REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 41 OF 1992

IN THE MATTER OF THE ESTATE OF M N J (DECEASED)

J K J M (suing on behalf of W M who is mentally challenged)...APPLICANT

-VS-

G G.....RESPONDENT

R U L I N G

1. Before me is a Summons for the revocation or annulment of the grant dated 8th May, 2017 and brought under ***Section 76 of the Law of Succession Act, Rule 44 & 73 of the Probate and Administration Rules, Section 71 of the Registration of Land Act 2012 of the Laws of Kenya & all other enabling provisions of the law*.** The applicant further sought orders that W M be recognized as the child and beneficiary of the estate, and that the grant issued to the respondent be cancelled and she be made the administrator of the Deceased's estate.

2. The grounds upon which the Summons was grounded were set out in its body and the supporting affidavit of **J K J M ("the applicant")** sworn on 8th May, 2017. It was contended that the applicant and the deceased got married under customary law. Unfortunately, the deceased died while the applicant was pregnant with his child named **W M** "(the child")

3. The applicant deponed that after the demise of the deceased, she was deceived by the respondent to marry him under fraud, duress and undue influence. That after the marriage, the respondent petitioned for the grant of letters of administration which he was issued with. That the same was confirmed whereby he effectively disinherited her and the child.

4. This application was opposed vide a replying affidavit sworn by **G G** on 2nd November, 2017. He deponed that the grant in this Cause was confirmed on 26th February, 1993. That the applicant had brought a similar application for the revocation of the grant but was dismissed on 7th April, 2003. He however, admitted that after the demise of his elder brother, he became friends with the applicant whereby they got married and officiated their marriage on 4th July 1992 under the African Marriage and Divorce Act at P.C.E.A, [Particulars withheld] Parish.

5. He further deponed that at the time of filing this succession cause and confirmation of the grant, he and the applicant were married and living together. She was not forced to get married to him as alleged. They were blessed with a daughter W D G. That child the applicant is referring to as W D M is one and the same person of whom he is the biological father. That the applicant had forged documents to show that the child is the deceased's. He concluded that he has no intentions of disinheriting his own daughter.

6. The applicant submitted that the child is not taken care of and that she should be taken to hospital and a special school. The respondent relied on his replying affidavit and submitted that the applicant had denied him access to the child which had impeded his effort to support the child.

7. Before embarking on the determination of any issue in this matter, this court is under a duty to first establish whether it has *locus standi*. In **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR**, the Court of Appeal held:-

> ***"In our view, issues of locus standi and jurisdiction are critical preliminary issues which ought to have been settled before dwelling into other substantive issues".***

8. The main order that the Applicant is seeking is the cancellation of the grant based on the fact that **W M** who is alleged to be a daughter of the deceased was not catered for. I have considered the entire record. The applicant had, on 19th November, 2001, made an application for the revocation or annulment of the grant. That application was heard and by a judgment made on 17th April, 2003 that application was found to have no merit and was dismissed.

9. The applicant has now come back 15 years later to seek the same order. Does this court have jurisdiction to determine this application?

This court despite being a probate court is still a civil court guided by the Civil Procedure Act. ***Section 7 of the Civil Procedure Act CAP 21*** 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 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."***

10. The question is whether the issues raised in this 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.***
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> ***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."***

11. The net effect of ***section 7 of the Civil Procedure Act*** is that litigation must come to an end. Resultantly, the principle of *res judicata* also applies to an application as well. For this court to establish *res judicata*, it must taking into consideration if the parties were the same, the issues were the same in both proceedings and whether the issues were ever determined.

12. Both applications seek for the revocation or annulment of the grant. In the present matter, not only that the parties are the same but that the issue is the same as in the first application. In its judgment of 7th April, 2003, the court made a determination that the applicant came to court seeking the annulment of the grant after the matrimonial disagreement between her and the respondent.

13. In the circumstances, I find that the application before me is *res judicata* the application dated 19th November, 2001. Litigation must come to an end. A party cannot be allowed to litigate an issue again and again in the same court. If the applicant was aggrieved by the judgment of 7th April, 2003, she should have appealed against it.

14. Even if the application was not *res judicata*, I would still have dismissed the same. My take of the matter is that, the applicant's complaint is that the respondent is not taking care of the child. I doubt whether that is an issue within the jurisdiction of this court. Even if it were, why wait for 25 years to come to court. That delay in my view is not only inordinate, but completely unacceptable. It is even doubtful if the estate is still intact.

15. The long and short of it is that the application is without merit and is dismissed. This being a family dispute, I will not make any order as to costs.

DATED and DELIVERED at Meru this 14th day of June, 2018.

A. MABEYA

JUDGE