REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1670 OF 2001

IN THE MATTER OF THE ESTATE OF SAMUEL GITHIO ALIAS SAMUEL NGUGI GITHUI (DECEASED)

MERCY WANJIKU.....APPLICANT

VERSUS

SAMUEL MAINA NGUGI.....RESPONDENT

RULING

1. The deceased Samuel Ngugi Githio alias Samuel Ngugi Githiu died on 21st September 1999 at the Kenyatta Hospital. His daughter Lucy Wanjiku Ngugi petitioned this court for the grant of letters of administration intestate. The grant was issued to her on 12th September 2000, and confirmed on 14th March 2001.

2. The petitioner died on 24th February 2018. An application was made for substitution. The same was allowed, and on 21st September 2018 an amended grant was issued in the name of Samuel Maina Ngugi (the respondent).

3. On 19th March 2018 Mercy Wanjiku (the applicant) filed an application seeking the revocation and/or annulment of the grant on the basis that proceedings leading to the same were defective in substance and that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case. Her case was that the deceased had died testate, having left a written Will dated 24th March 1998 in which he had indicated how his estate was to devolve upon his death. The fact of the existence of the Will, she stated, was known to the whole family, including the late Lucy Wanjiku Ngugi. Unknown to the applicant, the late Lucy Wanjiku Ngugi had petitioned the court for the grant of letters of administration intestate. She got a grant, had it confirmed and she distributed the estate. According to the applicant, this was a testate matter and therefore to proceed on the basis of intestate succession made the proceedings defective in substance. Secondly, she was a beneficiary whose consent had not been sought or obtained when the petition was filed and the grant subsequently issued. She was the executrix of the written Will.

4. The response by the respondent was by way of the present notice of preliminary objection dated 20th May 2019 in the following terms:-

> **"1. THAT the Interested parties/Applicants have previously brought similar applications against the Respondent within the same matter which have been heard and determined by this Hon. Court on diverse dates namely 2nd July 207 and 2nd February 2010 thus rendering the present application *Res Judicata* as envisaged by section 7 of the Civil Procedure Act, Cap 21 of the Laws of Kenya.**
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> **2. THAT the aforesaid application is frivolous, vexatious, bad in law, meritless, and an abuse of the court process and ought to be dismissed with costs to the Administrator/Respondent."**

5. Mr. Kaingu for the applicant and Mr. Kinyua for the respondent had agreed that the preliminary objection be taken first and filed written submissions on the same. The basic question is whether the application dated 14th March 2018 by the applicant is *res judicata*.

6. There is no dispute that on 2nd July 2007 Justice Aluoch (as she then was) dismissed with costs an application dated 16th July 2003 for want of prosecution. The application had been brought by the applicant and two others (Stephen Mbai Kikwao and Elizabeth Nyamwathi).

In the application the issue that the deceased had not died intestate but had left a written Will dated 24th March 1999 was raised. Secondly, on 2nd February 2010 Justice Dulu dismissed with costs for want of prosecution another application seeking to revoke the same grant. The application was dated 21st August 2007 by the applicant and the grounds were that the deceased had not died intestate but had left a written Will.

7. There is yet another application for the revocation of the grant that is dated 15th October 2014 by the applicant, Stephen Mbai Kikwao and Elizabeth Nyamwathi on the same grounds. That application is pending.

8. It is clear that what has aggrieved the applicant is that none of her two applications for revocation has been determined on merits. Each has been dismissed with costs for want of prosecution. What was open to her was to seek the review and/or setting aside of the orders dismissing her application for want of prosecution so that she could be heard on merits. The other avenue was to challenge, on appeal, the exercise of discretion on the part of the court in dismissing the applications for want of jurisdiction, instead of adjourning, for instance, in order to afford her a hearing and the resolution of her application on merits.

9. The merits of the applicant's complaint as contained in her various applications for revocation have not been determined, and therefore the issue of *res judicata* does not arise. I have seen that in **Njue Ngai –v- Ephantus Njiru Ngai & Another [2016]eKLR,** cited by the respondent, the Court of Appeal held that the principle of *res judicata* applies even where a suit was dismissed for want of prosecution. In other words, the suit does not need to be determined upon the hearing of the merits for *res judicata* to be applicable.

10. On the other hand, the applicant referred to another Court of Appeal decision (with a different bench) in **Michael Bett Siror –v- Jackson Koech [2019] eKLR** where it was held that –

> **"30. We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment, however such a judgments does not satisfy the requirements of section 7 of the Civil Procedure Act, as the issues raised in the suit have not been addressed and finally determined by the court, but the judgment is the result of what may be described as a technical knockout."**

11. Section 7 of the **Civil Procedure Act** provides 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 can 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."**

12. The matter directly and substantially in issue between the applicant and the respondent is whether the deceased died testate or intestate (and whether, if the deceased died testate, this was known to the respondent at the time of petitioning for grant and was brought to the attention of the court). The matter has not been heard and determined.

13. In **M.W.K. –v- A.M.K. [2016] eKLR** Justice Joel Ngugi of the High Court in Kiambu was confronted with an originating summons under the **Matrimonial Property Act 2013** for a declaration relief in respect of a matrimonial property between the parties. A preliminary objection based on *res judicata* was raised because in **HCCC No. 1 of 2014** at Kerugoya a similar suit had been struck out because, according to the court, it was incompetent as the matter should have been filed under the **Matrimonial Property Act 2013** instead of the **Married Women Property Act 1882** which had been repealed in 2013. The court, in dealing with the doctrine of *res judicata* under **section 7** of the **Civil Procedure Act,** found that the Kerugoya case had not been determined on merits and was therefore not *res judicata*. The court states as follows:-

> **"25. I have come to the conclusion that it does not. Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary points. *Res judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the same was improper or even for want of prosecution does not give rise to judgments on the merits and therefore does not trigger the plea of *res judicata*. The last issue (dismissal for want of prosecution) was the issue in The TEE G.E.E. Electronics and Plastics Company Ltd –v- Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed for want of prosecution if the same was not heard on merits."**

14. The doctrine of *res judicata* is provided for under **section 7** of the **Civil Procedure Act** with the object of barring multiplicity of suits and applications. It guarantees finality to litigation. A party who brings for the decision of the court a matter which has already been heard and determined is guilty of abusing the process of the court **(Benjoh Amalgamated Limited and Another –v- Kenya Commercial Bank Ltd, Civil Appeal No. 239 of 2004 (C.A)).** Lastly, in **Caneland Ltd and Others –v- Delphis Bank Ltd, Civil Appeal No. 20 of 2000 (C.A.K.)** it was emphasized that, for *res judicata* to arise the issue must have been heard and decided on merits otherwise the plea cannot be sustained.

15. The respondent may complain that for the applicant to keep coming to court with the same application, which has been dismissed twice for want of prosecution, is an abuse of the process of the court. However, she (the applicant) is crying for substantial justice – for the court to determine whether or not the deceased left a written Will, a Will in which she was the executrix. For her conduct, she can be asked to pay to the respondent.

16. In conclusion, I determine that the applicant's application dated 14th March 2018 seeking the revocation of the grant herein is not *res judicata*, and therefore the same should be listed for hearing and determination on merits.

17. The preliminary objection dated 20th May 2019 is dismissed.

18. The costs of the objection shall be borne by the applicant.

DATED and SIGNED at NAIROBI this 25TH SEPTEMBER, 2019.

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 30TH SEPTEMBER, 2019.

A.N. ONGERI

JUDGE