



**Kiando & another v Njoroge & 6 others (Succession Cause
38 of 2020) [2023] KEHC 20949 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 38 OF 2020**

**A MSHILA, J
JULY 28, 2023**

BETWEEN

WANJIRU KIANDO 1ST APPLICANT

MARY WAITHERA MBURU 2ND APPLICANT

AND

PATRICK MBUGUA NJOROGE OBJECTOR

AND

SAMUEL CHEGE GACHIE 1ST RESPONDENT

PETER KINYANJUI MBURU 2ND RESPONDENT

RIGISA WAHINYA 3RD RESPONDENT

MBURU MUNGAI 4TH RESPONDENT

FRANCIS WAWERU NJOROGE 5TH RESPONDENT

JOHN MACHARIA NGUGI 6TH RESPONDENT

RULING

Background

1. Before court is the Notice of Preliminary Objection filed on October 22, 2021 by Patrick Mbugua Njoroge the Objector herein objecting to the Petition filed herewith and dated September 16, 2020.
2. The Preliminary Objection is based on the following grounds:-



- a. THAT the instant Petition is res judicata as a similar Petition relating to the estate of Kiando Kiongo (deceased) was filed and concluded 20 years ago at the Chief Magistrate's court at Limuru in Succession Cause No 40 of 2001.
 - b. THAT all the estate named hereto are not available for distribution as the same were subject in the cause before the Honorable Chief Magistrate Court at Limuru.
 - c. THAT the Petition hereto is void ab initio.
 - d. THAT the Petition hereto is bad in law, frivolous, vexatious and an abuse of court process and should be struck off with costs.
3. The application is supported by the Supplementary Affidavit of PATRICK MBUGUA NJOROGE sworn on January 19, 2022 where he deponed that the Petitioners were involved in an appeal Succession Cause No 1698 of 2008 at Milimani High Court where the Certificate of Grant issued in Limuru Succession Cause No 40 of 2001 was the subject of the Appeal. That Wanjiru Kiando and Ndati Kiando both deceased withdrew their participation in the Appeal and subsequently Mary Waitera failed to prosecute the said appeal hence it was dismissed. That the 2nd Petitioner herein has always been aware of the succession cause in Limuru as she participated in its appeal.
 4. The parties canvassed the Preliminary Objection by way of written submissions; hereunder is a summary of the parties respective submissions;

Written Submissions

5. The Objector in his written submissions dated March 22, 2023 submitted that a Certificate of Confirmation of Grant was issued in Limuru Succession Cause No 40 of 2001 in respect of the estate of the deceased and the said estate was distributed. That Mburu Kiando filed for Revocation of Grant in Milimani Succession Cause No 1698 of 2008 which case was later dismissed for want of prosecution. It was submitted that despite the Petitioner being aware that the deceased's estate herein had been dealt with by the Limuru court she petitioned the instant court for Letters of Administration. The court was urged to disallow the Petitioners from redistributing the deceased's estate a second time. Reliance was placed on among other cases the case of *Siri Ram Kaura Vs MJE Morgan, Ca 71/1960 (1961) EA 462*.
6. This court was urged to uphold the Preliminary Objection and struck off the Petition with costs to the Objector.
7. The Petitioners submitted that the Objector's grounds cannot form the basis of a Preliminary Objection as such the court was urged to dismiss the same. Reliance was placed on the case of [*Kenya Commercial Bank Limited Vs Benjob Amalgamated Limited \(2017\) eKLR*](#). It was submitted that the issues raised in the current case were not directly or substantially in issue in HCSC No 1698 of 2008. It was also submitted that the two suits involve different parties as well as properties. The case in Milimani was never heard and/or determined as such the court herein was urged to dismiss the Objector's Preliminary Objection.
8. The Applicants submitted that the Preliminary Objection has not met the threshold to be met for a matter to be deemed res judicata. The current suit was said to be between beneficiaries who were not included in Limuru Succession Cause No 40 of 2001. It was also submitted that not all properties belonging to the deceased were included in the Succession Cause No 40 of 2001 Limuru as such the instant suit is not res judicata. The instant suit was also said not to be an abuse of the court process as the current issues have never been addressed, that there is no ongoing suit concerning the same parties



as well as the prayers sought herein. Lastly, it was submitted that the deceased's estate had not been fully administered as some beneficiaries and properties had been omitted in the previous succession.

Issues For Determination

9. Having considered the Preliminary Objection and the submissions by the parties herein the main issue for determination is whether the Petition herein is res judicata and whether the Preliminary Objection be upheld;

Analysis

Whether the Petition herein is res judicata and whether the Preliminary Objection be upheld.

10. The applicable law on Res Judicata is found at Section 7 of the [Civil Procedure Act](#); The doctrine of res judicata is set out in at Section 7 reads 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 can 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.'

11. The [Civil Procedure Act](#) also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:-

' Explanation.

1. The expression 'former suit' means a suit which has been decided before the suit in question whether or not it was instituted before it.
2. For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
3. The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.'

12. In [Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others \[2017\] eKLR](#), the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:-

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



13. In the case of *Attorney General & Another VS ET (2012) eKLR* it was held that:-

' 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 suit 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. In the case of *Omondi -v- Nbk & Others (2001) EA 177* the court held that 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju Vs Wambugu And Another Nairobi Hcc No 2340 OF 1991* (unreported) where he stated: 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...'

14. In the matter herein, Njoroge Kiando And Mburu Kiando petitioned for a grant of letters of administration in Limuru Succession Cause No 40 of 2001 in estate of Kiando Kiongo (deceased) and the same was issued to them on September 11, 2001. Thereafter, they made an application for confirmation of the said grant and the same was confirmed as prayed on June 4, 2002.

15. Subsequently, on July 21, 2008, Ndati Kiando, Mburu Kiando And Wanjiru Kiando filed their summons for revocation of the grant in Nairobi Succession Cause No 1698 of 2008. The grant sought to be revoked had been issued to Njoroge Kiando And Mburu Kiando on September 11, 2001 in Limuru Succession Cause No 40 of 2001 on the grounds that the said grant was defective in substance for failing to include some beneficiaries.

16. From the perusal of the record, it shows that the summons for revocation were scheduled for hearing on January 15, 2014. However, the same came up for notice of closure on June 4, 2018 when the suit was dismissed for want of prosecution.

17. Thereafter, on August 11, 2020, Wanjiru Kiando And Mary Waithera Mburu petitioned the court in Kiambu Succession Cause No 38 of 2020 for grant of Letters of Administration intestate for the estate of Kiando Kiongo (deceased). The same was ongoing in Kiambu High Court when the Preliminary Objection herein was filed that the petition herein is res judicata having being filed in the Limuru court.

18. It is clear from the record that a Petition for grant of administration was filed in Limuru Succession Cause No 40 of 2001 for the estate of the deceased herein and the grant therein was heard and determined. Thereafter, summons for revocation of the said grant were filed in Nairobi and the same were dismissed for want of prosecution.

19. What this court needs to determine is whether Petition in the Limuru Succession Cause and the dismissal for want of prosecution for the Succession Cause in Nairobi makes the matter herein to be said to be res judicata.

20. Refer to the case of *Njue Ngai -v- Ephantus Njiru & Another (2016) eKLR* where the Court of Appeal held that:-

' Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for



failure by the plaintiff to attend court in the case of Peter Ngome Vs Plantex Company Limited [1983] eKLR stating:-

'Rule 4(1) does not say judgment shall be entered for the defendant or against the plaintiff.' It uses the word dismissed. The *Civil Procedure Act* does not define the word 'judgment.' According to Jowitt's Dictionary of English Law 2nd ed p 1025:-

'Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several.'

Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says:-

' Judgment" means the statement given by the judge on the grounds of a decree or order; Judgment - in England, the word judgment is generally used in the same sense as decree in this code.'

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8.'

21. In the instant case, the beneficiaries in the Nairobi Succession Cause did not apply to have the said summons for revocation that was dismissed for want of prosecution to be reinstated as such this means that the order by the judge dismissing the suit forms a valid judgment in that suit.
22. The Petitioners herein, decided to approach the instant court where they again petitioned for a Grant of Letters of Administration for the deceased herein. Their argument is based on the fact that the issues raised in the current case were not directly or substantially in issue in HCSC No 1698 of 2008. They also submitted that the two suits involve different parties as well as properties.
23. It is this courts considered opinion that the order dismissing the Summons for Revocation of Grant filed in Nairobi Succession Cause No 1698 of 2008 is still a valid order made by a competent court and the same still remains in force. Instead of filing a fresh suit in Kiambu High Court, the Petitioners ought to have applied to set aside the said order and or sought for an order to reinstate the said summons so as to be able to litigate the issues raised herein.
24. As of todays' date there are three (3) succession causes in existence in regard to the estate of Kiando Kiongo (deceased) and the reason why the principle of res judicata exists is so as to avoid multiplicity of suits. In the circumstances, this court is satisfied that the Petition herein bears all the elements of res judicata, as another similar Petition had been filed, heard and concluded in Limuru Succession Cause No 40 of 2001 and Summons for Revocation in Nairobi Succession Cause No 1698 of 2008 relating to the same estate.



Findings And Determination

25. For the forgoing reasons this court makes the following findings and determinations;

- i. This court finds that the instant Petition has all the elements of res judicata;
- ii. The Preliminary Objection filed on October 22, 2021 is found to have merit and it is hereby upheld.
- iii. The Petition is found to be incompetent and it is hereby struck out
- iv. The Petitioners are hereby condemned to pay costs to the Objector.

26 Orders Accordingly

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 28TH DAY OF JULY, 2023.

HON. A. MSHILA

In the presence of :-

Mourice – Court Assistant

Waweru Njuru – for the petitioners

Patrick Njoroge for the objector present in person

Kairuthi for Mary Nduta & June Mutwiri - Beneficiaries

