



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 33”B” OF 2013

(formerly Embu Succ No. 177 of 2011)

IN THE MATTER OF THE ESTATE OF THE LATE JOTHAM WANJOHI KARIITHI (DECEASED)

EMMAH WANGITHI MAINAAPPLICANT

V E R S U S

MARY WANJIKU WANJOHIRESPONDENT

RULING

1. This matter relates to the Estate of Jotham Wanjohi Kariithi, deceased. A Grant of Letters of Administration was issued on 28/3/1995 and confirmed on 7/11/1995. What was pending before this court is an application dated 15/9/2011 filed by Emma Wangithi Maina brought under **Rule 76 of the Law of Succession Act and Rule 44 Probate and Administration Rules** seeking revocation/annulment of the grant.

2. However, before the application could be heard and determined, the respondent Mary Wanjiku Wanjohi file a notice of preliminary objection based on the grounds that –

- a) The application dated 15/9/11 is res judicata.**
- b) The issues raised and orders sought were fully determined at Nyeri Misc. Succession Application number 4 of 1996.**
- c) That the present application amounts to an appeal to this court against its own orders.**
- d) The application is incompetent bad in law and a waste of courts time.**

3. I directed that the Preliminary Objection be heard first. The parties agreed to file submissions. For the respondent submissions were filed by Wanjiru Wambugu Advocates. It is submitted that vide an application dated 15/1/1996 **Misc Application No. 4/1996** one Wilfred Jotham sought orders for revocation of grant on the ground that the grant was obtained fraudulently by concealment from the court facts material to the case. The applicant herein Emma Wangithi also filed an application in Misc. Application No. 4/1996 seeking revocation of grant on the ground that the grant was obtained fraudulently by making of a false statement and concealment from court of something material to the court (sic). That the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertence.

4. That the court made a ruling on the application where the Judge noted that Emma Wangithi the applicant herein had also supported the application by Wilfred.

The court made a finding that –

- a) The application for revocation was supported by the applicant herein. All beneficiaries were given equal portions.**
- b) Fraud was not proven.**
- c) The fact that one was not catered for when the estate was being distributed or did not get a proper share of the Estate is not a ground for setting aside the grant.**

5. It is submitted that the applicant did not file an appeal. It is submitted that Wilfred Kariithi having raised the issue of unfair distribution and fraud on behalf of his siblings and Emma Wangithi having supported the application, both of their interests and claims were fully

determined in the ruling of 16/12/1999.

6. For the Applicant, Emma Wangithi Maina, she opposed the preliminary objection and submits that her application is premised on fraud and cancelation (sic) of material information from court. That the doctrine of res judicata, specifically **Section -7- of the Civil Procedure Act (Cap 21)** does not apply in succession matters save where the Law of Succession provides for its application. That Misc. Application 4/1996 does not form part of the basis in which the application dated 15th September is premised and does form part of the proceedings herein.

7. She further submits that there is a question of fact as to whether the issue raised in the Misc App.No. 4/1996 involves the same parties and same issues. That the respondent needs to adduce evidence. That for the doctrine of res judicata to apply the respondent has to establish:-

- **Existence of a previous decision on the same issue.**
- **A final Judgment on merit**
- **Involvement of the same parties in privity with the same parties.**

That these grounds have not been established and the Preliminary Objection lacks merits.

8. I have considered the application and the submissions. The issue which arises for determination is res judicata.

Res Judicata.

Section -7- of the Civil Procedure Act embodies the doctrine of res judicata it provides:-

“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.”

9. The doctrine of res judicata ensures that there is finality in decisions and an end to litigation. It also saves judicial time and resources. So where a court with competent jurisdiction makes a decision in a matter involving the same parties litigating over the same issue, a party cannot go back to the same court to litigate over the same issue. The Court of Appeal in the case of **John Florence Maritime Services Limited –v- Cabinet Secretary for Transport and Infrastructure & 3 Others 2015 eKLR** stated:-

Res judicata is not a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been split and is now sufficiently settled. We therefore do not wish to re-invent any new wheel. We can however do no better than reproduce the reindatement of the doctrine many centuries ago captured in the case of **Henderson –v- Henderson (1843) 67 ER 313.**

“where a given matter becomes the subject of litigation in an adjudication by a court of competent jurisdiction the court requires the parties to that litigation to bring forward their whole case and will not (except under circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by parties to form opinion and pronounce a judgment but not every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time .”

10. The court stated that the ingredients of res judicata are:-

“that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar.

- that the former suit should be the same parties, or parties under whom they or any of them claim litigation under the same title.

- that the court or tribunal before which the former suit was litigated was competent and determined the suit finally.”

11. It is easy to discern the issue which was before the court leading to the ruling which was given. That will help to determine whether the issue is res judicata. It also helps to determine who were the parties and whether the issue was determined.

12. In the **Misc Application No. 4/1996** at the High Court of Kenya at Nyeri the parties were;

Wilfred Jotham Kariithi – Applicant

Mary Wanjiku Wanjohi – Respondent.

13. The issue which was before the court was revocation of grant under **Section 76 of Law of Succession Act Rule 44 P & A Rules** issued in the estate of the deceased. It was based on the ground that the grant was obtained fraudulently by concealing material facts. The application for revocation of grant was supported by Emma Wangithi Wanjohi.

14. In the ruling dated 16/12/99 Justice Juma dismissed the application and stated that fraud on the part of the respondent in obtaining the grant was not proved.

15. The issue of revocation of grant was therefore dealt with exhaustively. The applicant Emma Wangithi Wanjohi was a party as shown by annexure WMI to the affidavit of Erastus Waihura Wanjohi sworn on 5/7/16 she supported the application for revocation of grant and the issue of revocation of grant was determined.

16. The applicant in the present application seeks an order for revocation of grant on the ground that the proceedings were defective in substance and the grant was obtained fraudulently by making false statements and concealment from court something material.

17. In the light of the ruling by Justice V. V. Juma of the High Court, the issue of revocation of grant was determined. The issue of revocation of grant was before the court, it was determined between the same parties. The court which gave the ruling was competent as provided under **Section 47 of the Law of Succession Act** which states –

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

18. The applicant has submitted that **Section -7- of the Civil Procedure Act** does not apply in succession proceedings. This submission is not correct. **Rule 63 Probate and Administration Rules** specifically refers to application of **Civil Procedure Rules** and High Court (Practice and Procedure Rules). It does not refer to the **Civil Procedure Act**. The preamble to the **Civil Procedure Act** states that it is in **Act of Parliament** to make provision for procedure in Civil Courts under **Section -2- of the Act** it is provided that the Act applies in proceedings in the High Court. There is therefore no bar to raising any issue based on the **Civil Procedure Act** in succession matters. **Civil Procedure Rules** are subsidiary legislation and the **Law of Succession Act** has its own elaborate Rules. That explains why only the specified **Civil Procedure Rules** are applicable as they are relevant under the **Probate and Administration Rules**. The doctrine of res judicata is provided under the **Civil Procedure Act**. It applies in Succession matters may be raised by a party for determination by the court depending on the circumstances of the case.

19. I find that the issue of revocation was determined by a court with competent and concurrent jurisdiction. The issue is therefore res judicata and cannot be entertained by this court. I order as follows:-

- 1. The preliminary objection is allowed.**
- 2. The application dated 15/12/2011 is res judicata and is therefore struck out with costs.**
- 3. Costs of the application and the preliminary objection is awarded to the respondent.**

Dated at Kerugoya this 29th Day of May 2020.

L. W. GITARI

JUDGE