



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 43 OF 2019 (O.S)

EVERLYN MURUGI RUFUS.....APPLICANT

VERSUS

JOSEPH KABATHI WARARI.....1ST RESPONDENT

PRAM COMPANY LIMITED.....2ND RESPONDENT

RULING

1. The Applicant in this matter through a Notice of Motion dated 18th October, 2019 brought under sections 1A, & 3A of the Civil Procedure Act, Order 40 Rules 7, Order 51 of the Civil Procedure Rules, 2010 and Articles 50(1) and 159(2)(d) of the Constitution of Kenya 2010 seeks to set aside the orders of injunction issued on 30th September, 2019 restraining her from receiving payments from the sale of properties L.R No. 11610, L.R No. 22425, L.R No. 5983, L.R No. 2383, L.R. No. 0314 and L.R No.18594.

2. In her affidavit in support of the application dated 18th October, 2019, she deponed that she is the wife to the late Rufus Warari Kiwarie (Deceased), who died on 2nd December, 1969 and left behind a will dated 23rd December, 1968. She stated that in the will, she was named as the sole beneficiary of all his property and the executrix of the will. She averred that she filed for issuance of a grant of probate of the estate of the deceased. Subsequently, the 1st Respondent and 10 others raised an objection in relation to the validity of the will *vide High Court Miscellaneous Civil Case No. 227 of 1975*. She stated that the court heard the objection and determined that the will was valid.

3. It was her case that on 26th September 2019, the 1st Respondent made an application under certificate of urgency seeking a temporary injunction to restrain her from using any proceeds from the sale of the properties belonging to the 2nd respondent where she is a shareholder of 334 shares. She claimed that the court granted the orders sought although the 1st respondent did not provide any evidence to show in what capacity he was bringing the application. Further, that the application was made in bad faith since the issue of the properties had already been determined by another court of competent jurisdiction. She averred that the 1st Respondent's application was res judicata and should not have been entertained.

4. Secondly, the Applicant claimed that this matter had been transferred to the Commercial and Tax Division vide a letter from the Deputy Registrar dated 4th September, 2019 making this court *functus officio* when issuing the injunctive orders dated 1st October, 2019. She asserted that she has been suffering from terminal illness since 2013 and was in dire need of the proceeds from the 2nd Respondent to undergo further treatment.

5. In opposition to the application, the 1st respondent filed a replying dated 13th November, 2019. He denied knowledge of the purported will stated by the applicant that bequeathed her property in the deceased's estate. He also disputed the existence of **High Court Miscellaneous Civil Suit no. 227 of 1975** that purportedly validated the will. He asserted that the annexed decree and Judgment alleged to be from the suit were not certified. Further, that he had been unable to retrieve the file for perusal. It was his case that his late father's (Rufus Kibathi Kiwarie) estate, was not distributed as per the purported will dated 23rd December, 1968. He asserted that the applicant had by design refused to institute probate proceedings for purposes of obtaining a confirmed grant to legally transfer his father's shares in the 2nd Respondent to herself.

6. He asserted that the issues raised herein are not commercial in nature but within the ambit of the Family Division of the High Court. He asserted that the Applicant made no invoices/payments to justify the amounts expended for medical upkeep to warrant release of funds. He stated that he was apprehensive that in the event that the funds were released to the Applicant, she would waste the monies making recovery impracticable and any further suit rendered nugatory. He added that the estate of the deceased comprised of 19 children from the 2 houses with the 1st house having 13 beneficiaries and the 2nd house having 7 children including the Applicant. He urged the Court to dismiss the Application.

7. Wangui Muhiu Maina a Director of the 2nd Respondent swore a replying affidavit dated 30th October, 2019. She reiterated the contents of

the Applicant's supporting affidavit further stating that the initial shareholders of the 2nd Respondent were Francis Maina – 583 shares, Rufus Warari Kiwarie – 334 shares and Peter Kingu Kihari – 583 shares. She stated that all are deceased and their shares have since been divided among their respective estates. She stated that upon the deceased's demise, the Applicant presented the 2nd respondent with the deceased's will and the confirmed grant with her as the executrix. That, based on the provisions of the will, the company transferred all the shares belonging to her late husband Rufus Wariri Kiwarie to her. She averred that she is the registered proprietor of all the parcels of land in issue. It was her case that the 2nd Respondent has been wrongly enjoined in this suit as the main subject matter is property owned by the Applicant.

8. Parties filed written submissions which were highlighted by their respective learned Counsels. Mr. Macharia learned counsel for the Applicant submitted that the issues presented by the 1st Respondent in his application for injunction were conclusively dealt with over forty years ago and are therefore res judicata. That, the Judgment of Hon. Justice Mathew Muli in High Court Miscellaneous Civil Suit No. 227 of 1975 exhaustively dealt with the issues on the question of distribution of the deceased's estate. Further, that any other issue in that estate should not be entertained due to effluxion of time following the Judgment. He reiterated that the 1st respondent did not fulfil the requirements in **Giella v Casman Brown** to warrant the grant of an injunction. Mr. Macharia asserted that the matter was concluded in 1979 before the commencement of the Law of Succession Act and prior to 1982, when there was no requirement for a grant and a certificate of confirmation of grant for the transfer of shares in a company, to be effected.

9. Learned counsel Mr. Mvuria for the 1st Respondent maintained that the matter is not res judicata. He relied on **Section 3** and **Section 7** of the Civil Procedure Act. He asserted that the issue of validity of the will had never been determined and that property cannot be acquired and disposed-off by will alone. He further submitted that there are no time limitations in the Law of Succession and the 1st respondent was therefore within his right to bring his application.

10. I have considered the Application, the respective Affidavits in support and opposition thereto and the oral submissions by the respective Learned Counsels representing the parties. The issue that arises for determination is whether the Applicant has met the threshold for setting aside of the temporary injunctive orders issued on 30th September, 2019.

11. From the proceedings, on the 26th September, 2019, the 1st Respondent filed a Notice of Motion Application dated 26th September, 2019 under a certificate of urgency. The application was certified as urgent and ordered served for directions on 15th October, 2019. This court granted a temporary injunction restraining the Applicant herein from receiving payments from the sale of the properties in issue pending the hearing and determination of the application. On 15th October, 2019 the Court was not sitting and the matter was differed to 4th November, 2019 for directions. On 18th October, 2019 the Applicant filed the current application. Due to the issues raised on this application, it was set down for hearing first.

12. The 1st issue raised is that the application, giving rise to the order sought to be set aside is res judicata. It was claimed by the Applicant that the **High Court in Miscellaneous Civil Case No. 227 of 1975** distributed the estate of the deceased including the property in issue. She attached a copy of the judgment and a decree by Justice Mathew Muli dated 2nd August, 1977. The 1st respondent disputed stating that the property of the deceased had never been distributed to its beneficiaries through the Judgment and decree.

13. The doctrine of res judicata has been ably argued by the parties in the submissions. The doctrine has been expounded under Section 7 of the Civil Procedure Act which provides:-

“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.”

The doctrine of res judicata is aimed at ensuring that litigation must come to an end and affords litigants an end. A respite from being faced with a vicious circle of disputes which have been determined by a competent court being taken back and forth. It is designed to protect litigants from time and resource consuming endless litigation. Without such control which the doctrine is meant to ensure there would be endless litigation by parties filing multiplicity of suits in different courts hoping to obtain favourable outcomes. Judicial process would thus be abused and to disrepute.

14. From the evidence on record, the property of the deceased was distributed to his widows vide High Court Miscellaneous Civil Case No. 227 of 1975. Forty years have lapsed since that decision was made. The 1st respondent has never challenged the decision to distribute the deceased's estate. As way back as 1979, the 1st respondent ought to have known that the deceased's property had been distributed. And whereas it was within his rights to make an application like the one made on 26th September, 2019 seeking injunctive relief, it has taken him 40 years to move this court.

15. Even if he indeed had a claim on the estate other than the manner in which it was distributed, it is my considered view that the 1st respondent unjustifiably slept on his rights for far too long. In the passage of time the character of the estate must have drastically changed. The 1st respondent is guilty of 'laches'. The Black Law dictionary defines laches as:

a. Unreasonable delay in pursuing a right or claim

b. It is the equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim when that delay has prejudiced the party against whom the relief is sought.

Surely, in the circumstances of this case, 1st respondent's application herein is affected by 'laches'. Equity aids the diligent and not the indolent and delay defeats equity.

16. Further observation of the evidence on record revealed that the issue raised by the parties herein was whether the estate of the deceased was bequeathed to the Applicant and distributed by court via High Court Miscellaneous Civil Case no. 227 of 1975. From the evidence on record it is clear that distribution of the estate of the deceased was conclusively dealt with in the said suit. The application by the 1st respondent dated 26th September 2019 is therefore res judicata.

17. From the foregoing, the Applicant has met the threshold for setting aside of the temporary injunctive orders issued on 30th September, 2019. The upshot of all this is that the Application dated 18th October, 2019 is allowed.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 23RD DAY OF DECEMBER, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the 1st Respondent

In the presence ofAdvocate for the 2nd Respondent