



REPUBLIC OF KENYA



**In re Estate of Karomo Karanja (Deceased) (Succession Cause 1843 of 2002)
[2023] KEHC 17413 (KLR) (Family) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1843 OF 2002
MA ODERO, J
APRIL 28, 2023**

BETWEEN

BEATRICE WAMBUI KAROMO APPLICANT

AND

JENNIFER WAIThERA KAROMO RESPONDENT

RULING

1. Before this court is the notice of motion dated May 18, 2022 by which the applicant Beatrice Wambui Karomo seeks the following orders:-
 - “ 1. That this honourable court be pleased to review, revise and/or set aside its Judgment and or orders issued on the 7th December, 2015 and accommodate the applicant’s new evidence.
 2. That this Honourable court be further pleased to make such other interlocutory orders as may appear to the Honourable court to be just and convenient for the expeditious disposal of the matter.
 3. That the costs of this application be provided for.”
2. The application which was premised upon order 45 and order 51 rule 1, 3 & 4 of the *Civil Procedure Rules* 2010, section 93 of the *Law of Succession Act* ca160 Laws of Kenya, rule 63 of the *Probate and Administration Rules*, articles 40 of *the Constitution* of Kenya 2010 and all other enabling provisions of Law was supported by the affidavit of even date sworn by the applicant.
3. The respondent Jennifer Waithera Karomo opposed the application through her replying affidavit dated March 11, 2022. The application was canvassed by way of written submissions. The respondent



filed the written submissions dated December 5, 2022. The applicant despite being given an opportunity to do so did not file any written submissions.

Background

4. This Succession Cause relates to the estate of the late Karomo Karanja who died intestate on October 27, 2001. The applicant Beatrice Wambui Karomo is a widow to the Deceased whilst the respondent Jennifer Waithera Karomo is a daughter of the Deceased.
5. Following the demise of the Deceased Grant of letters Administration Intestate were on September 10, 2002 made to the widow Beatrice Wambui Karomo.
6. Following a mediation process between the parties a consent was reached which consent orders regarding distribution of the estate were adopted by the High Court on September 14, 2016. Thereafter a confirmed Grant was issued to the applicant on July 20, 2022.
7. The applicant has now filed the present application seeking to have the court orders of September 17, 2015 set aside in order to accommodate new evidence from the applicant.
8. The applicant avers that the mediation process was marred with immense hostility and/or acrimony between the beneficiaries of the estate and that in the midst of the chaos salient details/ facts were omitted from the deliberation and were not encompassed in the orders of September 14, 2016.
9. The applicant further avers that she has since discovered new important and compelling evidence to wit that part of the estate had already been sold to 3rd parties by different beneficiaries. That the said third parties were not involved in the mediation process leading up to the consent and were not heard by the court. Thus the estate is entirely different from what is as reflected in the orders of September 14, 2016.
10. The applicant states that this information was not in her possession at the time of deliberations leading up to the consent and has only recently come to her knowledge. She urges that the confirmed Grant ought to reflect this new information in order to ensure that each beneficiary gets their rightful share of the estate.
11. She is apprehensive that if this is not done then the estate may be embroiled in unending litigations as a result of the said sale. The applicant states that the current application has been made without unreasonable delay.
12. As stated earlier the application for review and/or setting aside the consent adopted by the court on September 14, 2016 was opposed. The respondent urged that the present application is '*Res Judicata*' as the issues raised therein were raised in an application dated July 27, 2021 which was determined vide a Ruling delivered on March 11, 2022 by Hon Lady Justice Thande.
13. The respondent denies that the mediation process was marred with acrimony as alleged by the applicant and insists that mediation proceeded peacefully. That all the beneficiaries were aware that some properties had been sold to third parties before mediation commenced. That therefore there is no new and/or compelling evidence as claimed by the applicant.

Analysis and Determination

14. I have carefully considered the application before this court, the reply filed thereto as well as the written submission on record. The only issue for determination is whether the present application is *Res Judicata* as alleged by the respondent.



15. The doctrine of *Res Judicata* is set out in section 7 of the [Civil Procedure Act](#) which provides:-
- “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.”
16. Therefore in order to satisfy the principle of *Res Judicata* it must be shown that:-
- i) There is a former suit or proceeding in which the same parties in the subsequent suit had litigated.
 - ii) The issue in dispute was directly or substantially in issue in the former suit.
 - iii) That a court with competent jurisdiction had heard the matter and finally determined it.
17. In the case of [Attorney General & another v ET](#) [2012] eKLR the court held as follows:
- “The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second it is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction.
18. Likewise in the case of *Omondi v NBK & others* [2001] EA 177 the court quoted Hon. Justice Kuloba (as he then was) who stated as follows:- in *Njankju v Wambugu & another* HCCC No 2340 of 1991 (in reported)
- “If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of Res Judicata...”
19. The applicant seeks a review of the consent orders adopted by the court on 14th September 2016 following mediation between the parties. It is trite law that a consent once adopted by the court becomes binding and enforceable in the same way as a contract entered into between the parties. Therefore a consent judgement may only be set aside on the same ground upon which a contract may be vitiated e.g. fraud misrepresentation, coercion or mistake.
20. In the case of [Kenya Commercial Bank Limited v Specialized engineering Co. Ltd](#) [1982] eKLR the court held that:-
- “A consent order entered into by counsel [or the parties] is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or in misapprehension or ignorance of suit facts in general for a reason which would enable the court to set aside an agreement.”
21. In this application the applicant is seeking to have the consent order ‘reviewed’ on grounds that new and compelling evidence has come to light. A consent cannot be reviewed on such grounds. The best the parties can do is to file an Amended consent if all are agreed that the alleged new information has bearing on the consent which was entered into.



22. In the supporting Affidavit dated May 18, 2022 it is evident that the ‘new evidence’ being referred to by the applicant concerns the parcel of land known as Title LR No. 10090/55 which she claims was sold vide an Agreement for sale dated November 5, 2012 (Annexure “BWK – 2’)
23. The respondent counter that the respondent herein had filed a summons dated May 25, 2021 seeking injunctive orders against the applicants in respect of the parcel of land known as Title LR No. 10090/55 and the subdivision there from.
24. That application was heard inter parties and vide a Ruling delivered on March 11, 2022 Hon. Lady Justice Thande made the following orders:-
- “i) The titles in respect of L.R. Nos. 10090/518, 10090/519, 10090/520, 10090/521, 10090/522 and 10090/51/1 and the deed plans in respect thereof are hereby revoked.
 - ii) Status quo ante be and is hereby restored and L.R No.10090/55 do revert to the deceased Karomo Karanja.
 - iii) The suit property shall be resurveyed and subdivided by a Government Surveyor in line with what is set out in the certificate of confirmation of grant dated 14/9/16.
 - iv) Thereafter, the Administration shall immediately take steps to transfer to each beneficiary, their respective entitlement.
 - v) “This being a family matter, there shall be no order as to costs.” [own emphasis]
25. It is manifest that the issue which was addressed by the High Court in its ruling of March 11, 2022 being the sale of LR No. 10090/55 to third parties is the very same issue being raised by the applicant in the present application a basis for seeking a review of the consent order made by the court on September 14, 2016.
26. In this ruling of March 11, 2022 the court stated found that the applicant Beatrice Wambui Karomo had gone on a frolic of her own in sub-dividing the suit property. At paragraph 20 of the ruling the Honourable Judge states:-
- “Having found as I have, that the subdivision of the suit property is a nullity having been done in contravention of a court order, it follows that the title in respect of L.R. Nos. 10090/578, 10090/519, 10090/520, 10090/521, 10090/522 and 10090/51/1 are a nullity and incurably so...”
27. The court proceeded to revoke the said Titles and directed that title number LR 10090/55 revert back to the name of the Deceased Karomo Karanja.
28. It is clear therefore that the issue being raised in the present application was already heard and determined vide the court ruling of March 11, 2022. The matter is clearly *Res Judicata*. This court cannot deal with an issue which has already been determined by a court of concurrent jurisdiction. If the applicants are dissatisfied with the ruling of March 11, 2022 their only remedy lies in filing an appeal.
29. In conclusion I find no merit in the notice of motion dated May 18, 2022. The same is dismissed in its entirety. Costs will be met by the applicant.



DATED IN NAIROBI THIS 28TH DAY OF APRIL, 2023.

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MAUREEN A. ODERO

JUDGE

