REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 351 OF 2004

IN THE MATTER OF THE ESTATE OF WILLIAM KIPTABUT MWEI (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR STAY OF EXECUTION

BETWEEN

SALLY JEPTOO MWEI.....2ND ADMINISTRATOR/APPLICANT

AND

ESTHER JEPKOECH MWEI.....1ST ADMINISTRATOR/RESPONDENT

RULING

[1] This ruling is in respect of the 2nd Administrator's application dated **23 October 2020.** The said application is expressed to have been filed pursuant to **Sections 1A, 1B, 3, 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Section 47** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya** and **Rules 49 and 59** of the **Probate and Administration Rules,** for orders that:

> **[a]** the Court be pleased to stay the execution of Item 4 of the Consent Order dated **28 June 2011** pending the hearing and determination of the matter herein;
>
> **[b]** the Court be pleased to order that the *status quo* be maintained pending the hearing and determination of this matter;
>
> **[c]** the Court be pleased to order that the Originating Summons dated **21 July 2008** be heard on priority basis;
>
> **[d]** costs of the application be in the cause.

[2] The application was premised on the grounds that when this matter came up for mention on **5 October 2020**, counsel for the 1st administrator/respondent vehemently opposed the application to set the matter for hearing on the ground that the applicant is yet to comply with the consent order dated **21 July 2011.** The applicant now seeks stay of execution of paragraph 4 of the said consent order pending the hearing and determination of this cause. It was further asserted that implementation of the consent order as approved by the Court would entail extreme prejudice to the parties and will usurp the final judgment of the Court in this matter with particular reference to land parcel **Number NANDI/KEBEN/65**.

[3] The application was supported by the applicant's own affidavit, sworn on **23 October 2020** and the annexures filed therewith. She averred that, whereas it is not in dispute that land parcel **No. NANDI/KEBEN/65** forms part of the estate of the deceased, there is a dispute as to whether **Land Parcel No. NANDI/KEBEN/64,** which is presently registered in the name of the respondent, also forms part of the estate of the deceased. In effect, it was averred that, should the distribution go on in terms of the consent order, the respondent would not only retain the whole of **Parcel No. 64** but also receive half of **Parcel No. 65** which is presently in the possession of the applicant. Thus, the applicant averred that subdivision and transfer of **Parcel No. 65** before the hearing and determination of this matter will not only work injustice from her standpoint, but will also be costly on her part since she might be subjected to further costs of subdivision and transfer should **Parcel No. 64** be found to belong to the deceased's estate.

[4] The application was opposed by the respondent. She relied on her Replying Affidavit sworn on **16 November 2020**, in which she

deposed that the application is a non-starter in so far as all the issues in dispute have been resolved by consent; and in particular by the consent order dated **28 June 2011**. She further averred that the applicant filed an Originating Summons, being **Eldoret HCCC (OS) No. 95 of 2008** dated **21 July 2008**, seeking, among other orders, that a determination be made on whether or not property known as **NANDI/KEBEN/64** forms part of the estate of the deceased. The respondent annexed a copy of the said Originating Summons to her Replying Affidavit as **Annexure EJM/2.**

[5] The respondent further blamed the applicant and her children for the delay in the disposal of this cause, and accused her of filing numerous frivolous applications to buy time for her continued refusal to have the consent order of **28 June 2011** implemented. The respondent proceeded to give a chronology of events at paragraphs 9 to 21 of her Replying Affidavit to demonstrate that this is the third application by the application for stay; and therefore that there is no justification at all for the orders sought; granted that the applicant obtained a stay order which she let lapse without preferring an appeal as proposed.

[6] With regard to the applicant's apprehension that she will be prejudiced by having to pay twice over for survey charges unless stay is granted, the respondent averred that she is ready and willing to share the costs of subdivision of the suit land with the applicant, as she is eager to have this longstanding matter brought to closure. The respondent drew the Court's attention to the fact that the applicant and her children forced her out of her matrimonial home on land **Parcel No. 65** in breach of the orders of the Court; and that she has been receiving all the proceeds from the 3-acre tea plantation that she planted with the help of her children; again in disregard of a consent order adopted by the Court. The respondent accordingly urged the Court to find that the applicant is not deserving of its discretion, granted her conduct and her record of blatant disobedience of court orders.

[7] The applicant, in a detailed response to the respondent's Replying Affidavit, filed on **21 January 2021,** denied that, vide the instant application, she has sought orders similar to the orders she prayed for in her earlier application dated **4 June 2012**. She reiterated her stance that the instant application has been brought in good faith and in the interest of justice.

[8] The applicant further averred that the respondent is estopped from raising the issue of compliance with the consent order dated **28 June 2011** on the ground that she has acquiesced thereto. She asserted that the implementation of Clause 4 of the said consent order before the determination of this dispute is impractical and would be inimical to the interests of the parties. She accordingly prayed for stay of that aspect of the consent order dated **28 June 2011** pending the hearing and final determination of this cause.

[9] The application was disposed of *via* written submissions, as directed by the Court on **29 October 2020**. The applicant's written submissions were filed herein on **18 February 2021** while the respondent's submissions were filed on **16 April 2021**. **Ms. Kiptoo**, counsel for the applicant, proposed the following issues for determination:

> **[a]** Whether the Court has jurisdiction to hear the application;
>
> **[b]** Whether the implementation of Clause 4 of the consent order dated **28 June 2021** is prejudicial to the applicant and/or impractical; and,
>
> **[c]** Whether the 1st administrator is guilty of acquiescence/waiver.

[10] On jurisdiction, **Ms. Kiptoo** relied on **Section 47** of the **Law of Succession Act**, which gives the Court the jurisdiction to entertain any application and determine any dispute brought pursuant to the Act; and to make such decrees and orders as may be expedient. She urged the Court to consider that there is an extant dispute, which is yet to be resolved, over the respondent's ownership of **Land Parcel No. 64** and whether it is part of the deceased's estate; and therefore that compliance with Clause 4 before a final determination on that issue is made would be counterproductive. Counsel relied on **Re Estate of Philip Nthenge Mukonyo (Deceased)** [2018] eKLR and **Il Nwesi Company Ltd & 2 Others vs. Wendy Martin** [2011] eKLR for the proposition that, in exercising its discretion, the Court is obliged to weigh the likely consequences of its orders, so as to pursue the path that entails the lower risk of injustice.

[11] On behalf of the 1st administrator/respondent, **Ms. Oduor** relied on her written submissions dated **15 April 2021**, wherein she proposed the following issues for determination:

> **[a]** Whether the Court should stay execution of Item (4) of the Consent Order dated **28 June 2011** pending the hearing and determination of this cause;
>
> **[b]** Whether the Court should issue a *status quo* order pending the hearing and determination of this cause; and,
>
> **[d]** Whether the Court should issue an order that the Originating Summons dated **21 July 2008** be heard on priority.

[12] According to **Ms. Oduor**, the instant application is *res judicata*; a similar application having been heard and determined herein on the merits. She relied on **Section 7** of the **Civil Procedure Act** and **Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others** [2017] eKLR. It was further her submission that the applicant has no intention of appealing against the impugned consent order; and therefore the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** are inapplicable to the facts of this case. She added that, in any case, the applicant has failed to show what damage or loss she will suffer if the stay order is not granted.

[13] Further to the foregoing, **Ms. Oduor** submitted that, since the applicant is a contemnor who has defied several court orders, and in particular the subject consent order, she is not deserving of the Court's discretion, either in the manner sought, or at all. She also took the view that to allow the prayer for a *status quo* order would be tantamount to not only inviting the Court to legalize an illegality or to approve the continued disobedience of its own orders by the applicant, but also to amend and vary the terms of the consent entered into by the parties of their free will. Counsel relied on the **Shimmers Plaza Ltd vs. National Bank of Kenya Ltd** [2015] eKLR and **Accredo Ag & 3 Others vs. Stefano Uccelli & Another** [2019] eKLR.

[14] Ms. Oduor concluded her submissions by pointing out that, by asking for an order that her Originating Summons dated **21 July 2008** be heard on priority basis 13 years down the line, the applicant is merely betraying the lack of interest she has exhibited in pursuing that other matter. In counsel's view, the applicant did not need the intervention of the Court to prosecute that other suit. She further pointed out that, the dispute over the ownership of land **Parcel No. Nandi/Keben/64** is not a matter falling squarely within the jurisdiction of this Court. She accordingly prayed for the dismissal of the application with costs.

[15] I have carefully considered the application in the light of the averments in the Supporting and Supplementary Affidavits as well as the written submissions filed by learned counsel on behalf of the parties. I have likewise perused the record herein. This being an old, long-drawn out matter, a brief background would help place the instant application in proper perspective. The record shows that the deceased, **William Kiptabut Mwei**, died intestate on **7 November 1981**. He was survived by two widows, who are the disputants herein. Initially the Grant of Letters of Administration was made to the Public Trustee on behalf of the deceased's beneficiaries. However, on the application of the respondent, that Grant was revoked on **21 July 2008** and the two widows appointed joint administrators. The disputants further agreed and a consent order recorded to the effect that:

> **[a]** KTDA shares belonging to the deceased be shared equally and transferred to the widows, **Esther Jepkoech Mwei** and **Sally Jeptoo Mwei;**
>
> **[b]** That the movable properties, namely tractor Registration No. KDK 698, 2 disc ploughs and tractor trailer be sold and the proceeds shared equally between the two widows;
>
> **[c]** That land determined to be forming part of the estate of the deceased be shared equally between the two houses; and that the respective widows to divide each of their shares to their children;
>
> **[d]** That land **Parcel No. NANDI/KEBEN/65** measuring 23.75 acres is part of the estate of the deceased;
>
> **[e]** That the Court to determine the ownership of land **Parcel No. NANDI/KEBEN/64**, with a view of ascertaining whether it forms part of the estate of the deceased;
>
> **[f]** That the Court do rely on the evidence already on record; and that further evidence be tendered by the 2nd applicant (the applicant herein) before making a determination on ownership of land **Parcel No. NANDI/KEBEN/64.**
>
> **[g]** That money received for lease/renting of property determined as forming part of the estate of the deceased be accounted for and shared equally between the two widows; and that the sum may be recovered from other estate monies due to the party to reimburse and or refund the same.
>
> **[h]** The money held by Public Trustee be shared equally between the two widows, credit being given for sums already paid out.

[16] Thereafter, disagreements arose between the two widows and their children, particularly over the possession and use of **Parcel No. 65.** Hence, on **30 March 2009,** the respondent filed an application, seeking orders, *inter alia*, that the District Surveyor, Nandi Central, be ordered to subdivide the land equally between the two administrators to give effect to the consent order of **21 July 2008**. The application dated **30 March 2009** was, likewise, amicably settled on terms, *inter alia*, that the *status quo* be maintained; and that both parties, their servants and agents be prohibited from carrying out any development by way of erecting structures, buildings etc. on the two suit properties, i.e. **NANDI/KEBEN/64** and **NANDI KEBEN/65** pending the determination of the dispute relating to **Plot No. 64.**

[17] While the dispute was pending hearing, and notwithstanding the conservatory orders in place, the applicant proceeded to cause **Plot No. 65** to be registered in her sole name. Counsel for the respondent then wrote to her counterpart requiring cancellation of the title, which in her view was fraudulently obtained. There being no positive response, she filed an application for contempt dated **18 May 2011**. Again, that application was amicably settled and a consent order in respect thereof issued on **28 June 2011** in the following terms:

> **[a]** That the 2nd administrator, **Sally Mwei,** do purge her contempt by surrendering the title for **NANDI/KEBEN/65** erroneously registered in her name for cancellation and rectification;
>
> **[b]** That the said title **NANDI/KEBEN/65** be re-issued in the names of the late **William Kiptabut Mwei;**
>
> **[c]** That the application dated **18 May 2011** seeking that the respondent be committed to civil jail for contempt of court be and is hereby withdrawn;
>
> **[d]** That the District Surveyor, Nandi East, be and is hereby ordered to proceed and survey property known as **NANDI/KEBEN/65** within 14 days of the date of this order, so as to ensure that each of the administrators herein, namely, **Esther Jepkoech Mwei** and **Sally Jeptoo Mwei,** get an equal share thereof;
>
> **[e]** That the orders made by **Justice Azangalala** on **23 May 2011** an all other subsequent orders be and are hereby set aside, and the 2nd administrator is hereby allowed to present her evidence and case to court;
>
> **[f]** That the Administration Police Department in Nandi County do provide security during the survey process to keep peace;
>
> **[g]** That all the terms of the Court Order issued on **17 September 2008** remain in force.

[18] The applicant was however not pleased with the aforementioned consent order. Accordingly, she filed a Notice of Motion dated **16 November 2011** seeking that it be set aside. She also prayed for stay of its execution pending the hearing and determination of the said application. She blamed the firm of **M/s Amasakha & Company Advocates** for executing the consent on her behalf without her authority or instructions. The application was resisted by the respondent; and in addition, **Mr. Alex Amasakha R. Imbwaga**, put in an affidavit asserting that he had instructions from the applicant to enter into the impugned consent. The application was consequently dismissed on **23 April 2012** by **Hon. Azangalala, J.** (as he then was).

[19] Undeterred, the applicant filed another Notice of Motion dated **4 June 2012**, seeking stay of execution of the consent order dated **28 June 2011** pending an appeal from the ruling delivered on **23 April 2012**. Although the said application was allowed by **Hon. Githua, J.** on **9 December 2014** no appeal was ever filed. The applicant now seeks, in the instant application, orders staying execution of Clause 4 of the consent order dated **28 June 2011,** a *status quo* order, as well as an order that the Originating Summons dated **21 July 2008** be heard on priority basis. I have no hesitation in dismissing the last prayer, as such orders can only be made in the subject suit, namely HCCC (OS) No. 95 of 2008. It would be improper, if not an abuse of the court process, for this Court to be required to determine how a court of co-ordinate jurisdiction is to handle an entirely separate suit. Thus, granted the foregoing background, the issues presenting themselves for determination are:

[a] Whether the instant application is *res judicata*; and if not,

[b] Whether the applicant is entitled to stay of Clause 4 of the Consent Order dated **28 June 2011.**

[20] Section 7 of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya,** provides that:

> **"No Court shall try any suit or issue in which the matter 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… and has been heard and finally decided by such Court."**

[21] And, as was stated by the Court of Appeal in **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd** [2017] eKLR, the elements set out in the aforestated provision are conjunctive and must all exist to attract the invocation of the doctrine. Here is what the Court of Appeal had to say:

> **"The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;**
>
> **(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.**
>
> **…**
>
> **Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in Henderson v Henderson (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by 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…"**

[22] Needless to add, then, that the doctrine of *res judicata* applies not only to substantive suits but also to applications. This was restated by the Court of Appeal in **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others,** Civil Appeal No. 36 of 1996, thus:

> **"There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation**..."(See also **Accredo AG & 3 Others vs. Stefano Uccelli & Another** [2019] eKLR)

[23] In the matter at hand**,** the prayers sought by the applicant in the instant applicant are, pretty much, the same prayers sought by her in the application dated **4 June 2012**; which application was heard on the merits and accordingly determined on **9 December 2014**. The only difference is that in the former application, the stay sought was with an appeal in view. No appeal has been filed thus far. In addition, the applicant has another pending suit, **Eldoret HCCC (OS) No. 95 of 2008**, raising the same questions touching on the two parcels of land No. 64 and No. 65.

[24] I entertain no doubt therefore that the instant application is *res judicata* in so far as it is raising the same issues that were in issue in the application dated **4 June 2012**; and that it amounts to abuse of the process of the Court for the applicant to obtain orders in vain; and thereafter come back to Court seeking the same orders. It is further manifest from the record that the applicant filed an application for the setting aside of the impugned consent order and that the same was dismissed on **23 April 2011**. The applicant had the option to appeal the decision but opted not to. Instead, she has resorted to filing a plethora of applications to delay implementation of their consent orders.

[25] In **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd,** (supra) the Court of Appeal invoked the doctrine of constructive *res judicata* and applied the decision of the Supreme Court of India **State of UP vs. Nawab Hussain, AIR 1977 SC 1680,** that:

> **"This doctrine is based on two theories: (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon…But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could; have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata, by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constructive res judicata which, in reality, is an aspect or amplification of the general principle."**

[26] Similarly, in **Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others (2017) eKLR,** the Court of Appeal held that:

> **"The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."**

[27] And, in **Kenya Commercial Bank Ltd vs. Muiri Coffee Estate Ltd & Another** [2016] wherein the Supreme Court was called upon to make orders that would in effect be a claw-back on a consent order; it held that:

> **"A Court's Judgment and/or Ruling, in the perception of the Constitution and the law, is an edict that resolves a live issue of controversy, and is by no means an abstract pronouncement. In asking this Court to pronounce itself on the propriety of a missing record of the High Court, the Court is being called upon, in the very first place, to determine the question of the legality of the consent made by the parties herein in that missing record. That question was settled as far back in time as 1998. It is not conceivable that this Court should reopen that consent. Since that question was first determined with finality on 10th March, 1998, rights, obligations and interests have crystallized, and they carry all validity, and embody proper and legitimate expectations. The system of justice that is upheld by the Court of law, will not tamper with such rights and obligations, even where some parties may feel aggrieved."**

[28] Clearly therefore, the applicant's application dated **23 October 2020** is untenable. In the premises, it would be superfluous to give it a merit consideration. The said application is hereby struck out for being *res judicata*. The costs thereof shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE 2021

OLGA SEWE

JUDGE