



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**FAMILY SUIT NO. 79 OF 2003 (O.S.)**  
**IN THE MATTER OF AN APPLICATION UNDER**  
**SECTION 17 OF THE MARRIED WOMEN PROPERTY ACT OF 1982**  
**IN THE MATTER OF THE ESTATE OF JAMES KIOI KARANJA (DECEASED)**

RHODA WAIRIMU KARANJA.....PLAINTIFF

VERSUS

MARY WANGUI KARANJA.....1<sup>ST</sup> DEFENDANT

SALOME NJERI KARANJA.....2<sup>ND</sup> DEFENDANT

MARTHA MUNYUA.....3<sup>RD</sup> DEFENDANT

JEDDY NYANJUGU.....4<sup>TH</sup> DEFENDANT

*(As Representatives of James Kioi Karanja (Deceased))*

**RULING**

1. The deceased James Karanja Kioi died on 3<sup>rd</sup> February 1995. He left a written Will dated 6<sup>th</sup> February 1992. Grant of probate of the Will was made to his two daughters of the first house Mary Wangui Karanja (1<sup>st</sup> defendant) and Salome Njeri Karanja (2<sup>nd</sup> defendant) on 15<sup>th</sup> December 1999. The two were the executrices in the Will. The deceased's second wife Rhoda Wairimu Karanja (the plaintiff) had filed an objection to the petition for grant of probate. She had challenged the validity of the Will on the grounds that –

(a) the Will had purported to dispose properties which the deceased did not have capacity to dispose of as they were jointly acquired by her and him; and

(b) her and her son John Kioi Karanja had not been adequately provided for in the Will.

2. Following oral hearing the objection was dismissed and grant of probate issued. It was found that the two grounds did not go to the validity of the Will.

3. The grant of probate was confirmed on 2<sup>nd</sup> December 2005 and certificate issued. Prior to the confirmation, the plaintiff and her son had filed an application dated 7<sup>th</sup> April 2003 for dependency. The application was dismissed on 9<sup>th</sup> May 2005 for want of prosecution. An application to review and/or set aside the dismissal and to reinstate the application was dismissed on 5<sup>th</sup> August 2005. When the application for confirmation was filed the two filed an application for reasonable provision dated 6<sup>th</sup> September 2005. The two applications were heard together. The application for reasonable provision was dismissed and the application for confirmation allowed. This was on 2<sup>nd</sup> December 2005. A Notice of Appeal was filed by the two. On 19<sup>th</sup> January 2010 the Notice was struck out.

4. On 22<sup>nd</sup> April 2013 the plaintiff died. She had before this, on 18<sup>th</sup> November 2003, filed the instant suit under **section 17** of the **Married**

**Women Property Act, 1882** seeking half share in each of LR No. 7842/1 and LR 11595 in Muguga and Dagoretti/Riruta/5 and the developments thereon. Her case was that these were matrimonial properties between her and the deceased; properties whose acquisition and development she had contributed to. She sought the determination of her interest in them. She pleaded that the property had unlawfully been bequeathed by the deceased to the defendants. That was why she had sued them in the originating summons. She further filed a chamber application seeking an early hearing date for the summons.

5. The defendants filed a notice of preliminary objection dated 13<sup>th</sup> October 2008 on the grounds that the application was defective. They further filed the present application dated 17<sup>th</sup> October 2008 seeking to strike out the summons with costs, and/or in the alternative there be stay of proceedings pending the hearing and determination of **HCCC No. 1624 of 1995**. The application was based on the grounds that the suit was *res judicata* and that the **Married Women Property Act, 1882** had no application where one spouse was deceased. The application was supported by the affidavit sworn by the 1<sup>st</sup> defendant on behalf of the others.

6. The application and the objection were opposed by the plaintiff in her relying affidavit dated 31<sup>st</sup> October 2008. Her case was that her claim to the properties was valid and was based on, among other things, the advice contained in the ruling delivered on 16<sup>th</sup> January 2004 in the Succession Cause above. She denied that the originating summons was *res judicata*. She stated that she had a valid claim against her late husband's estate over matrimonial properties that were jointly acquired and developed during their marriage. The fact of his death, she argued, did not bring to an end her claim to the property. This was because, first, under **section 2** of the **Law Reform Act (Cap. 26)** her claim survived against his estate, and secondly, he held the matrimonial property in trust for her, and therefore could not purport to bequeath it to the defendants.

7. Mr. Mbabau for the plaintiff and Dr. Kamau Kuria for the defendants filed written submissions which I have considered.

8. It is clear that when the plaintiff and her son filed an application dated 7<sup>th</sup> April 2009 for dependency, which was dismissed, and filed an application dated 6<sup>th</sup> September 2006 for reasonable provision, which was also dismissed, they were acknowledging that the properties claimed herein belonged to the deceased who had bequeathed them in the Will. Secondly, following the death of the plaintiff, her son sought to bury her remains on LR No. 11595. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed an application dated 6<sup>th</sup> May 2013 seeking to restrain him from burying the remains on the land. In a ruling delivered on 31<sup>st</sup> January 2014 the court found that the property belonged to the defendants by dint of the certificate of confirmation of grant dated 2<sup>nd</sup> December 2005. The court observed that the issue of the ownership of the property had been heard and determined by various judges in the succession proceedings.

9. It is trite that under **section 7** of the **Civil Procedure Act**, for the doctrine of *res judicata* to apply three basic conditions have to be satisfied. These are:-

(a) there was a former suit or proceedings in which the same parties as in the subsequent suit litigated;

(b) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit; and

(c) a competent court to try it had heard and finally decided the matters in controversy between the parties (**Abok James Odera –v- John Patrick Machira, Civil Application (NAI) No. 49 of 2001**).

10. In **Greenfields Limited –v- Baber Alibhai Manji, Civil Appeal No. 160 of 1997** it was held 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 matter which might have been brought forward as part of the subject in contest but was not brought forward only because they have, from negligence, inadvertence or even accident, omitted part of their case. *Res judicata* applies to every point which properly belonged to the subject of litigation and which the parties exercising due diligence, might have brought forward at the time (**Henderson –v- Henderson (1843) 3 Hare 100 at 115**).

11. The question is whether the plaintiff in this originating summons was trying to bring before the court, in another way and in the form of a new cause of action, a transaction which she already put before the court in the succession proceedings and which was adjudicated upon by a competent court (**Kamunye & Others –v- Pioneer General Assurance Society [1971] EA 263 at 265**). If the answer is in the affirmative, then the case is *res judicata*.

12. From the history of the case, I find that the plaintiff has employed various tactics to try and wrestle the estate of the deceased, or parts of it, from the defendants. She has challenged the validity of the Will and failed. She sought dependency and failed. She sought reasonable provision and failed. Now she claims that part of the estate was matrimonial property between her and the deceased which ought not to have been bequeathed to the defendants. First, this conduct amounts to an abuse of the process of the court. Secondly, the issue regarding the ownership of the property in this originating summons has been heard and determined by a competent court, and the issue has not been challenged on appeal.

13. Had the dispute not been *res judicata*, I would have dismissed the contention by the defendants that on death of deceased the plaintiff's claim to matrimonial property under the **Married Women property Act, 1882** had not survived his estate.

14. I find that the originating summons by the plaintiff against the defendants is *res judicata* and is struck out with costs.

**DATED AND DELIVERED AT NAIROBI THIS 23RD OCTOBER 2019.**

**A.O. MUCHELULE**

JUDGE