceeding Kshs 1,000,000 or both such fine and imprisonment for intermeddling with the property of deceased person namely Charles Peter Angwenyi.
  5. Any other order that may be just and in the interest of preservation of the suit properties.
  6. Costs of the application be borne by the Respondent.”
2. The application which was premised upon Section 45 & 47 of the *Laws of Succession Act* Cap 160. Laws of Kenya and Rule 73 of the Probate and Administration Rules was supported by the Affidavit of even date and the Further Affidavit dated 21<sup>st</sup> December 2022 both sworn by the Applicant.
  3. The Respondent Susan Njeri Angwenyi opposed the application through her Replying Affidavit dated November 28, 2022. The matter was canvassed by way of written submissions. The Applicant filed undated written submissions whilst the Respondent relied upon her written submissions dated January 30, 2023.

## **Background**

4. This Succession Cause relates to the estate of the late Charles Peter Angwenyi who died on January 9, 1991. The Deceased died testate having left a written Will dated May 13, 1982. The Respondent Susan Njeri Angwenyi was appointed as sole Executrix under the said Will. Grant of Probate was issued in the name of the Respondent and Lawrence George Sagini on July 9, 1991. Following the death of one Executor the Grant was amended on December 18, 2002 naming the Respondent as the sole Executrix of the estate.
5. Vide an application dated January 31, 2013 the Respondent sought an order that the property known as LR No 12146/5 (hereinafter the ‘suit property’) as well as the property known as Nairobi/Block 91/219 Gigiri be added to the Will as assets belong to the estate. In the ruling delivered on March 8, 2013 Hon Justice William Musyoka held as follows:-

“It should be stated for the benefit of the applicant that a Will is a document prepared by the deceased. It is the maker of the Will alone who can add or subtract from it. Neither the court nor the family members can add or subtract anything from the will. The court while dealing with a will, is restricted to interpreting its terms, and in doing so it should not add to it or subtract anything from it.”



6. By so saying the Judge held that the Deceased died intestate in so far as the two properties were concerned. The Hon. Judge declined the prayer to have the two properties added to the Will as assets belonging to the estate of the Deceased.
7. Thereafter the Applicant filed an application dated December 22, 2017 seeking injunctive orders in respect of LR No 12146/5 (the suit property herein) and all the subdivisions thereto. Hon Lady Justice Asenath Ongeri delivered a Ruling dated July 26, 2019 directed the Executrix to petition the Court for Grant of letters of Administration Intestate in respect to the said property. The Respondent did file a Petition dated September 2, 2019 but the Grant is yet to be issued. The Applicant then filed this present application seeking preservatory orders in respect of the suit property.
8. The Applicant averred that there is ongoing construction on LR No 12146/31 (Original Number 12146/5/2 despite the fact that no letters of Administration have been issued to any party in respect of the suit property. That the said construction and other business activities on the suit property amounts to intermeddling.
9. The Applicant states both Hon Justice William Musyoka and Hon Lady Justice Asenath Ongeri had in their respective rulings cautioned the Respondent against intermeddling with the suit property. That in defiance of the caution issued by the court the Respondent proceeded to subdivide LR No 12146/5 into ten (10) plots which she had registered in her own name.
10. The Applicant further averred that the Respondent has been reluctant to pursue her Petition for Grant of letters of Administration Intestate to allow her the leeway to continue intermeddling with the estate to the detriment of the other beneficiaries.
11. The Respondent countered that the present application was '*Res Judicata*' as the orders being sought herein are the same as the orders which the Applicant had sought in his application dated December 22, 2017 which application was heard and determined by Hon. Lady Justice Asenath Ongeri vide the Ruling dated July 26, 2019. The Respondent further states that she did file a Petition seeking Grant of letter of Administration Intestate. That she is awaiting gazettelement of the Petition.
12. The Respondent denies intermeddling with the estate of the Deceased. She states that the property in question is her matrimonial home which was merely undergoing renovation. The Respondent equally accused the Applicant of intermeddling with the property known as LR No 6001/3 [Original No 6001/2/1 (I R 16526)] which belongs to the estate. She urges the court to dismiss this application in its entirety.

### **Analysis and Determination**

13. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties. The issues for determination are:-
  - i Whether the present application is Res Judicata.
  - ii Whether preservatory orders ought to be issued

### **Whether the present application is Res Judicata**

14. The doctrine of *res judicata* is set out under Section 7 of the [Civil Procedure Act](#) as follows:-

“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.”

15. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR; the Court of Appeal stated as follows:-

“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 commonsensical 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 for a, 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”. [own emphasis]

16. Therefore party seeking to rely on the doctrine of *res judicata* to bar a suit from being heard must prove each of the following elements:-

- a The suit or issue was directly and substantially in issue in the former suit;
- b The former suit was between the same parties or between the same parties under whom they or any of them claim;
- c The parties were litigating under the same title in the former; and
- d The court that formerly heard and determined the issue was competent to try and the subsequent suit or the suit in which the issue is raised.

17. The Respondent claims that the prayers being sought in the present application are identical to the prayers which were sought in the application dated December 22, 2017 which application was heard and determined by Hon. Lady Justice Asenath Ongeru.

18. I have carefully perused the application dated December 22, 2017 and the prayers sought therein. The prayers sought included inter alia the following:-

- i .....
- ii That pending the hearing and determination of this application *inter-parties*, a temporary order of injunction do issue orders restraining the Respondent, whether by herself or her servants or agents or otherwise howsoever from alienating, transferring, selling or disposing of Land Reference Number 12146/31 (Original Number 12146/5/2) IR No 161603; Land Reference Number 12146/32 (Original Number 12146/5/3) IR No 161604; Land Reference Number 12146/31 (Original Number 12146/5/4) IR No 161605; Land Reference Number 12146/31 (Original Number 12146/5/5) IR No 161606; Land Reference Number 12146/31 (Original Number 12146/5/6) IR No 161607; Land Reference Number 12146/31 (Original Number 12146/5/7) IR No 161608; Land Reference Number 12146/31 (Original Number 12146/5/8) IR No. 161609; Land Reference Number 12146/31 (Original Number 12146/5/9) IR No 161610; Land Reference Number 12146/31 (Original Number 12146/5/10) IR No 161611; and Land Reference Number 12146/31 (Original Number 12146/5/11) IR No 161612;



- iii That the subdivision of Land Reference Number 12146/5 by the Respondent out of which the above mentioned titles were issued, and the issuing of the titles of the subdivision plots in the personal and individual named of the Respondent be nullified.
  - iv That the entries made on Certificate of Title No. IR 39610, Land Reference Number 12146/5 Karen issuing of the titled of the sub division plots in the personal and individual named of the Respondent be nullified.”
19. In the previous application the Applicant sought order ‘to restrain’ the Respondent from ‘alienating transferring, selling or disposing” of the suit property.
  20. In the present application orders are being sought to ‘preserve the suit property from intermeddling’ by constructing on the suit property and/or conducting any form of business thereon or undertaking any developments on the property pending the issuance of Grant of letters of Administration.
  21. I find that there is a distinction between the orders being sought in the two applications. In the application of Decembber 22, 2017 the prayer was for injunctive orders against any alienation of the suit property whilst in the present application the prayer is for orders to preserve and protect the suit property from any interference/ intermeddling. Accordingly I find that the instant application is not Res Judicata.

#### **Whether the Estate ought to be preserved**

22. As stated earlier the High Court had ruled that the suit property forms part of the ‘intestate’ estate of the Deceased. The Executrix was directed to file a Petition for Grant of Letters Administration to authorize her to deal with this ‘intestate’ estate. In compliance the Respondent did file the Petition dated September 2, 2019. The Petition is awaiting gazettelement.
23. The Applicant claims that there has been intermeddling with the suit property by way of construction and business activities thereon. He annexes a set of photographs “PSA 1” to his supporting Affidavit as proof of this allegation.
24. On her part the Respondent has also accused the Applicant of intermeddling with property belonging to the estate of the Deceased
25. In the case of *Japhet Kaimenyi M’ndatho v M’ndatho M’mbwiria* [2012] eKLR the court noted that an Applicant seeking preservatory orders over the estate of a Deceased person had to satisfy the following conditions:-
  - a “That the suit is at risk of being disposed of or alienated or transferred to the detriment of the applicant unless Preservatory orders of inhibition are issued.
  - b That the refusal to grant order of inhibition would render the Applicant’s suit nugatory.
  - c That the applicant has arguable case.”
26. From the Affidavit evidence and from the annexed photographs the court is not able to make a determination that it is the Respondent who has been intermeddling with the suit property. In order to reach such a conclusion the court would have to hear the parties substantively on the issue of intermeddling.
27. That being said it is pertinent to note that at the present time no person is authorized to deal in any manner whatsoever with the suit property as no Grant has been issued to any party in respect of the



said property. The court has a duty to ensure that the estate of a Deceased person is protected from any form of intermeddling and/or interference from any quarter.

28. Section 47 of the *Law of Succession Act* vests court with wide discretion in granting protective powers of purposes of safeguarding the estate of a deceased person. It provides:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

29. Likewise, Rule 73 of the *Probate and Administration Rules* provides that:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

30. The parties herein have pointed fingers at each other over intermeddling with the estate. No party has authority to deal with the suit property. In the interests of justice I hereby grant preservatory orders in terms of prayer (3) of the application.

### **Conclusion**

31. Finally and inconclusion this court makes the following orders:-

- 1 Preservatory Orders be and are hereby issued restraining the Applicant and the Respondent or any other person whatsoever from intermeddling with the estate by constructing structures of any kind, carrying on business, leasing to third parties, developing undertaking or continuing to undertake any further developments on the following properties (all together the “suit properties”) namely:-
  - a Land Reference Number 12146/31 (Original Number 12146/5/2) Karen and;
  - b Land Reference Number 12146/32 (Original Number 12146/5/3) I R No 161604;
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  - h Land Reference Number 12146/31 (Original Number 12146/5/9) I R No 161610;
  - i Land Reference Number 12146/31 (Original Number 12146/5/10) I R No 161611;  
and
  - j Land Reference Number 12146/31 (Original Number 12146/5/11) I R No 161612  
until the Letters of Administration are obtained and the Grant confirmed.
- 2 Prayer (4) of the summons is dismissed.
- 3 This being a family matter each side will bear their own costs.

**DATED IN NAIROBI THIS 5<sup>TH</sup> DAY OF MAY, 2023.**



.....  
**MAUREEN A. ODERO**  
**JUDGE**

