REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 63 OF 2007

IN THE MATTER OF THE ESTATE OF SAMSON NZIOKI KYUMA (DECEASED)

VINCENT MUSYOKA NZIOKI.....PETITIONER/APPLICANT

VERSUS

STEPHEN KAWINZI NZIOKI

WAMBUA NZIOKI

MUTUKU NZIOKI.....OBJECTORS/RESPONDENTS

RULING

1. This succession cause has been in the courts since 27th February, 2007, when the Petitioner who is a son of the deceased petitioned for grant of letters of administration intestate. Summons for confirmation of grant were filed on 28th October, 2008 and the Objectors filed a summons for revocation of grant on 10th March, 2009 seeking that the grant issued to the applicant be revoked. The same was revoked vide a consent that was recorded by J.N. Mutinda, advocate for the petitioner and O.N. Makau, advocate for the objector on 23.3.2009 wherein the court directed that the 1st objector do petition as a joint administrator and was thus made the 2nd petitioner. On 9th June, 2009, the 1st petitioner/1st objector applied for confirmation of grant of probate and the affidavit was deponed by him He subsequently filed affidavits proposing the mode of distribution. The court heard the application for confirmation and vide judgement delivered on 26th July, 2017 the court confirmed the grant. The applicant was aggrieved by the judgement through her advocates Gladys Gichuki who filed the application dated 4.9.2017 to set aside the judgement that was delivered on 24.7.2017 which application was dismissed on 4th February 2019 hence the instant application dated 25th February 2019.

2. The Applicant in his application dated 25.1.2019 is seeking the following substantive orders:

a. That he be granted leave to act in person.

b. That the judgement entered on 23.3.2009 and the judgement delivered on 24.7.17 and all consequent rulings be set aside and the case be heard de novo on merit.

3. The main grounds for this application as stated in a supporting affidavit sworn by the applicant on 25th February, 2019, were that the court proceeded *ex-parte* with the proceedings and evidence of the judgement was delivered ex-parte on 27.7.17 and yet the applicant was never informed of the court proceedings by the previous advocates who passed away in 2014.Further, that he was taken ill and was not in contact with his previous advocates. The applicant averred that the objector presented an untrue allegation that the deceased did not subdivide his property and yet the subdivision occurred in 1964.

4. The objectors in response filed the preliminary objection and grounds of opposition on 7th May, 2019 where the learned Advocates stated that the instant application is res judicata and may only be challenged on appeal for it raises the same issues that were in the application dated 4.9.2017 that was determined vide ruling dated 4.2.2019. The 1st prayer is not opposed and therefore my issues for determination are firstly, whether the application dated 4.9.2019 is *res judicata*; secondly, whether the issues raised in the application filed on 26.2.2019 wholly or substantially similar to issues raised in the application dated 4.9.2017 where judgement was delivered on 4.2.2019 and thirdly, whether the applicant has satisfied the conditions for setting aside the consent order recorded on 23.3.2009.

5. The court directed that parties file submissions but there are none on record.

6. To ascertain the second issue for my determination, it is necessary to closely examine the issues raised in the dismissed application and the issues presented in this application. Paragraph 16 of the judgement reads in part:-

> *"I am persuaded that the applicant had every opportunity to participate at the hearing held on 22.2.17, and opted not to, he also had 21 days from 15.11.16 when his advocate was on court to file his witness statements but did not do so, and in any event there is no application on record to extend the 21 days that were granted. I am in agreement with the holding by Odunga J. in* ***Yusuf Gitau Abdallah vs Building Centre (K) Ltd & 4 Others*** *(2013) eKLR that a litigant should not be penalised for the mistake of the Advocate where failure to appear in Court was attributed on the Defendant's counsel, however I agree more with the holding in* ***Charles Ratemo Nyamweya v Joyce Bochere Nyamweya & 8 Others (2016) eKLR*** *because I am convinced that the proceedings of 22.2.17 was not ex-parte and the judgement on 24.7.17 was not irregular"*

7. Paragraph 20 reads that

> "*I find that the applicant has not presented sufficient reasons for setting aside the proceedings and judgement …* and in Paragraph 21*... the 1st petitioners application dated 4.2.2017 lacks merit*"

8. From the foregoing, the bone of contention in the application dated 4.2.2017 was the setting aside of what was an ex parte judgement.

9. The court then went ahead to make a final determination on the said issue *as* reproduced in paragraph 7 above.

10. From the foregoing, I find that what was framed as a part of prayers 2 of the application were conclusively handled by the court in the ruling delivered on 4.2.2019.

11. Nevertheless prayer 1 and the remaining part of prayer 2 in the application was not resolved in finality and therefore I find that not all of the issues for determination in the application dated 4th September, 2017 are the same for determination in the instant application.

12. I shall now address what I framed as the first issue for determination. On what constitutes *res judicata*, I adopt the following passage in the dictum of Wigram V-C, in ***Henderson vs Henderson*****(1843) 67 ER 313** as it summarizes *res judicata*:-

> *" … 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 the 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."*

13. When *res judicata* is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case- to ascertain; **(i)** what issues were really determined in the previous case; and **(ii)** whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

14. The test of determining whether a matter is *res judicata* was also summarized in ***Bernard Mugo Ndegwa v James Nderitu Githae and 2 Others,*** **(2010) eKLR** as follows: - (**a)** The matter in issue is identical in both suits; **(b)** the parties in the suit are the same; **(c)** sameness of the title/claim; **(d)** concurrence of jurisdiction; and **(e)** finality of the previous decision. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

15. Prayers 1 and part of prayer 2 capture the issues raised in this case and having found that the same were not finally determined, it means that the same are yet to be determined on its merits.

16. With regard to the 3rd issue, the record bears witness that vide a consent that was recorded by J.N. Mutinda, advocate for the petitioner and O.N. Makau, advocate for the objector on 23.3.2019 the grant issued to the applicant were revoked and the court directed that the 1st objector petition as a joint administrator and was thus made the 2nd petitioner. In its decision in **S M N vs Z M S & 3 Others [2017] eKLR**, the Court of Appeal stated as follows:

> ***"There is no dearth of authorities on the law governing the setting aside of consent judgments or orders, and we are grateful to counsel for citing some of them before us. Generally a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties."***

17. **In Flora N. Wasike vs Destimo Wamboko [1988] eKLR** *the court stated:*

> ***Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983."***
>
> ***In Purcell vs F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;***

> ***"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons..".***

18. In **Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR**, the Court of Appeal stated as follows:

> ***"A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court."***

19. Finally, in **Setton on Judgments and Orders (7th Edn), Vol.1 pg 124** the author states that:

> ***"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... it cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."***

20. In this case, the applicant in his affidavit has not placed before the court any evidence to demonstrate that the consent entered into between the parties on 23.3.2009, which was adopted as an order of the court, was obtained illegally or through fraud. His argument seems to be that the consent should be set aside as he was never invited to fix a date and he was never served with the judgement. However, as demonstration of fraud or any of the grounds for setting aside a consent order has not been placed before the court, I find the orders sought in the remaining part of prayer 2 of the application dated 25.2.2019 to be without merit. The parties hereto are bound by their consent order to revoke the grant that was made in the favour of the applicant and the 1st objector to petition as a joint administrator which he did and is now the 2nd petitioner. In any event the consent was entered way back in 2009 and no explanation has been given by the applicant as to why he had to wait for a record ten years to spring up the present claim. Further the applicant has always been represented by counsels all along who are deemed to have his authority to act for him. Accordingly, prayer 2 of the application is found to lack merit and is dismissed.

21. Upon analysing the facts on record, there is no reason to deny prayer 1 because the same is not opposed and in any case the applicant has the liberty to decide to act in person. Therefore I grant the same. The Petitioner/Applicant's application aforesaid thus succeeds only to that extent while prayer two thereof fails. I need to point out that there is need to adhere to the doctrine of finality in matters. Indeed the appropriate way for the applicant if dissatisfied with the rulings dated 24.7.2017 and 4.2.2019 is to lodge an appeal. This matter has been in court since 2007 and there is need to bring it to a closure.

22. In the result it is my finding that the applicant's application dated 25th February 2019 partially succeeds only on prayer 1 thereof while prayer 2 is dismissed. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 31st day of July, 2019.

D.K KEMEI

JUDGE