



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO 561 OF 2013

IN THE MATTER OF THE ESTATE OF OLELA OKETCH (DECEASED)

FELIX OPONDO.....PETITIONER

VERSUS

LUCAS OBIERO MUSANDO.....OBJECTOR

AND

CHARLES OMONDI OTIENO.....INTERESTED PARTY

RULING

INTRODUCTION

1. In his Summons for Revocation and/or Annulment of Grant dated 5th August 2021 and filed on 6th July 2021, the Objector herein sought for orders that the Grant of Letters of Administration issued to the Petitioner herein and confirmed on 3rd day of December 2018 be revoked and/or annulled and the property LR East Ugenya/Anyiko/3412 and 3413 (hereinafter referred to as “subject properties”) be cancelled and reverted back to the names of Olela Oketch (deceased) for procedural distribution.
2. He swore an affidavit in support of the application herein on 5th August 2021. He averred that the Grant of Letters of Administration was obtained fraudulently by making false statements and by concealment of material facts relevant to the case.
3. It was his contention that LR No East Ugenya/Anyiko/1621 which was subdivided into the subject properties belonged to him pursuant to a decision of the Land Adjudication Board on 18th December 1972 which the deceased did not appeal against and hence the same could not therefore have been registered in the deceased’s name and subsequently passed to the Petitioner herein. He added that the Interested Party also benefited from the subject properties which were fraudulently acquired from LR East Ugenya/Anyiko/1621.
4. He pointed out that the dispute was dealt with in **Kisumu ELC No 100 of 2015** and **Ukwala ELC No 77 of 2018** and that when he learnt that the Petitioner herein had filed a Summons for Confirmation of Grant, he filed Objection proceedings therein. However, on 18th February 2015, the court directed that the matter proceed for confirmation and that his claim be dealt with at the confirmation stage.
5. He averred that he was unwell and due to his old age, he was not able to follow up the matter. It was his contention that the Petitioner failed to disclose to the Trial Court that he was a beneficiary to the subject properties. He argued that had the same been disclosed to the court, the Grant of Letters of Administration would not have been granted as prayed. He therefore urged this court to allow his application as prayed.
6. In opposition to the said Summons of Revocation and/or Annulment of the Grant, on 14th September, the Petitioner filed Grounds of Opposition dated 9th September 2021. He asserted that the Petitioner died after distributing the deceased’s estate. He further averred that the objection that the Objector had raised was *res judicata* having been heard and determined by Chemitei J and judgment delivered by Cherere J on 26th July 2018. He added that this court lacked jurisdiction to deal with the matter herein as the same involved cancellation of land title.
7. When this matter came up for directions on 15th November 2021, this court directed that the Petitioner move the court properly by filing a Preliminary Objection as regards the issue of *res judicata*.
8. Pursuant to the aforesaid directions, on 30th November 2021, the Petitioner filed a Notice of Preliminary Objection dated 29th November 2021 where he reiterated that the matter herein was *res judicata*, this court being *functus officio*. He termed the present application bad in law,

misconceived and an abuse of the court process. He thus urged the court to strike out the Objector's Summons for Revocation of Grant as it lacked merit.

9. The Petitioner's Written Submissions in respect of the said Preliminary Objection were dated 29th November 2021 and filed on 30th November 2021 while those of the Objector were dated 20th January 2022 and filed on 21st January 2022.

10. The Ruling herein is based on the Written Submissions that both parties relied upon in their entirety.

LEGAL ANALYSIS

11. The Petitioner submitted that what constitutes a preliminary objection was addressed by the Supreme court in the case of **Aviation and Allied Workers Union Kenya vs Kenya Airways Ltd & Others [2015] eKLR** where the court stated that a preliminary objection may be raised on a pure question of law and to discern such a question of law, the court must be satisfied that there was no proper contest as to the facts. He asserted that the above sentiments were in line with the case of **Mukisa Biscuits Manufacturer Ltd vs West End Distributors Ltd** (eKLR citation not given) where the court stated that a preliminary objection raised a pure point of law and could not be raised if any facts had to be ascertained.

12. He invoked Section 7 of the Civil Procedure Act and cited the case of **Accredo AG & 3 Others vs Stefano Uccelli & Another [2019] eKLR** where the court cited the case of **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR** where the Supreme Court held that for the doctrine of *res judicata* to be invoked, the suit or issue must have been directly and substantially in issue in the former suit, that former suit must have been between the same parties, that the parties must have been litigating under the same title, that the issue must have been heard and finally determined in the former suit and that the court that formerly heard and determined the issue was competent to try the subsequent suit.

13. He contended that the Objector filed similar objection proceedings dated 10th April 2013 in which he sought for prayers that he was entitled to land parcel number East Ugenya/Anyiko/1621 on allegations that the suit parcel land was fraudulently transferred to the deceased's name when he was unwell which Chemitei J dismissed on 18th February 2015 and ordered that Letters of Administration be issued to him and the Objector's interest be determined at the confirmation stage.

14. He pointed out that at the confirmation stage, the Grant was later confirmed and the same issued to him on 3rd December 2018 pursuant to a judgment that was delivered by Cherere J on 26th July 2018 in which she held that she did not find any evidence to support the Objector's claim that he was entitled to benefit from the deceased's estate as regards the subject properties.

15. He asserted that the Objector had now filed another application seeking for orders that the Grant issued to him be revoked and that LR No East Ugenya/Anyiko/3412 and 3413 be cancelled and reverted back to the names of the deceased. He explained that the subject properties were subdivided from East Ugenya/Anyiko/1621 and hence his claim revolved around the same subject matter which is LR East Ugenya/Anyiko/1621.

16. In this respect, he placed reliance on the case of **Pop-in Kenya Ltd & 3 Others vs Habib Bank AG Zurich [1990] eKLR** where the court held that where a given matter becomes subject of litigation for adjudication by a court of competent jurisdiction, parties to that litigation are required to bring forward their whole case. It will not be permitted, except under special circumstances, that the same parties reopen the same subject of litigation in respect of matter which might have been brought forward in contest but was not brought forward only because they have from negligence or even accident omitted to bring it out in their case.

17. He was emphatic that he had satisfied all the elements for a doctrine of *res judicata* to be invoked as outlined in the case of **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others** (Supra) in that the objection was directly and substantially in issue in the former objection, between the same parties herein and further that the parties were litigating in the same names over the same title and the issue on objection was also heard and determined by a competent court.

18. The Objector also invoked Section 7 of the Civil Procedure Act and the conditions to be met for the doctrine of *res judicata* to be invoked as outlined by the Petitioner. He agreed that some of the limbs of the principles of *res judicata* had been fulfilled. He admitted that there was a suit between the same parties litigating under the same title in a former suit and the court which heard and determined the issue was competent to try the matter in question and the subsequent suit. He was, however, emphatic that the issue in question was never heard and finally determined in the former suit.

19. He was categorical that the issue raised in their instant application was not the same issue he raised in the year 2013 and determined by Chemitei J vide a Ruling dated 18th February 2015. He explained that the issue in question in the aforesaid Ruling was an objection to the making of the Grant of Letters of Administration Intestate provided under Section 68 of the Law of Succession Act and that that was before the Petitioner was granted Letters of Administration Intestate in respect of the deceased's estate.

20. He submitted that the doctrine of *res judicata* was divided into two (2) categories, namely cause of action *res judicata* and issue *res judicata*. He pointed out that his main concern was the issue *res judicata* which arose where a particular issue forming a necessary ingredient in a cause of action had been litigated and decided in previous proceedings between the same parties involving a different cause of action to which the same issue was relevant and one of the parties sought to reopen that issue.

21. He placed reliance on the Singapore Court of Appeal case of **Management Corporation Strata Tile Plan No 301 vs Lee Tat Development Pte Ltd (2009) S GHC 234** where the court stated that courts have never accepted *res judicata* as an absolute principle of law which applies rigidly in all circumstances irrespective of the injustice.

22. He also relied on the English case of **Henderson vs Henderson (1843-60) ALL ER 378** where the court held that the plea of *res judicata* except in special cases, applied not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment 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.

23. It was his contention that the Petitioner had not satisfied all the elements to invoke the principle of *res judicata* as was outlined in the case of **Invesco Assurance Company Limited & 2 Others vs Auctioneers Licensing Board & Another; Kinyanjui Njuguna Advocates & Another (Interested Parties) [2020] eKLR.**

24. He contended that this court had the jurisdiction to hear and determine their application as donated to the court by Article 165 of the Constitution of Kenya 2010 and as read with Section 47 of the Law of Succession Act.

25. He described the Petitioner's Preliminary Objection a waste of court's time and an intention to subvert the wheels of justice. He pointed out that it would have been appropriate to have the issues canvassed and determined at the proper hearing of the application so as to fully determine the rights and interests of the objector to the estate of the deceased.

26. He pointed out that the Summons for Revocation of Grant was provided for under Section 76 of the Law of Succession Act and added that the Ruling of 18th February 2015 had provided that his interest be determined at the confirmation stage.

27. He added that Section 76 of the Law of Succession Act provides for revocation of grant at any time irrespective of whether or not the grant had been confirmed. He added that the Grant of Letters of Administration issued to the Petitioner was confirmed on 3rd December 2018 which was the court had determined that his rights be determined at the confirmation. He was emphatic that his interest was never been determined since the Grant of Letters of Administration was confirmed in his absence thus necessitating the filing of his instant application. He thus urged this court to dismiss the Petitioner's Preliminary Objection with costs.

28. The law pertaining to the doctrine of *res judicata* is captured under the provisions of Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) which states 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 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.”

29. In the case of **E.T vs Attorney General & Another [2012] eKLR**, the court stated that courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy. It further held that the test was whether the plaintiff in the second suit was trying to bring in another way, a new cause of action which had been resolved by a court of competent jurisdiction.

30. It was clear from the parties' submissions that they were in agreement as to when the doctrine of *res judicata* could be raised, what constituted a preliminary objection and its effect on proceedings once the same was established to exist at any given time.

31. From the pleadings and submissions, it was not in dispute that the subject matter in the previous litigation and the current application were the same. Both the former suits and the present suit were between the same parties. Having said so, the question was whether the Petitioner had established that the Objector's Summons for Revocation of Grant was *res judicata*.

32. Notably, a reading of the Ruling delivered on 18th February 2015 by Chemitei J showed that the Objector's rights over the deceased estate were to be determined at the time of confirmation of the Grant of Letters of Administration Intestate.

33. In her judgment of 26th July 2018 at Paragraphs 8, 9 and 11, Cherere J stated:-

“I have considered the evidence on record and the green card for land parcel No East Ugenya/Anyikaa/1621 and it evidently demonstrated that it was first registered in the name of Olel Oketch (deceased) on 11.6.77. The Objector's allegation that the said land belonged to his great grandfather, Gode and that he was entitled to the said land is not supported by any tangible evidence and therefore lacks merit. Objector's claim that the deceased caused land parcel East Ugenya/Anyikaa/1620 to be registered in his name while the objector was sick is unconvincing ...

There's evidence that the Objector's attempt to unlawfully have the land registered in his name was thwarted by the Land Registrar who cancelled the title deed issued to the objector, the same having been obtained without first applying for letters of administrator to the deceased's estate. Consequently, I find that the Objector's claim does not meet the threshold of the provisions of Section 38 of the Law of Succession Act...

Having said that, I find no evidence to support the Objector's case that he is entitled to the deceased's estate.” (emphasis court)

34. Parties cannot evade the doctrine of *res judicata* by merely adding causes of action in a subsequent suit. It was this court's considered view that the Objector was trying to litigate a concluded matter by bringing issues which were determined in the former applications by filing the instant application and twisting the same to appear as if he was seeking different prayers.

35. The doctrine of *res judicata* principle was meant to lock out from the court system parties who had had their day in courts of competent

jurisdiction from re-litigating the same issues against the same opponents. Without it, there would be no end to litigation, and the judicial process would be rendered a nuisance and brought to disrepute. The foundation of *res judicata* thus rests in the public interest for swift, sure and certain justice.

36. This court perused the Summons for Revocation and/or Annulment of Grant dated 5th August 2021 and noted that the grounds and issues in question in relation to the Objector's claim over the deceased estate had actually been determined by Cherere J on 26th July 2018. Applying the stated law to the facts before this court, it was clear that the Objector had sought to re-open issues that had been raised or ought to have been raised in the earlier proceedings as they were relevant to the issues that were decided by the court in those instances.

37. This court was therefore persuaded that the Petitioner had satisfied the conditions for invoking the doctrine of *res judicata*. Consequently, the High Court could not sit on appeal of its own decisions. The only recourse the Objector had if at all he was aggrieved by the decisions of Chemitei and Cherere JJ who were courts of equal and competent jurisdiction as this one, was to appeal to the Court of Appeal.

DISPOSITION

38. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Preliminary Objection dated 29th November 2021 and filed on 30th November 2021 was merited and the same be and is hereby upheld. The effect of this is that the Objector's Summons for Revocation and/or Annulment of Grant dated 5th August 2021 and filed on 6th July 2021 be and is hereby struck out for having been *res judicata*.

39. Notably, this court noted from the Petitioner's Grounds of Opposition dated 9th September 2021 and filed on 12th September 2021 that the Petitioner herein was deceased. There was no indication in the court file that he had ever been substituted in the suit herein. The issue of abatement of the proceedings was pertinent. Be that as it may, this court did not delve into the issue as the same had not been placed before it for determination. As there was ideally no Petitioner herein, this court will not award any costs to him.

40. It is so ordered.

DATED and DELIVERED at KISUMU this 26th day of April 2022

J. KAMAU

JUDGE