REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 50 OF 2003

IN THE MATTER OF ESTATE OF KIURA KATHERI alias KIURA NJAMIU (DECEASED)

NJERU NJAMIU.....1ST APPLICANT

ISAIAH MWANIKI.....2ND APPLICANT

NJAGI NJAMIU.....3RD APPLICANT

VERSUS

NJERU NJAMIU.....1ST RESPONDENT

NJUE NJAMIU.....2ND RESPONDENT

JOTHAM KARUKA.....3RD RESPONDENT

RULING

A. Introduction

1. The application before this court is dated 23.06.2020 and it substantively seeks an order that this Honourable be pleased to grant a stay of execution of the judgment delivered on 7/02/2017 and all the consequential orders pending the hearing and the determination of the application or additionally and/or in the alternative to grant an order of maintenance of status quo pending the hearing and determination of the appeal. The applicants also prayed for the costs of the application.

2. The application is premised on the grounds on its face and on the supporting affidavit sworn by the 3rd applicant. The applicants' case is that this court delivered judgment on 7.02.2017 and being dissatisfied with the same, they lodged an appeal at Nyeri being No. 128 of 2018 and that they will be grateful if this court issues an order of stay of the said judgment and all consequential orders thereto, pending the hearing and determination of the said appeal. That, if the said orders of stay are not granted they stand to suffer irreparable loss; the appeal shall be rendered nugatory; that the application was brought without inordinate delay; the appeal raises triable issues and thus the application ought to be allowed in the interest of justice and in exercise of this court's inherent powers.

3. The application is opposed by way of the replying affidavit sworn by the 1st respondent on 19.08.2019 and filed in court on 24.08.2020 wherein it was deposed that the grant issued by this court on 13.10.2011 has already been implemented and that some of the siblings sold their respective land parcels to third parties. Further that, after the orders of 7.02.2017 were made, the applicants herein filed an application before the court of appeal at Nyeri seeking for orders of stay of execution of the said ruling in Nyeri being Civil Application No. 47 of 2017 but which was dismissed by the Court of Appeal for want of merits, on 31.07.2018 and which application is similar to the instant application and as such, the instant application is *res judicata*. That the application is incompetent having been filed by parties in person whereas they have advocates on record and that the same does not meet the threshold for granting of orders of stay of execution as provided under order 42 rule 6(2) of the Civil Procedure Rules 2010. That the applicants are in occupation of the suit land and granting the orders of status quo will be tantamount to denying the respondents the occupation and enjoyment of the proprietorship rights as the beneficiaries of the estate of the deceased.

4. The applicants filed a further affidavit and wherein it was deposed that they moved with speed to lodge a restriction on the suit land and that the grant was implemented against the law and against a pending appeal at Nyeri which is yet to be concluded. Further that the court made orders after it found merits in the application dated 23.06.2020 bearing in mind the appeal in Nyeri.

5. The application was canvassed orally wherein both parties reiterated the position in their pleadings herein.

6. I have considered the application, the replying and further affidavits and the oral submissions made in court. However, before going to the merits of the application, the respondents in their replying affidavit raised an issue to the effect that the instant application is *res judicata* for the reasons that the applicants had filed a similar application to the Court of Appeal being Nyeri Civil Application No. 47 of 2017 but which was dismissed by the Court of Appeal for want of merits on 31.07.2018.

7. The principle of *re judicata* is found in Section 7 of the Civil Procedure Act which provides that: -

> **"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.**

8. F**or the bar of** *res judicata* **to be effectively raised and upheld on account of a former suit, the following elements must be satisfied that is; the suit or issue was directly and substantially in issue in the former suit; that former suit was between the same parties or parties under whom they or any of them claim; those parties were litigating under the same title; 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. {See Accredo AG & 3 others v Steffano Uccelli & another [2019] eKLR}.**

9. I have perused the court record and I note that indeed the applicants herein made an application to the Court of Appeal for stay of execution of the orders of 7.02.2017. The said application was between the same parties as the ones before this court and litigating under the same title. The application was heard on merits and dismissed by the Court of Appeal vide a ruling delivered on 31.07.2018. The application was heard by the Court of Appeal which is a competent court. As such, it is clear that the application herein is *res judicata.*

10. Further, the Court of Appeal being a superior court to this court, this court is bound by the doctrine of *stare decisis* and the issue of staying the execution of the orders of Justice F. Muchemi made on 7.02.2017 cannot be considered by this court having been considered by the Court of Appeal. This court is bound by the decision of that court.

11. Though *stare decisis* is not absolute and a decision made ***per incuriam*** is exempt to the application of the doctrine (See Mativo J's decision in **Ernst & Young LLP v capital Markets Authority & another [2017] eKLR)**, the decision of the Court of Appeal herein was not made ***per incuriam*** and neither has the applicants proved so. As the Supreme Court held in in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR**; -

> **"Adherence to precedent should be the rule and not the exception...the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."**.

12. It is trite that a court of law is bereft of jurisdiction once it finds that a matter is res judicata. Where a court finds that it has no jurisdiction, it ought not to go further and make any findings on the merits of the matter before it. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. (See **The Owners Of The Motor Vessel Lillian's –vs- Caltex Oil [1989] KLR 1.).**

13. In view of the foregoing, the application herein is struck-out with costs.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF MARCH, 2021

L. NJUGUNA

JUDGE

……..……for the Applicants

……..for the Respondents