



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO 46 OF 2017

IN THE MATTER OF THE ESTATE OF REBECCA NJERI KAMAU (DECEASED)

- 1. SAMUEL NDAMBO NGUGI**
- 2. PETER MUCHINA NGUGI**
- 3. JOSEPH NJUGUNA NGUGI**
- 4. JAMES MACHARIA NGUGI..... APPLICANTS**

VERSUS

ANTONY MUCHINA KAMAU..... RESPONDENT

RULING

1. On 21st October 2014, the four Applicants herein led by **Samuel Ndambo Ngugi** filed a summons seeking revocation of the grant made to **Rebecca Njeri Kamau** in **Kiambu CM's Succession Cause No.19 of 1993**. On grounds *inter alia* that the land parcel **LR No. Loc/Gakarara/1156/23** included among assets in that cause, was not the property of **Paul Kamau Ngugi** who was the husband to Rebecca Njeri Kamau, but the property of one **Samson Ngugi Kamau**, the father to the said Paul Kamau Ngugi and Applicants.
2. Anthony Muchina Kamau the Respondent herein filed an affidavit in opposition to the application and on 4th June 2018 he filed a Notice of a preliminary objection (P.O). The key grounds are that the Applicants had filed a similar application in **NRB HC Succession Cause no. 605 of 2002** which was heard and determined, and a further application in **NRB HC. Succession Cause No. 3711 of 2004** which was also determined. Therefore, it was asserted that the instant application is defective, incompetent, misconceived and an abuse of the court process.
3. The revocation application was due to be heard on 24th September, 2019 but on 5th July, 2019 the Applicants filed a fresh summons seeking an earlier hearing date for the purpose of taking the evidence of a witness identified as **Beth Mbura Samson**, alleged to be over 100 years old and suffering from physical infirmity and memory lapses.
4. To this latter application the Respondent filed a preliminary objection on 16th July 2019 which is in similar terms as the previous one raised in respect of the first summons. A further ground was raised, namely, the anomaly that the application for revocation seeks to revoke a grant made in the estate of Rebecca Njeri Kamau issued to the self-same person. On 23rd July, 2019 the Respondent filed a bundle of copies of decisions relating to previous court proceedings concerning the same matter.
5. The preliminary objection was argued on 30th July, 2019. It was argued on behalf of the Respondent that the impugned grant was issued in the succession cause in respect of **Paul Kamau Ngugi**, namely, **Kiambu CM's Succession Cause no. 19 of 1993**, and not in a cause relating to the estate of Rebecca Njeri Kamau.
6. It was asserted that the subject matter of the present cause, has also been the subject of concluded litigation and a pending appeal whose particulars are stated in the Respondent's affidavit. Counsel for the Respondent referring to the decision of **Koome, J** in **NRB Succession Cause No. 3711 of 2004** pointed out that the Applicants had been advised by the Judge, to file a substantive suit in respect of their claim to a portion of the land parcel LR. No. LOC. 4/Gakarara/1156/23. The Court was urged to uphold the objection as the matters raised in this suit have been determined in previous causes.
7. The Applicants' response was that the Preliminary Objection did not amount to a plea of *res judicata* as envisaged in Section 7 of the Civil Procedure Act; that for the plea of *res judicata* to succeed the parties and subject matter must be the same in the former and successive suit. Counsel for the Applicants asserted that the present Applicants had not been involved in the previous litigation. Moreover that, the subject matter in **NRB HC Succession Cause no. 3711 of 2004** related to the estate of Paul Kamau Ngugi and that the present Applicants were at liberty to invoke the provisions of Section 76 of the Law of Succession Act in lieu of an appeal.

9. To the latter assertion counsel for the Respondent countered in a rejoinder that a party cannot file both appeal and revocation application in respect of the same subject matter; that the change in parties' names when the dispute remains the same is of no avail; and that the Respondent ought not to be involved in this matter.

10. The court has considered the record herein as well as the submissions made in respect of the preliminary objection. Undoubtedly, the summons for revocation filed on 21st October 2014 relates to the grant made to **Rebecca Njeri Kamau** in respect of the estate of her deceased husband **Paul Kamau Ngugi**. This is evident from the depositions in the supporting affidavit sworn by **Samuel Ndambo Ngugi** in support of the summons. Thus, the reference in the title of the summons to the estate of Rebecca Njeri Kamau (hereafter Rebecca) could only result from deliberate mischief or careless error on the part of the Applicants. The question to be determined is whether these proceedings are *res judicata*.

11. 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

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.”

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*).

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-indentation of the doctrine many centuries ago as captured in the case of *Henderson v Henderson [1843] 67 ER 313:-*

“.....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. From the undisputed material on record, the subject matter of these proceedings namely, land parcel **LR No. LOC.4/Gakarara/1156/23** has been the subject of several previous proceedings, some of which are concluded. The first, is obviously **Kiambu CM’s Succession Cause No. 19 of 1993** filed by Rebecca upon the demise of her husband Paul Kamau Ngugi in whose name the suit property was registered. The grant issued to Rebecca was subsequently confirmed and rectified. That proceeding spawned two successive applications for revocation before the High Court at Nairobi, the first being **NRB HC Succession Cause No. 605 of 2002** and thereafter **NRB HC Succession Cause No. 3711 of 2004**. Both applications were heard and determined. Further, an appeal, namely **NRB HCCA No. 80 of 2005** was also filed against the order of the subordinate court made on 9th December 2005 in **Kiambu CM’s Succession Cause No. 19 of 1993**.

13. The above order of 9th December 2005 was for the eviction of **Nahashon Kamau, Kamau Ngugi** and **Julius Wainaina** from the land parcel **LR No. LOC.4/Gakarara/1156/23**, hence the appeal by the three to the High Court. It is not clear whether the appeal has been heard. However, the grounds in the memorandum of appeal stated *inter alia* that:

“2. The learned magistrate erred in failing to appreciate that the land parcel no. LOC. 4/GAKARARA/1156/23 (Kandara Market) does not form part of the estate of Paul Kamau Ngugi in its entirety

4. The learned magistrate erred in fact and in law in upholding illegality when materials supplied by appellants to demonstrate proprietorship swayed to the fact that land parcel no. LOC. 4/GAKARARA/1156/23 (KANDARA MARKET) belonged to Paul Kamau Ngugi and BROTHERS and the brothers are Nahashon Kamau and Kamau Ngugi” (sic).

14. **Koome J** (as she then was) in rejecting the summons for revocation filed in **NRB Succession Cause No. 3711 of 2004** recounted the history of the matter the proceedings and referred to the decision of **Waweru J** in **NRB Succession Cause no. 605 of 2002** before concluding that:

“I have therefore considered the application and the supporting affidavit, and I have also perused the court records. This application is similar to the one that was dealt with by Hon. Waweru, J. The reason why the certificate of amended grant was declared null and void (by Waweru, J) was because there was no record to show that the court ever issued an order of amendment.

In the present case, there is an order by the learned magistrate, **G. M. Njuguna** made on 6th May, 2004. The only problem is that the Applicants say were never served with the application for amendment ... The issue for determination herein is whether in the absence of service, the applicant is entitled to the prayers sought. The Applicant’s grievance is to do with the amendment that included **Loc. 4/Gakarara/1156/23** in place of **Kandara Market T./1156** (in rectified grant).

In my humble view the proper procedure was to file an application under **Rule 41(1)(3)** seeking for the determination of the declared share or his share of the suit premises. This ought to have been done before the grant was confirmed. Since the grant was confirmed, and the applicant claims some interests over the suit premises, the available remedy is to file a substantive civil suit against the Petitioner (Rebecca) as the administrator of the estate”.

15. Before leaving the above case, it is apposite to observe that the Applicant therein was **Joseph Kamau Ngugi** while the Applicants in the earlier proceedings before **Waweru, J** in **NRB Succession Cause No. 605 of 2002** were **Joseph Kamau Ngugi** and **Nahashon Kamau Ngugi**. Both applications were against Rebecca and related to the property described as **Loc.4/Gakarara/1156/23** hereafter the suit property. The suit property was also the subject matter of two suits filed in 2012 and 2013. The first, **Nyeri HCCC 22 of 2012** was brought by **Beth Mbura** and **Nyambura Samson** described as the widows of **Samson Ngugi** the alleged owner of the suit property, against the present Respondent **Anthony Muchina Paul**. The plaint in the matter is silent on the succession cause in Kiambu or indeed any other previous litigation. It was averred that the widows had not filed a succession cause even though there was an agreement between them on how to share the said property and that “there was no other suit pending in any competent court over the same style and subject matter” (sic). The orders sought therein was eviction of the Respondent from the suit property.

16. The fate of the said suit is unknown, but on 18th October, 2013, **Samuel Ndambo Ngugi**, the first Applicant herein filed **Civil Suit No. 173 of 2013** in the RM’s Court at Kandara against the present Respondent. It was averred therein that **Samson Ngugi** was the proprietor of land parcel **Loc.4/Gakarara/1156/23** prior to 1965 when the ownership was transferred to new proprietors namely **Paul Kamau and Brothers**. The averments in Paragraphs 7 and 8 of the plaint bear *verbatim* replication:

“7. The late Rebecca Njeri Kamau, (deceased) while applying for confirmation of grant for the estate of Kamau Ngugi included the whole Plot No. Loc4/GAKARARA/1156/23 as part of the estate of the deceased and acquired a title deed to that effect whereas she was only entitled to a ninth share of the same and/or a third (1/3) share from unit “C” of the portion which formed Grace Wambui’s unit as per the sharing out done on 6th January, 1996.

8. The plaintiffs’ claim against the defendant as the administrator of the estate of Rebecca Njeri Kamau (deceased) is for a declaration that the land parcel No. Loc.4/GAKARARA/1156/23 should be shared out between Sophia Nyambura, Beth Mbura and Grace Wambui as per proceedings of 1996 (alleged agreement between the three houses in paragraph 6) and that the title deed issued to Rebecca Njeri Kamau be cancelled forthwith” (sic).

17. The final prayers are for a declaration that the suit property belonged to the three widows of Samson Ngugi, namely Sophia Nyambura, Beth Mbura and Grace Wambui and an order for the cancellation of the title deed issued to Rebecca in respect of the suit property and a new title to be issued in the names of the two widows and the Respondent herein to hold the suit property in trust for members of their respective households who are stated.

18. The pleadings in the 2012 and 2013 suits are plain and speak for themselves – the same issues determined in the **Kiambu CM’s Succession Cause No. 19 of 1993** and before the High Court at Nairobi were being presented to different courts for fresh litigation. Once more, the current status of **HCCC No. 22 of 2012** and **Kandara RMCC No. 173 of 2013** is unknown but a year since the filing of the latter suit, the Plaintiff therein together with his co-applicants lodged the present application for revocation of grant. Thus, it is idle in my respectful view for counsel for the Applicants to claim that the other proceedings filed prior to the present application relate to a different subject matter.

19. How about claims that the parties in the causes are different? The identities of the different claimants and applicants in the various litigation is revealed in the plaint and specifically the list of beneficiaries in prayers (b) of the plaint filed in **Kandara RMCC No. 173 of 2013**. First, the Respondent herein is described in that suit as the administrator of the estate of Rebecca Njeri Kamau now deceased. Matching the list of beneficiaries listed in prayer (b) of the plaint, and copies of the pleadings and decisions placed before the court, it becomes evident that:

a) the widows of Samson Ngugi Kamau (the present applicants’ father) that is Beth Mbura and Sophia Nyambura, are the Plaintiffs in **Nyeri HCC 22 of 2012**;

b) From Beth Mbura’s house:

i) the 1st Applicant in this case is also the Plaintiff in **Kandara RMCC no. 173 of 2013**;

ii) Nahashon Kamau Ngugi was an applicant in **NRB HC. Succ. Cause No. 605 and NRB HCCA No. 80 of 2005**;

iii) Peter Muchina Ngugi and Joseph Njuguna Ngugi are the 2nd and 3rd Applicants herein;

iv) Julius Wainaina, was an appellant in **NRB HCCA No. 80 of 2005** as earlier noted;

c) From the house of Sophia Mbura:

i) James Macharia Ngugi is the 4th Applicant herein;

ii) Joseph Kamau Ngugi was an applicant in **NRB HC Succession Cause no. 605 of 2002 and NRB HC Succession Cause No. 3711 of 2004**.

20. Evidently, Rebecca, whose husband hailed from the 3rd house of Samson Ngugi Kamau was until her death the Respondent in all the cases, which unfortunate mantle seems to have now fallen upon Anthony Muchina Kamau, the Respondent herein. In this scenario, it is disingenuous with due respect, for counsel for the Applicants to assert that the parties in the multitude of litigation herein are different. The parties are all members of the three houses of Samson Ngugi Kamau. They have been feuding and litigating over the same suit property. The fact that different members of them were involved in different suits make no difference – the claim was the same, namely that the suit property belonged not to deceased Paul Kamau Ngugi but to their deceased father Samson Ngugi Kamau. The script has not changed since the litigation commenced despite different characters entering the stage, sometimes in camouflage costumes, at different times and acting their roles on behalf of others behind the stage.

21. Thus, the citation of the estate of Rebecca Njeri Kamau in the title of the instant cause was as mischievous as it was deliberate; the intention being to disguise the true nature of the proceeding. The claimants in this cause, as others before them are all litigating under the same title in terms of Section 7 of the Civil Procedure Act. In my considered view, the objection raised by the Respondent has merit. The Applicants are barred from re-litigating a dispute that has been determined by competent courts. This cause in my view represents an egregious abuse of the process of the court by the Applicants and must be halted at the earliest opportunity as a way of the court communicating its displeasure at the wastage of time occasioned to different courts through recycled litigation for almost two decades. Litigation must come to an end.

22. The upshot is that the court upholds the preliminary objection and strikes out the summons for revocation filed on 21st October 2014 together with all subsequent applications. Costs are awarded to the Respondent.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 7TH DAY OF AUGUST 2020.

C. MEOLI

JUDGE