REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 979 OF 2000

IN THE MATTER OF THE ESTATE OF JACOB KIRAGU KAMAU – (DECEASED)

FRANCIS KAHORA KAMAU.....APPLICANT

VERSUS

JAMES KARIUKI MWAURA.....1ST RESPONDENT

KAMAU GITAU.....2ND RESPONDENT

RULING

1. **Section 7** of the **Civil Procedure Act** provides that;-

> **"7. 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."**

2. The elements of the doctrine of the *res-judicata* were indicated by the Court of Appeal in **IEBC –v- Maina Kiai & 5 Others, [2017]eKLR** to be as follows:-

(a) the suit or issue was directly and substantially in issue in the former suit;

(b) the former suit or issue was between the same parties or parties under whom they or any of them claim;

(c) these parties were litigating under the same title;

(d) the suit or issue was heard and finally determined in the former suit; and

(e) the court that formerly heard and determined the suit or issue has competent jurisdiction to try the suit or issue."

3. In the same decision, the Court explained the rationale of the doctrine in the following words:-

> **"The rule or doctrine of *res judicata* serves the salutory 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 commonsensical 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 or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice."**

4. The applicant Francis Kahora Kamau was one of the sons of the deceased Jacob Kiragu Kamau who died intestate on 20th March 1971. In his life, the deceased married three times. The wives were Wanjiku Kamau, Wangui Kamau and Nyambura Kamau. The applicant was

from the house of Nyambura Kamau. The deceased left parcel Ndeiya/Ndeiya/439. There was a dispute among the family of the deceased over the parcel that was settled by consent in **HCCC No. 381 of 1982.** In the consent recorded on 13th July 1982:

(a) the house of Wanjiku Kamau was to get 4 acres to be registered in the joint names of Mrs Annah Gathoni and her elder son James Kariuki Mwaura in trust for themselves and the other sons of Mwaura;

(b) the house of Wangui Kamau was to get 4 acres to be registered in the names of Joseph Gitau Kamau and his brother Stanley Muturi Kamau absolutely in equal shares; and

(c) the house of Nyambura Kamau was to get 5 acres to be registered in the names of Joram Kamau and the applicant Francis Kahora Kamau.

5. When this succession cause was filed, on 1st February 2005 Justice Koome (as she then was) delivered a judgment and issued a joint grant of letters of administration intestate to the applicant (representing the house of Nyambura Kamau), Joseph Gitau Kamau (representing the house of Wanjiku Kamau) and Joseph Gitau (representing the house of Wangui Kamau). The grant was confirmed on 20th July 2005 when the parties, by consent, shared the estate in the same terms as had been agreed in **HCCC No. 381 of 1982.**

6. The present administrators of the estate of the deceased are the applicant (representing the house of Nyambura Kamau), the 1st respondent James Kariuki Mwaura (representing the house of Wanjiku Kamau) and the 2nd respondent Kamau Gitau (representing the house of Wangui Kamau).

7. The present application by the applicant was dated 10th August 2020. It was filed under **section 76** of the **Law of Succession Act (Cap 160) and rules 44(1) and 73 of the Probate and Administration Rules** seeking to revoke the grant issued on 20th May 2005 as amended on 8th April 2020. His case was that, prior to his death, the deceased held a lease granted by the Town Council of Kiambu over the disputed land (Ndeiya/Ndeiya/434) since 1st January 1962 and for annual rent of Kshs.60/=. The lease was renewable annually on the payment of the rent. It had other terms, including the term that on the death of the tenant the land would revert to the Council. When the deceased died on 16th March 1971, and because the annual rent was now not being paid, the land reverted to the Council upon the termination of the lease. At that point, the applicant and his brother Joram Gitau Kamau (deceased) applied to the Council and the land was allocated to them. The allocation was in 1961. Eventually a joint title deed (FK 3) was issued to them on 22nd February 1994.

8. There was no dispute that upon the death of the deceased, the applicant and Joram Gitau Kamau filed SRM at Kiambu **Succession Cause No. 129 of 1990** in which they stated they were the only children of the deceased whose only wife was Nyambura Kamau. The two brothers obtained a grant and got the parcel of land which they had declared belonged to the deceased. The deceased challenged the grant whose revocation they sought in the instant cause. Their case was that, they had not been involved in the proceedings, yet they were beneficiaries. Further that, there had been a consent in **HCCC No. 381 of 1982** that had shared the parcel to the three houses of the deceased, and which the applicant and his brother had not brought to the attention of the Kiambu Court. In the judgment delivered on 11th February 2005 the court revoked the grant issued and confirmed by the Kiambu Court and cancelled any subsequent transactions over the parcel. A fresh grant was issued based on the consent. Subsequently the grant was confirmed on 20th July 2005. In the instant application, the applicant challenges the consent in **HCCC No. 381 of 1982** on the ground that he was not a party to it. The simple answer to the complaint is that the applicant was at liberty to seek the review and or setting aside of the consent if it affected him without being afforded a hearing. If the applicant had a problem with the judgment that revoked the grant jointly issued to him and his brother by the Kiambu Court, he ought to have appealed against it. As matters stand, I find, the ownership of Ndeiya/Ndeiya/434 by the deceased and the distribution of the same to the members of the family upon his death are matters that have been heard and determined. This court cannot re-open them using the applicant's application dated 10th August 2020. Under **section 7** of the **Civil Procedure Act**, the issues being raised now are *res-judicata*.

9. In paragraph 10 of the supporting affidavit, the applicant deponed that this court lacks the jurisdiction to hear and determine the question regarding who between the deceased and he was the owner of the land parcel; that under **section 13** of the **Environment and Land Court Act** and **Article 162 (2)(a)** of the Constitution the court with power to deal with the dispute is the Environment and Land Court. This point is not relevant now, but the only thing to point out is that when the applicant and his brother petitioned the Kiambu Court they sought to inherit their father's (the deceased) estate. The estate comprised the parcel in question. The applicant cannot be allowed to, on the other hand, say the parcel belonged to his father and, on the other hand, say that their father had ceased to be the owner and that the land had become theirs.

10. In conclusion, the application has no merits and is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2021.

A.O. MUCHELULE

JUDGE