REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 58 OF 2016

IN THE MATTER OF THE ESTATE OF THE ESTATE OF GITUBIA GATHUMU (DECEASED)

RULING

1. For determination is the Summons filed on 21st June, 2018, and expressed to be brought under Section 2(2), 47, 70, 71 and 98 of the Law of Succession Act. The Applicants **Dorcas Wambui Kamau**, **Mary Njeri Gitubia**, **Esther Muthoni Gitubia** and **Hannah Nyakarura Mbugua** sought an order to appoint Hannah **Nyakarura Mbugua** an administrator in this estate. And further that, the estate assets, namely, **Githunguri/Rioki/102** and **Githunguri/Rioki/T.165** be distributed equally among all the beneficiaries of the estate who are named in the summons.

2. Hannah Nyakarura Mbugua swore the affidavit in support of the application on her own behalf and on behalf of her co-Applicants. She deposed that the Applicants are daughters of the deceased hence beneficiaries of the deceased's estate. Her contention was that despite there being a judgment in **Githunguri Succession Cause No. 57 of 1975**, distribution of the deceased's estate has never taken. She proposed equal distribution of the estate among all the surviving beneficiaries.

3. The summons was opposed by **Daniel Kimani Gitubia** through his replying affidavit filed on 26th October 2018. He asserted that a partial decree was issued pursuant to the judgment delivered on 8/5/1976 after a full hearing of the matter and that the deceased's estate consisted of several assets which he listed. He further deposed that this is an old matter and that the said judgment has never been appealed. He proposed that he be appointed as the administrator and the mode of distribution provided by the trial court in 1976 be confirmed.

4. On 26/3/19 parties recorded a consent that Daniel Kimani Gitubia and Hannah Nyakarura Mbugua be appointed as joint administrators and that the deceased beneficiaries be substituted. Further, the court directed the parties to file written submissions on the question whether the matter is fully determined under the law. The Applicants submitted that they were not provided for in the distribution of deceased's estate, thus seek for redistribution of **LR No. Githunguri/Rioki/102**. Her contention was that the portion measuring 1.3 acres therein and which had been assigned to **Philis Wanjiru Gitubia** (the Applicants' deceased mother) in the lower court judgment was not included in her estate for distribution in Githunguri Succession Cause No. 28 of 2001. The court was urged to vary the orders made in 1976 and grant the said share due to their mother to the Applicants. Reliance was placed in the case of **Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others (2015) eKLR**.

5. For his part , Daniel Kimani Gitubia argued that the estate of the deceased herein was distributed by the court in a judgment delivered on 8/5/176 and a partial decree issued on 8/5/1976 and as such the land parcels **LR No. Githunguri/Rioki/102** and **Githunguri/Riuki/T.165** are not available for distribution. He submitted that the only issue in contention is the wording of the judgment in the lower court which referred to Phylis and her young children as the beneficiaries of the share in the former parcel. He contended that the law applicable in the material period was the Kikuyu Customary Law under which female children could not inherit from the estate of their deceased father; that in any case this court cannot reopen the question of the share due to Philys Wanjiru because the issue had been determined. Reliance was placed on among other cases, the case of **Githongo v Munya (2008) e KLR**. In his view the reference in the lower court judgment to the younger children of Philis was to Daniel Kimani Gitubia and Stanley Kamande Gitubia, her younger children. He pointed out that the Applicants received larger portions of their mother's estate to compensate them for not sharing in their father's estate. The court was urged to allow **Daniel Kimani Gitubia** and **Stanley Kamande Gitubia** to take their share of **Githunguri/Rioki/102** which was previously held in trust for them by their mother.

6. The court has considered the prayers in the summons filed on 21st June 2018 and the Replying affidavit filed by Daniel Kimani Gitubia on 26.10.18. The court has also perused entire record herein in light of the affidavit evidence and the submissions of the parties in compliance with the directions given by this court on the question whether this matter is fully determined under the law. There is no dispute that the Applicants and Daniel Kimani Gitubia are among the surviving children of Gitubia Gathumu, the deceased herein and Phyilis Wanjiru Gitubia the deceased's second wife and that estate of Gitubia Gathumu comprised of two immoveable and other assets, namely:

a) Land parcel LR No. Githunguri/Rioki/T. 165 – measuring 0.10 ha;

b) Land parcel LR No. Githunguri/Rioki 102 – measuring 1.48 ha;

c) Shares in Rioki Estate Co. Ltd;

d) Shares in a business building at Rioki Trading Centre; and

e) Shares in Kiburi House -a business enterprise.

7. By a judgment delivered on 8th May 1976 in Succession Cause No. 57 of 1975, the District Magistrate Githunguri distributed the estate and subsequently issued a Partial Decree respecting the asset (b) above only. **Phylis Wanjiru Gitubia** (the deceased's wife) in whose name a share measuring 1.3 acres in asset (b) was by the terms of the decree to be registered died on 25th November 1999 and a Succession Cause No. 28 of 2001 was filed and concluded before the subordinate court at Githunguri.

8. Subsequently in the Succession Cause No. 57 of 1975 in the Estate of Gitubia Gathumu, the court on 18/9/03 granted an application that the partial decree be executed by way of subdivision of the land parcel No. LR Githunguri/Rioki/102. Seemingly the decree could not be executed as a restriction had been lodged on 29th October 2007. This prompted the application filed on 12th February 2010 seeking the removal of the restriction on the said property. After several adjournments the lower court made the following observations and directions on 17.11.14:

> **"This matter appears to be an old matter with a partial decree and commenced way before coming into force of Succession Act Cap 160. Though I am aware of Section 2(2) it is only prudent that any application be dispensed with in the High Court as I don't believe I have jurisdiction to set aside partial decree. In the premises I direct that the matter be transferred to the High Court for any order pending to be dispensed with. I have invoked the provisions of rule 40(9) of the Probate and Administration Rules. It is so ordered."**

9. There is no record of an application seeking the setting aside of the decree as the only pending application at the time of the order of transfer was that filed on 12th February 20120 seeking the raising of restriction orders in respect of the suit property, LR Githunguri/Rioki/102. Upon the transfer of the cause to this court, Ngugi J ordered the objectors, whom I presume to be the present Applicants in the summons filed on 21/6/18 led by **Hannah Nyakarura Mbugua** to file a summons for revocation of grant within 60 days. On appearing before him on 28/9/17 the said objectors through Hannah Nyakarura sought more time to take steps in the matter. No application had been filed by Hannah Nyakarura and her sisters at the expiry of the period given by Ngugi J. What they proceeded to do next was to file the instant summons dated 29/5/18 and filed on 21st June, 2018 seeking the distribution of the estate. When the summons came up for hearing inter parties on 26/3/19, the parties recorded a consent to appoint Hannah Nyakarura Mbugua and Daniel Kimani Gitubia as joint administrators. This consent was followed by the direction of this court earlier referred to.

10. The judgment and decree of the lower court concerning the distribution of the estate of Gitubia Gathumu has never been the subject of appeal and the Applicants seemingly ignored the directions given by **Ngugi J** to file an application for revocation of grant or such equivalent application. It is my considered view for the foregoing reasons that the entire application filed on 21st June 2018 is caught up by the *res judicata* rule. There is a valid judgment of a competent court which has never been set aside or varied. The fresh application seeking the redistribution of the estate of the deceased herein is misconceived. Secondly the window granted to the Applicants by Ngugi J to file an application for revocation has long closed.

11. Therefore, so far as the question of distribution of the estate is concerned, this court could only revisit the matter on an appeal, or in an application for revocation or for review. In the case of **John Florence Maritime Services Ltd and Another v Cabinet Secretary for Transport and Infrastructure and 3 Others [2015] e KLR,** the Court of Appeal considered at some length the application of the doctrine of *res judicata* generally and to constitutional petitions specifically. The Court had this to say:

> **"The doctrine of res judicata in Kenyan law is embodied or anchored on Section 7 of the Civil Procedure Act. It is in these terms:-**
>
> **"7. Res judicata**
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> **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."**
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> **From the above, the ingredients of res judicata are firstly, 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. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (*see* Karia & Another v the Attorney General and Others [2005] 1 EA 83).**
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> ***Res judicata* is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313:-**
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> **"…..where a given matter becomes the subject of litigation in and 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 special circumstances) permit the same parties to open the same subject of litigation in respect of 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 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….."

See also Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263. Simply put *res judicata* is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked, and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality? If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit….

We are also not aware of any legal edict that an objection to a suit taken on the basis of res judicata must be so taken on a formal application. The appellants did not cite to us any such authority….

The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."

12. In relation to the distribution of the land parcel **LR. No. Githunguri/Rioki/T. 165** – measuring 0.10 ha - the judgment of the lower court is unambiguous; this parcel was assigned to Joseph Mungai the eldest son of the deceased's first wife. However, for whatever reason, a partial decree issued only in respect of the land parcel **LR Githunguri/Rioki/102** (hereafter the suit property) which appears in my view to be at the heart of the confusion exhibited in the parties' submissions. It is a travesty of justice that since 1976 when judgment herein was given, the administration of the estate is still incomplete. As a result of the delay, many of the initial beneficiaries have since died. Any of the parties now before the court who may have been aggrieved by the said judgment could have appealed but did not. It is self-evident that the summons filed on 21st June 2018 raises matters which are *res judicata* and must be hereby struck out and the Court hereby so orders. But there is more to be said in order to lay to rest the ghost of this dispute.

13. Reading from their submissions, it appeared that the parties have different interpretations of the actual purport of the judgment as concerns the distribution of the land parcel **LR. No. Githunguri /Rioki/102.** Through the parties' submissions it is clear that the parties herein are held up in a legal conundrum arising from the wording of the judgment and the issuance of only a partial decree after the judgment.

14. In the interest of justice, this court considers it necessary to clarify the position. First, it is apposite to state that the judgment of the subordinate court must be read as a whole, and not in a selective manner. It is however correct that the Kikuyu customary law on succession would have applied during the material period as the Law of Succession Act of 1981 had not come into force at the time of the death of the deceased herein. The trial court did not however at any point identify by name or gender of the ***"younger children"*** of Phylis Wanjiro (as her name is spelt in the said judgment) who, with Phylis were to benefit from the portion measuring 1.3 acres out of the suit property. The identity of the ***"younger children of Phylis Wanjiro"*** referred to in the judgment must be inferred from the law applicable at the time and the entire judgment of the lower court.

15. The relevant portion of the said judgment states that:

> **"In view of the foregoing reason I reject it (alleged will) and rule (that) the deceased died intestate and while considering the proper method of distributing the estate of the deceased I shall adhere to those lines …. During my visiting the land I noted – Phylis Wanjiro and her children (excluding John Mungai who is her first son), do live on one part of it. Phylis Wanjiro's house is built on the said part. She has also about 600 mature coffee trees growing there. I rule that Phylis Wanjiro and her younger children, excepting John Mungai who has got another piece of land which he bought with his own money, shall take 1.10 acres out of this land viz. Githunguri/Rioki/102. I also rule that Phylis Wanjiro's 1.10 acres share shall embody the part where her coffee is growing. Having given Phylis Wanjiro and her young children the share of 1.30 (**sic**) acres, there now remain 2.4 acres undistributed."** (emphasis added)

16. The court proceeded to give a share measuring 0.8 acres to **Joseph Mungai** a son of the deceased's first wife and 0.95 acres to *"**John Mungai** the eldest son in the house of Phylis Wanjiro (the second wife); 0.60 acres to **Mbugua Mwega** son to **Ben Mwega** (deceased) son of the 1st wife of the deceased herein, on behalf of his brothers."* The land was to be carved out of the portion containing the grave of Ben Mwega.

17. While considering the distribution of the deceased's shares in Lioki Estate the court stated:

> **"Phylis Wanjiro and her sons contended these two shares should go to her younger son, namely Peter Muiruri. I note all the sons have, in my judgment, been each allotted with at least a property. I see no reason, therefore, for not allotting these two shares to the said Peter Muiruri s/o Gitubia."**

18. there was any doubt that the distribution of the assets of the deceased was based on the customary patrilineal inheritance system, in this case Kikuyu customary law, the final orders in the judgment remove any such doubt. With the exception of Phylis Wanjiro, all the other beneficiaries are the male children of the deceased. That was clearly in accordance with the customary law in force prior to the coming into force of the Law of Succession Act. Thus, prior reference in the judgment of the court to Phylis Wanjiro and "*her younger children"* must refer to the male children younger than the eldest son **John Mungai** who received a separate share of his own, measuring 0.95 acres out of the suit property.

19. The original file in this cause disappeared from the registry of the subordinate court at Githunguri. However, the Succession Cause No.28 of 2001 in respect of the estate of Phylis Wanjiro alias Phelis Wanjiru Gitubia was forwarded to this court and is on record. According to material available in this cause, and according to the petition and other material filed in that cause, Phelis Wanjiru Gitubia had the following children:

1) John Mungai Gitubia - (deceased)
2) Stanley Kamande Gitubia - (deceased)
3) Daniel Kimani Giutubia
4) Peter Muiruri Gitubia - (deceased)
5) Esther Muthoni Gitubia
6) Dorcas Wambui Kamau
7) Hannah Nyakarura Mbugua
8) Ruth Wanjiku Gitubia - (deceased)
9) Mary Njeri Gitubia

20. From the foregoing it goes without saying that the younger males entitled under the 1976 judgement to the share of 1.30 acres with their mother Phylis are **Stanley Kamande Gitubia**, **Daniel Kimani Gitubia** and **Muiruri Gitubia** all being younger than their older brother **John Mungai Gitubia** who had already received his own share. Under Kikuyu customary law, which the court below clearly applied, the widow held a life interest on land which terminated upon her death, whereupon the land reverted to the sons and would be inherited by the male children. In a sense, Phylis Wanjiru Gitubia was to hold the land ordered to be registered in her name for the eventual benefit of her younger sons. Little wonder that the said portion did not form part of her estate distributed in Githunguri Succession Cause No. 28 of 2001. See **Eugene Cotran's Restatement of African Law, Kenya Vol. 2: The Law of Succession,1969 (London, Sweet & Maxwell).**

21. From the foregoing, it should be clear that Stanley Kamande Gitubia, Daniel Kimani Gitubia and Peter Muiruri Gitubia being the male children younger than John Mungai are the persons entitled in light of the contents of the judgment of the lower court, to the share of the 1.30 acres assigned to Phylis Wanjiro Gitubia and *"her younger children"*. It is too late in the day for the Applicants to attempt to turn back the clock. The above clarification was deemed necessary in order that the administration of this estate can be completed. In addition, this court will direct that any restriction still subsisting in respect of the suit property be lifted so that the proper beneficiaries or if deceased, their legal representatives can receive their share of the suit property in accordance with the 1976 judgment.

22. The legal conundrum having been thus resolved; it is imperative that the entire administration of the estate herein be completed. Only a partial decree dated 18th November 2003 respecting one asset, that is Land parcel LR No Githunguri/Rioki/102 , was issued by the court even though there were other assets distributed in the judgment of 8th May 1976. Section 2 (2) of the Law of Succession Act provides that:

"The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless, the administration of their estates shall commence or proceed so far as possible in accordance with this Act."

23. Parts VII and VIII of the Act *inter alia* provide for the administration of estates under the Act. On 26/3/19, the parties recorded a consent to the effect that Daniel Kimani Gitubia and Hannah Nyakarura Mbugua be appointed as joint administrators. Accordingly, a grant will issue in the joint names of the two persons. At the expiry of 30 days of this ruling, a confirmed grant will issue incorporating all the assets of the deceased as distributed in the judgment of 8th May 1976, but subject to the clarification made in this ruling regarding the share of Phylis Wanjiro w/o Gitubia of 1.30 acres out of land parcel No. Githunguri/Rioki/102, which portion will be shared equally by **Stanley Kamande Gitubia, Daniel Kimani Gitubia** and **Peter Muiruri Gitubia** or if deceased, their respective legal representatives. Parties will bear own costs.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 23RD DAY OF JULY 2020

C. MEOLI

JUDGE