



**In re Estate of Aloise Ondiele Adera (Deceased) (Succession Cause
1226 of 2014) [2022] KEHC 15692 (KLR) (29 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 1226 OF 2014
JN KAMAU, J
NOVEMBER 29, 2022
IN THE MATTER OF THE ESTATE OF ALOISE ONDIELE ADERA
(DECEASED)
IN THE MATTER OF AN APPLICATION BY FREDRICK OCHIENG
ADERA, FRANCIS ODHIAMBO ONYANGO & STEVEN ODHIAMBO
ONYANGO (APPLICANTS)**

BETWEEN

**FREDRICK OCHIENG ADERA 1ST OBJECTOR
FRANCIS ODHIAMBO ONYANGO 2ND OBJECTOR
STEVEN ODHIAMBO ONYANGO 3RD OBJECTOR**

AND

HENRIETA ANNA ONDIELO PETITIONER

AND

**ROSELINE ADHIAMBO SIJENJE INTERESTED PARTY
GREGORY SADAT OUMA INTERESTED PARTY**

RULING

Introduction

1. In their summons for revocation of grant dated November 18, 2021 and filed on November 19, 2021, the objectors herein sought orders for injunction to prevent any further dealing in the deceased's estate being Kisumu/Chiga/3169 (hereinafter referred to as "the subject property"), registered in the names



- of Petro Nyanchuga Ondieki, Abraham Ombui Ondieki and the petitioner herein and that the said subject property be transferred to the interested parties herein.
2. They also sought an order for revocation and annulment of the grant of letters of administration that was issued to the petitioner and that the same be issued to them and one Charles Akech Onyango for purposes of administration of the estate.
 3. On 1December 6, 2021, the petitioner filed a notice of preliminary objection dated December 14, 2021 on the grounds that the court lacked the jurisdiction to hear and determine the aforesaid objectors' summons for revocation by virtue of the provisions of section 7 of the *Civil Procedure Act* cap 21 laws of Kenya as the issues raised herein were *res judicata* having been conclusively determined by Cherere J vide ruling delivered on May 14, 2020. She further contended that the court was *functus officio* and that the suit was bad in law, misconceived and an abuse of the court process and thus urged this court to dismiss the same with costs to her.
 4. When the matter came up in court on February 7, 2022, parties agreed to canvas the petitioner's preliminary objection by way of written submissions.
 5. The petitioner's written submissions were dated December 14, 2021 and filed on December 16, 2021 while those of the objectors were dated February 24, 2022 and filed on February 28, 2022. This ruling is based on the said written submissions which parties relied upon in their entirety.

Legal Analysis

6. Both parties placed reliance on the case of *Mukisa Biscuit Manufacturer Ltd vs West End Distributors Ltd* (eKLR citation not given) where it was held that a preliminary objection is raised on a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any facts have to be ascertained or if what was sought was exercise of judicial discretion.
7. Further, they both invoked section 7 of the *Civil Procedure Act* cap 21 (laws of Kenya) which provides for when a matter can be said to be *res judicata*.
8. The petitioner argued that a similar objection proceedings were raised by one Charles Akech Onyango vide an application that was dated August 10, 2018 in which he had sought revocation of the grant of letters of administration and for the cancellation of transfer in favour of the petitioner and her two (2) sons and for the same to be registered in his name and that of the deceased. She pointed out that subsequently, Cherere J delivered a ruling on May 14, 2020 wherein she was satisfied that the grant of representation issued to the petitioner on the basis of the deceased's estate was lawfully made and as such declined to revoke it.
9. She pointed out that in the instant case, the said Charles Akech Onyango was in the shadows as only his brothers had been indicated as objectors, which was intended to mislead the court that there had never been any objection proceedings. She therefore submitted that she had demonstrated that the present application was *res judicata* and urged this court to strike out the present summons for revocation of grant.
10. To support her argument that the issues that the objectors herein had raised were *res judicata*, she referred this court to the case of *Accredo AG & 3 others vs Stefano Uccelli & another* [2019] eKLR where the Court of Appeal cited with approval the case of *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 others* [2017] eKLR and on the case of *Pop-in Kenya Limited & 3 others vs Habib Bank AG Zurich* [1990] eKLR where the Court of Appeal held that courts will not allow parties to re-open the same subject matter for determination.



11. On the other hand, the objectors submitted that the doctrine of *res judicata* was based on two (2) fundamental principles, that there must be an end to litigation and that a party should not be vexed twice over the same cause as was pronounced in *Omondi vs National Bank of Kenya Ltd & Others* (2000) EA 177. They added that it had generally been the position of the court that *res judicata* should only be invoked in the clearest of cases, very sparingly and in the most obvious of cases as was held in the case of *Okoti Omtata & AG & 3 others* Petition No 593 of 2014 (eKLR citation not given).
12. They also relied on the case of *Union of Civil Servants & 2 others vs Independent Electoral and Boundaries Commission (IEBC) & another* [2015]eKLR which quoted the cases of *Kaari & another vs the Attorney General & others* (2005) 1 EA 83 and *Omondi vs National Bank of Kenya Limited & others* (2001) EA 177 where the common thread was that for the doctrine of *res judicata* to be invoked, one had to demonstrate that the suit or issue was directly and substantially in issue in the former suit, that the former suit was between the same parties, that the parties were litigating under the same title, that the issue was heard and finally determined in the former suit and 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. They asserted that the parties herein were not quite the same as those in the ruling that was delivered on May 14, 2020 although the respondent remained the same. They were emphatic that the real issue in contest in their impugned summons was fundamentally different and the principle of *res judicata* could not be invoked.
14. They contended that although in both suits the 3rd objector had brought the claim against the petitioner, the 1st and 2nd objectors had never approached this court to have their rights protected and therefore it was a matter of right to accord them the right to be heard.
15. They further argued that the impugned ruling addressed the issue of whether the petitioner was married to the deceased and whether or not grounds of revocation of grant were met whereas the current application raised issues of forgery and fraud on her part and that of her sons, which evidence was not considered at the time of the delivery of the aforesaid ruling.
16. It was their case that the allegations had been investigated by the Criminal Investigations Department of the Kenya Police and the forgeries confirmed. They argued that the petitioner ought not be protected by the law as the administrator of the estate of the deceased for having obtained the grant of letters of administration by fraud and forgery.
17. They also referred this court to the case of *Telcom Kenya Limited vs John Ochanda* [2014] eKLR where the Court of Appeal held that the doctrine of *functus officio* was not meant to bar any engagement by a court with a case that it had already decided or pronounced itself on. They submitted that the aforesaid principle did not apply in their case. They urged the court to dismiss the petitioner's preliminary objection with costs.
18. 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.”



19. In the case of *ET 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 or not the plaintiff in the second suit was trying to bring a new cause of action which had been resolved by a court of competent jurisdiction in another way.
20. 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.
21. It is trite law that parties cannot evade the doctrine of *res judicata* merely by adding causes of action in subsequent proceedings. Indeed, the intention of this doctrine *res judicata* is to lock out parties who had had their day in courts of competent jurisdiction from re-litigating the same issues against the same opponents in the court system. 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.
22. 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. Although the summons for revocation dated August 5, 2021 and filed on July 10, 2021 and the present summons for revocation of grant dated November 18, 2021 and filed on November 19, 2021 were filed by different parties, the issues were the same issues between parties under whom they or any of them could have claimed. The objectors expected the same result. In addition, the summons for revocation of grant in which the issue of revocation of grant of letters of administration to the petitioner had subsequently been raised and had been heard and finally decided by a court of competent jurisdiction.
23. This court perused the summons for revocation and/or annulment of grant herein and noted that the grounds and issues in question in relation to the objectors' claim over the deceased estate had actually been determined by Cherere J on May 14, 2020.
24. Notably, a reading of the judgment that was delivered on May 14, 2020 showed that the learned judge had conclusively dealt with the issue of revocation of grant of letters of administration that was issued to the petitioner herein. The learned judge rendered herself as follows:-

“From the foregoing, I find that the grant of representation issued to the petitioner / Respondent on the basis that LR Kisumu/Chiga/3169 belonged to the deceased was lawfully made and decline the invitation to revoke it.” (emphasis court)
25. 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 and was thus persuaded to find and hold that the present summons for revocation of grant was *res judicata*.
26. The objectors were trying to litigate a concluded matter by bringing issues which had been determined in the first summons for revocation of grant by twisting facts in the present summons for revocation of grant to make it appear as if they were seeking different prayers. The fact that the intended result of both summons for revocation of grant was the same after determination brought the present summons for revocation of grant within the doctrine of *res judicata*.
27. Notably, the High Court could not sit on appeal of its own decisions. The only recourse that was open to the objectors if at all they were aggrieved by the decisions of Cherere J, who was a court of equal and competent jurisdiction as this one, was to appeal to the Court of Appeal.



Disposition

28. For the foregoing reasons, the upshot of this court's decision was that the petitioner's preliminary objection dated December 14, 2021 and filed on December 16, 2021 was merited and the same be and is hereby upheld. The effect of this is that the objectors' summons for revocation and/or annulment of grant dated November 18, 2021 and filed on November 19, 2021 be and is hereby struck out for having been *res judicata*. The objectors will bear the petitioner's costs of the said summons for revocation and/or annulment of grant dated November 18, 2021 and filed on November 19, 2021 and costs of her preliminary objection dated December 14, 2021 and filed on December 16, 2021.
29. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF NOVEMBER 2022

J. KAMAU

JUDGE

