REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 793 OF 2010

IN THE MATTER OF THE ESTATE OF MUNGAI MUNDIA (DECEASED)

HANNAH WANJIRU MUNGAI.....................................1ST APPLICANT

ELIUD MUGU MUNGAI..2ND APPLICANT

VERSUS

KARIUKI MUNGAI..RESPONDENT

RULING

1. The application before the Court is a Summons for revocation and/or annulment of the grant issued on 6th October, 2009 and confirmed on 18th May, 2011. The Application is premised on the grounds set out on the face thereof and in the Supporting Affidavit filed by the 1st and 2nd Applicant sworn on 23rd May, 2017. Therein, it was contended that the 1st Applicant was married to the Deceased in the year 1993 under Kikuyu Customary Law. The 1st Applicant deponed that she came into the marriage with three children namely George Kinyanjui, Eliud Mugu Mungai (the 2nd Applicant herein) and Monica Gathoni Mungai; and that their marriage bore three more children namely Joshua Mundia Mungai, Daniel Ngaruro Mungai and PKM.

2. It was the 1st and 2nd Applicants contention that they, as the wife and child of the deceased together with George Kinyanjui Mungai, Monica Gathoni Mungai and PKM who were children of the Deceased, had not been provided for in the Will of the Deceased. It was further contended that PKM is a minor son of the Deceased and has a right to have his needs met out of the estate of the Deceased. The Applicants allege undue influence on the part of the Respondent to explain why they were not included in the will of the Deceased.

3. In submissions dated 12th October, 2018, the Applicants submitted that the Will made by the Deceased had left exposed some dependants and was therefore not capable of being relied upon in distributing the estate of the deceased. The Applicants urged the Court to find that it is in the interest of justice to redistribute the estate of the deceased and make reasonable provision for the Applicants and the other children left out of the Will.

4. The Applicants referred the Court to the decision by Martha Koome J. (as she then was) in the case of **Evelyne Wagitie Kamau & Another v Jane Wanjiru Kamau, Succession Cause no. 522 of 2001** (unreported) wherein, the Court while dealing with a matter of a similar nature, held that it would not serve the interest of justice to leave out the matter of making a reasonable provision for dependants left out of the will despite the fact that the grant had already been confirmed.

5. The Respondent has opposed this Application via a Replying Affidavit dated 2nd June, 2018. In which he deponed that the fathers of the 2nd Applicant and the other children not mentioned in the Will of the Deceased are all alive and provide for the said children. On the issue of whether the Applicants in this case qualified for reasonable provision as provided for under **section 26** of the **Law of Succession Act,** the Respondent argued that without proof of marriage, the 1st Applicant cannot claim to be a wife/Dependant within the meaning of **Section 29** and therefore cannot claim for reasonable provision under **Section 26.** The Respondent further submitted that the 2nd Applicant had not demonstrated in his Application that he is indeed a dependant of the Estate of the Deceased.

6. The Respondent submitted that the 1st Applicant had already filed a similar application which was dismissed by this Court in the Ruling delivered 25th April, 2017. He argued that the said Ruling addressed provisions of **Section 26, 27, 29 and 79** of the **Law of Succession Act** and that the Application was therefore frivolous, vexatious and an abuse of the Court process as the same was *res judicata*.

7. The Respondent urged that the Application as filed by the Applicants be dismissed as it was not properly before the Court as per **Section 7 of the Civil Procedure Act** and that the Applicants had not demonstrated that there was discovery of any new and important evidence

warranting a review of the already existing decision

Analysis and Determination

8. I have considered the application and the rival arguments of both parties. The main order that the Applicant is seeking is the revocation and/or annulment of the grant issued on 6th October, 2009 and confirmed on 18th May, 2011. The Application is premised on grounds that the 1st and 2nd Applicants, George Kinyanjui Mungai, Monica Gathoni Mungai and PKM who are alleged to be dependants of the deceased, were not catered for in the will.

9. I have considered the entire record and note that the applicant had, on 30th July, 2012, made an application for the revocation or annulment of the grant on grounds that the Will written by the Deceased was invalid as the Deceased lacked capacity. The Applicant argued that what was contained in the Will were not the wishes of the Deceased because as the widow of the Deceased, she was not adequately provided for, neither were some of her children.

10. That application was heard and by a Ruling delivered on 25th April, 2017 that application was found to have no merit and was dismissed. The applicant has now returned to this court seeking the same order. This Court is guided by the provision of the Civil Procedure Act, under **Section 7** which states that:-

> **"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."**

11. The question before the Court is whether the issues raised in the current application can be regarded as issues already heard and finally determined. In the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR**, the Court of Appeal held:-

> **"In order to rely on the defence of *res judicata*, there must be:**
>
> **i) a previous suit in which the matter was in issue;**
>
> **ii) the parties were the same or litigating under the same title;**
>
> **iii) a competent court heard the matter in issue;**
>
> **iv) the issue has been raised once again in a fresh suit.**
>
> **What is before us is: can a matter of interlocutory nature decided in one suit be subject of another similar application in the same suit" Does the principle of *res judicata* apply to an application heard and determined in the same suit" We would like to refer to the decision in the case of RAM KIRPAL VS RUP KUARI reported in I.L.R. Vol. VI 1883 Allahabad series.**
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> **……..**
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> **What did the Privy Council say in RAM KIRPAL's case" Their Lordships clearly were concerned about the desirability of bringing an end to litigation and went on to say that Section 13 of act I of the 1877 which is equivalent to Section 7 of our Civil Procedure Act, was not exhaustive, really; and that the law of "res judicata" did apply to a matter decided in the same suit and that upon its general principles it applied to interlocutory proceedings in the same suit."**

12. The Applicant in the instant suit submitted that the Court in its Ruling delivered on 25th April, 2017 did not interrogate the issue of reasonable provision for the children of the Deceased as the main issue then was on revocation of Grant premised under **Section 76 (a)(b) and (c)** and **Section 5** of the **Law of Succession Act.** Both applications as filed by the Applicants seek for the revocation or annulment of the grant. The sole difference between the two applications is that in the instant Application, the son of the 1st Applicant appears as the 2nd Applicant. The issues placed before the Court are essentially the same as those in the first application.

13. In **Gurbacham v Yowani Ekori [1958] EA 450**, the Court of Appeal of Eastern Africa, while considering the doctrine of *res judicata*, made reference to the Judgment of the Vice-Chancellor in **Henderson v Henderson (1), 67 E.R.313** and stated as follows:

> **"In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of 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 the parties to form an opinion and pronounce a judgement, 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."**

14. The instant application as filed by the 1st and 2nd Applicants has raised issues that have already been litigated upon and determined under this Court's Ruling dated 25th April, 2017. A party cannot be allowed to litigate an issue again and again in the same court. This is because the principle of law that litigation must come to an end applies to all kinds of litigation. It would be an abuse of the process of the Court to re-open matters that have been heard and decided on merits, unless the Court is dealing with review or appeal. The Applicants have not made any prayer for a review of the said Ruling.

15. The summons filled by the Applicants in this Court is not merited and is dismissed. The Applicant shall bear the costs of this Application.

It is so ordered.

SIGNED DATED and **DELIVERED** in open Court this **10th day of April, 2019.**

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L. A. ACHODE

JUDGE

In the presence of ………………..….……...Advocate for the Applicant

In the presence of ….........................….Advocate for the Respondent