

TANZANIA / JUDGMENT

PAUL KYAUKA NJAU AND FEBRONIA PAUL KYAUKA AND ANOTHER

COURT
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THE JUDICIARY OF TANZANIA
IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI SUB REGISTRY
AT MOSHI
PROBATE AND ADMINISTRATION CAUSE NO. 05 OF 2002
IN THE MATTER OF THE ESTATE OF THE LATE PAUL KYAUKA
NJAU DECEASED
AND
IN THE MATTER OF APPLICATION FOR LETTERS OF
ADMINISTRATION BY: 1. FEBRONIA PAUL KYAUKA
2. EMMANUEL PAUL KYAUKA PETITIONERS

RULING

10/02/2025 & 14/03/2025 SIMFUKWE, J. 1 This is the ruling in respect of the objections/complaints raised against the inventory and accounts of the estate of the late Paul Kyauka Njau. The said objections were raised by the beneficiaries: Monica Paul Kyauka Njau, Roselyne Paul Kyauka Njau, Richard Paul Kyauka, Oswald Paul Kyauka and Catherine Paul Kyauka. The following issues/complaints were raised by Monica and Roselyne Paul Kyauka Njau:

1. Whether the surviving Administrator, one Emmanuel Paul Kyauka is still interested in the administration and has instructed advocate Daniel Ngudungi to act on his behalf.
2. Whether the first wife of the late Paul Kyauka Njau, one Cresencia Paul Kyauka (who died after the deceased) is entitled to allocation of any estate of Paul Kyauka Njau.
3. Whether the second wife of the late Paul Kyauka Njau, one Christina Marealle (who died after the deceased) is entitled to allocation of any estate of Paul Kyauka Njau.

4. Whether the reflected estate in the accounts is in existence for the same to be handled (and transferred) to the beneficiaries.
5. Whether there are pending properties forming part of the estate of the late Paul Kyauka Njau not reflected in the accounts. 2
6. Whether the Administrator had powers to allocate part of an estate of the deceased to a person who is not a known legal beneficiary.
7. Whether the administrator (the late Febronia Paul Kyauka) had powers to give an estate of the deceased (Pauli Kyauka Njau) as a gift to a beneficiary (or any other person). The beneficiary Richard (Mark) Paul Kyauka Njau complained inter alia:
 1. That, up to date the Administrator has not handed over part of his share from the distribution of the estate of his father Paul Kyauka Njau (deceased) as well as the justification of the distribution.
 2. That, the administrators conveniently did not include the following properties and assets in their statements of account produced before the court for distribution to the beneficiaries: HOUSE/FARM I) House at Rombo Mrao (Obadia staying) II) House at Rombo Mrao (mbege bar) III) House at Rombo (Useri) IV) Msandaka Mnono Farm 13 acres MACHINERY AND EQUIPMENTS I) Lathe machine (Germany Made) II) Lathe Machine (Czechoslovakia) 3 III) Crusher Machine Heavy Duty (England made) IV) Wood Chipper Machine (England made) V) Wood scraping machine (England made) VI) Welding Machine (England made) VII) Heavy Duty Welding Machine (England made) VIII) Compressor Machine (England made) IX) Drilling Machine (3) X) Heavy Duty Electrical Generator (England made) AUTOMOBILES I) Landrover (109) Station Wagon Series II II) Landrover (109) Series III Station Wagon III) Massey Ferguson 165 Tractor IV) Ford Major Tractor V) John Deere Tractor VI) Volkswagen Beetle VII) Austin Lorry 5ton VIII) Austin Lorry 5ton BANK ACCOUNTS It was further complained that the Probate Statement of Accounts does not show any of Bank Accounts statements and its distribution 4 e.g. NBC bank, Stanbic Bank - Nairobi Kenya etc which the deceased maintained.
 3. That, the distribution among the three wives of the late Paul Kyauka Njau was not justified.
 4. That, there is no existing Saw Mill on Plot No. KAR.28/36 Karanga Moshi Municipality.
 5. That, the transfer and disposition of Plot No. 1"N" III Ghala Street by Joseph Paul Kyauka was illegal. The complaints of Monica and Roselyne Paul Kyauka were argued by advocate Patrick Paul, Mr. Matuba Nyirembe learned counsel argued the complaints of Oswald, Richard and Catherine. Advocate Daniel Ngudungi replied all the complaints for the Administrator Emmanuel Paul Kyauka. Advocate Patrick Paul submitted that, in the filed inventory there are some properties which are missing while they are part of the estate of the deceased. He stated that there are pieces of land and houses located at Rombo: one house at Mengwe, the second house is at Useri and the third house is at Mrao at Rombo. Another house was said to be at Mazinde Juu – Tanga. Another missing property was said to

be a farm of thirteen acres at Mandaka – Mnono within Moshi district. Other properties were said to be different machines which were not listed to form part of the estate of the deceased. Mr. Matuba Nyirembe, learned counsel for Oswald, Richard and Catherine supported the submission of Mr. Patrick Paul, learned counsel. In addition, he stated that bank accounts, motor vehicles, tractors and crushers have not been listed in the inventory. Moreover, Plot No. 16 Block M Section IV Moshi Municipality was said to have been sold. At the same time the said property has been divided to Oswald. Advocate Daniel Ngudungi for the Petitioner (Administrator) replied among other things that the house at Mengwe is not the property of the deceased. That, the said house was the property of another person in which the deceased was conducting his business. Regarding the house at Useri, Mr. Ngudungi alleged that it was bequeathed to other people by the deceased himself. Likewise, the house at Mrao was said not to be the property of the deceased. Mr. Ngudungi submitted further that the house at Mazinde Juu was decided before this court before Hon. Mwingwa, J in 2016. The same was ordered to be divided within 30 days. The inventory and account of the said house were filed on 08/04/2016 as directed by the court. 6 The farm at Mandaka was alleged to have been divided to three beneficiaries: Chediel, Emmanuel the Administrator and Peter Kyauka. That, Peter and Chediel sold their portions, leaving Emmanuel's portion only. Concerning machines, motor vehicles and all movable equipment, Mr. Ngudungi replied that Daniel Kyauka the son of the deceased did vandalism by invading the workshops and machines. The list of the said machines and other lost properties were attached to the inventory as annexure FEM 6 collectively. The learned counsel explained that it was true that the said properties existed. However, the properties vanished after the demise of the deceased as the same were stolen by the children of the deceased. In respect of Plot No. 16 Block M Section IV Moshi Municipality, it was replied that the administrator had informed the beneficiaries that the said house was sold on 16th January 2006. That, the house was sold for the sake of paying debts of the deceased and costs of administering the estates of the deceased. Mr. Ngudungi conceded that the said house was not listed in the accounts of estate which was filed on 27/06/2006. However, he contended that the house was not divided to anyone. 7 Moreover, Mr. Ngudungi implored this court to take note that the complaints have been brought after twenty-two years while some of the beneficiaries are no more and some of the properties have been transferred. He averred that before Hon. Mwingwa, J the complaint was that there were some properties of the deceased which were not listed. Upon investigation by the court, only one property was found to have been forgotten. That is the house at Mazinde Juu. One of the issues which were raised by the court was whether the administrator had listed all the properties of the deceased. The second issue was whether there was any property of Paul Kyauka Njau which was left undistributed. With that on record, the learned counsel was of the view that litigation should come to an end. He noted that in this case we have all the decisions of this court and the Court of Appeal. Therefore, the issues cannot be re-instituted as the same were decided by this court to their finality. It was stressed that the complaints were res judicata as the decision of this court has not been set aside to date. Concerning the Bank accounts, Mr. Ngudungi said that there was a Bank account at Nairobi of which Vicent forged the signature of the deceased and drew all the

money. His siblings arraigned him before Kisutu RM's 8 court. They were advised by elders to forgive each other. Thereafter, the case at Kisutu was withdrawn. In his rejoinder on the issue of res-judicata Mr. Patrick was of the view that the same was misplaced because the objections which they were addressing were in respect of the inventory which was filed on 05/02/2025. Concerning the averment that the only property which was not listed was the house at Mazinde; Mr. Patrick submitted that the same cannot be discussed as we do not have the former inventory. He submitted further that, the properties at Rombo were listed by the administrator in his letter to the DCI. Thus, it is not correct stating that the properties at Rombo do not form part of the estate of the deceased. That, in the minutes, all the properties were listed. After the preservation order that's when the administrator complained that there were beneficiaries who had broken into the workshops. No settlement had been filed. It was contended that, the annexures of the inventory do not show that the said properties were divided to various people. On the issue of the house at Plot No. 16 Block M; Mr. Patrick stated that in order to deal with it, the administrator was supposed to list it in the 9 inventory. Therefore, it will be false information that the house was sold that's why it's not listed in the inventory and accounts. If the same was sold in order to pay debts of the deceased, it must be reflected in the accounts. The learned counsel continued to submit that the filed inventory is not correct. That, it should have shown all the properties including the house at Mazinde. They could have obtained the reports of the properties while discussing accounts. Mr. Patrick formed an opinion that what was done by the administrator, was that he had forced the filed inventory to be like the accounts which is inappropriate. Regarding the allegation that some of the beneficiaries have passed away and that some of the properties have been transferred; Mr. Patrick stated that their aim was to know the actual list of the estate of the deceased, which one have been vandalized, which one have exchanged hands and beneficiaries should understand how the estate of the deceased was distributed and the real situation at the moment. In response to the saying of Mr. Ngudungi that litigation should come to an end, it was responded that the truth shall set the administration free. It's after that truth that each of the beneficiaries shall have a just share 10 and move forward peacefully. That's when the matter shall be finalized to the finality. Mr. Matuba supported the rejoinder of Mr. Patrick that some of the properties of the deceased have not been listed, including the bank accounts. That, no official reports had been filed showing that there were some properties which were stolen. On the issue of res judicata, Mr. Matuba submitted that for this matter to be res judicata this probate should have been closed. He said, Mr. Ngudungi has admitted that an inventory was never filed. It was insisted that the inventory should be properly drawn so that there might be proper account of distribution. Having considered the filed complaints and submissions of both parties, it is worth to note that this matter was re-assigned to me while the original case file was mysteriously missing. When both parties and their counsels appeared before the court for the first time, I had to order them to file in court all requisite documents under their possession for re-constructing a duplicate case file. The exercise took almost six months. Despite all the odds, at last we made it except that the inventory was to be refiled afresh as its copy could not be traced. It is for that reason that before determining the merits of the

complaints of the beneficiaries of the estate, 11 I would like to appreciate the effort which was done by both parties and their counsels to ensure that a duplicate case file was composed. Without such support, it is obvious that it could be difficult to determine the raised complaints on merit. That said, according to the raised complaints and submissions of the learned counsels of both parties, issues for determination are:

1. Whether the raised complaints are *res judicata*.
2. If the first issue is answered in the negative, whether the raised complaints have merit. On the issue whether the raised complaints are *res judicata*, section 9 of the Civil Procedure Code, Cap 33 R.E 2022 provides that: “9. 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.” Emphasis mine 12 In my determination of the issue whether the raised complaints are *res judicata*, I am deeply moved by introductory remarks of my Lordships in the case of *Zuberi Paul Msangi v. Mary Machui*, Civil Appeal No. 316 of 2019 [2022] TZCA (27 October 2022) at pages 1-2 where the following was stated: “One of the pillars of the modern law of civil procedure as derived from Roman Jurisprudence and which has been accepted throughout the Common Law Jurisdictions with the utmost respectability, is the doctrine of *res judicata*. According to Shivan Goelin in his article entitled “Rome has spoken, the cause has ended. Rome Spoke Through her Laws” (<https://ssrn.com/abstract=3307814>) from which we can obtain a pertinent illustration, simply stated, the doctrine means that: “If a person though defeated at law sues again, he should be answered “you were defeated formerly.” Today, it is generally understood among the legal fraternity, that the doctrine of *res judicata* is based upon two other maxims of Roman law. One, that, *interest reipublicae ut sit finis litum*, that is, it concerns the State that there should be an end to law suits, and two, that, *nemo debet bis vexari pro una et aedem* 13 *causa*, that is, no man should be vexed twice over for the same cause. Otherwise, no one can gainsay that, when the doctrine is applicable, if it is not given full effect, an abuse of the court process takes place. We have no doubt whatsoever that, the doctrine of *res judicata* as provided under section 9 of the Civil Procedure Code, Chapter 33 of the Laws, makes today both good sense and good law;” Emphasis added At page 7 and 8 of the same decision, the Court identified conditions precedent for the doctrine of *res judicata* to apply, which I have paraphrased. That:
 - (i) The matter directly and substantially in issue in the former suit, must be directly and substantially in issue in the subsequent suit; (ii) The former suit must have been between the same parties or privies claiming under them; (iii) The parties in the subsequent suit must litigate under the same title like in the former suit; (iv) The Court which decided the former suit was competent to try the said suit; and 14

- (v) The matter in issue in the subsequent suit must have been heard and finally decided in the former suit. In another case of Diocles Kamuhabwa vs Theonest Kamuhabwa (Civil Appeal No. 436 of 2022) [2024] TZCA 221 (22 March 2024) at page 17, the Court insisted that: “It is noteworthy that the objective of the doctrine hinges on the public policy that litigation has to come to an end so that the parties can continue with their normal developmental activities. It therefore bars multiplicity of suits and ensures finality of litigation, and in a way also protecting an individual from multiplicity of litigations. See: Umoja Garage vs NBC Holding Corporation [2003] T.L.R. 339.” In the instant scenario, after being alerted in the reply submission of Mr. Ngudungi, that the grievances of the beneficiaries were *res judicata*, I had to peruse the record carefully. I came across the ruling of my learned brother Hon. Mwingwa, J (retired) dated 09/03/2016, in Probate and Administration Application No. 34 of 2010 which was consolidated with Application No. 14 of 2014, arising from Probate and Administration Cause No. 5 of 2002. The applicants in the two applications were Catherine Paul Kyauka Njau and Joseph Paul Kyauka Njau who are among the 15 beneficiaries of the estate of the late Paul Kyauka Njau. Before commencement of the hearing of the applications, the following were among the raised issues:
1. Whether the Estate of the late Paul Kyauka Njau was properly distributed to the beneficiaries.
 2. Whether there is any property of the late Paul Kyauka Njau which was left undistributed. According to the adduced evidence and determination of all the raised issues, all the properties which are at issue in the grievances raised before me were at issue before Hon. Mwingwa, J. All the properties at Rombo, Moshi Town and Tanga were discussed and determined. Evidence of defence witnesses in the said ruling was to the effect that all beneficiaries were given their shares from the estate of their deceased father. At page 20 of the ruling, Hon. Mwingwa, J (retired) referred to the evidence of one Hyacinta Paul Kyauka (DW6) who opposed the caveat raised by the applicants. The said witness was quoted to have mentioned Joseph, Catherine, Rosaline, Monica, Oswald and Richard (the complainants herein) to have invaded the house of Cresencia (first wife of the deceased). After thorough consideration of evidence which was adduced before the Court, Hon. Mwingwa, J found that the applications had no merit and dismissed them with costs. Further, the administrator was ordered to facilitate the distribution of the left house located at Mombo to complete his task within 30 days. As correctly stated by Mr. Ngudungi, the order was complied with by the administrator by filing the inventory and accounts on 08/04/2016. Then, the applicants being aggrieved with the decision of Hon. Mwingwa, J, were time barred to appeal against the said decision. Thus, they filed Miscellaneous Civil Application No. 26 of 2016 before this court seeking extension of time. Their application was dismissed with costs. Thereafter, the applicants filed Civil Application No. 7/05/2016 before the Court of Appeal seeking extension of time to file application for leave to appeal as a second bite. The Court of Appeal dismissed the application for lack of merit. Still dissatisfied, the applicants filed Civil Reference No. 5 of 2020 which was determined by Hon. Lila, J.A, Levira, J.A and Mashaka, J.A. The Court did not see any justifiable ground to interfere with the decision of the Single Justice and

dismissed the application with costs. After the decision of the Court of Appeal, the complainants herein Catherine Paul Kyauka, Monica Paul Kyauka and Rose Paul Kyauka filed several applications before this court. Alternatively, together with other 17 beneficiaries, they lodged their complaints in the original Probate Cause, which are the subject of this ruling. With all due respect, the complainants herein are in total abuse of court process as all the raised issues/complaints are res judicata to the issues which were raised and determined before Hon. Mwingwa, J, in the consolidated applications (supra). The issues were determined to finality. The complaints in issue in the former applications are directly and substantially in issue in the instant grievances. The applicants in the former applications and the complainants in this ruling are beneficiaries of the same estate of the late Paul Kyauka Njau. In his rejoinder on the issue of res judicata, Mr. Matuba submitted inter alia that for this matter to be res judicata this probate should have been closed. Respectfully to the learned counsel, the test of the matter or issue to be res judicata is whether the same was decided on merit formerly to its finality. I subscribe to the case of Future Century Ltd vs Inspector General of Police and 3 Others (Civil Appeal No. 43 of 2022) [2025] TZCA 40 (21 February 2025), at page 15 last paragraph where it was held that: "In order for the matter to be said to have been heard and finally decided, the decision must have been determined on merits. The doctrine of res judicata is inapplicable where there was no decision 18 on merits in the former suit. See- Charles Thys v. Hermanus P. Steyn (Civil Appeal No. 45 of 2007) [2016] TZCA 760 (1 March 2016; TanzLII) and Sarkar Code of Civil Procedure, 9th Ed. 2000 by Sudipto Sarkar and V.R. Manohar, at page 79." On the same issue, Mr. Patrick Paul alluded that the issue of res judicata was misplaced as their objections were in respect of the inventory which was filed on 05/02/2025. That, the same were never raised. With respect, the learned counsel is crystal clearly misleading the court. I wish to remind him that their complaints were filed on 21st October 2024 and 22nd October 2024, respectively. The inventory which was filed on 05/02/2025, was filed vide the order of this court dated 30/01/2025, to replace the missing inventory which was filed on 30/06/2006. Concerning the assertion that the house at Mazinde was not listed in the inventory dated 05/02/2025, it is on record that the same was the subject of the order of the court in the ruling dated 09/03/2016. I am grateful that the inventory and account in respect of the house at Mazinde are the first documents in the duplicate case file. Guided with the decisions in the cited cases of Zuberi Paul Msangi (supra) and Diocles Kamuhabwa (supra) as well as the conditions set under section 9 of the CPC, it's my finding that certainly, this court is 19 functus officio as the raised complaints are res judicata. In the event, complaints dismissed forthwith. To avoid multiplicity of suits, no order as to costs. It is so ordered. Dated and delivered at Moshi this 14th day of March 2025. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE 14/03/2025 20

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