



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 35 OF 2016

KIBIBI MWAMADI

RUKIA SALIMU MWACHARO

HADIJA SALIMU APPELLANTS

VERSUS

GOGA ABDALLA MASEMO RESPONDENT

RULING

(An Appeal from the Ruling and Orders of Hon. Said Hamisi Bedzenga,

Kadhi delivered on 29.8.16 in Kwale Kadhi Succession Cause No. 88 of 2015)

1. Goga Abdalla Masemo, the Respondent herein filed Succession Petition No. 88 of 2015 dated 11.3.15 against the Appellants, Kibibi Mwamadi, Rukia Salimu Mwacharo and Hadija Salimu in respect of the estates of Mama Hasina Mohamed, Fatuma Mwinyi Mwakulema and Amina Salimu Mwacharo. He averred that the estate consisted of a property known as Kwale/Ngomeni/1104 (the property). He sought the distribution of the property to the survivors, transfer of the property to the heirs and vesting orders.

2. By his application dated 25.4.16 in the Kadhi's Court, the Respondent sought a temporary injunction restraining the Appellants from dealing with the property. He also sought an order for the Registrar of Lands Kwale to place a restriction on the said property until the matter was concluded. The Appellants did by their Preliminary Objection dated 11.5.16 oppose the application on the main grounds that succession in respect of the estate of Mama Hasina Mohamed (the deceased) is *res judicata* having been determined by the High Court in Succession Cause No 444 of 2011 and that the Kadhi's Court had no jurisdiction to adjudicate on a matter already determined by the High Court.

3. By a Ruling delivered on 29.8.16, the Hon. Kadhi dismissed the Preliminary Objection and allowed the Respondent's Application.

4. The Appellants being aggrieved by the decision of the Hon. Kadhi preferred the Appeal herein. The grounds of appeal are that the Hon. Kadhi erred in law and fact in that he:

1. failed to consider that the issue of succession in the estate of the deceased, was determined in High Court Succession Cause No. 444 of 2011 and the Appellants herein were duly issued with the Letters of Grant of Administration Intestate on the 24th of September, 2012 and later issued with a Certificate of Confirmation of a Grant on 30th of October, 2015.

2. failed to consider that Kadhi's Court Succession Case No. 88 of 2015 filed by the Respondent is *Res Judicata* hence dismissing the Appellants' Preliminary Objection.

3. allowed the Respondent's Application dated 25th April, 2016 in its entirety and disregarded the fact that the Respondent failed to adduce evidence to prove the allegations contained in the Affidavit in Support of the said Application.

4. failed to consider that the Respondent did not have the *locus standi* to bring the Application dated 25th April, 2016 by dint of the fact that he is not a dependant, heir or beneficiary of the estate of the deceased.

5. failed to consider that the Appellants herein are the only legal representatives of the estate of the deceased and as such have the legal right to administer the affairs of the estate of the deceased.

6. found that he had the jurisdiction to determine the Respondent's Petition whose main issue of succession of the estate of the deceased has already been dealt with by this Honourable Court in High Court Succession Cause No. 444 of 2011.

7. found that he had the jurisdiction to hear and determine the Respondent's Application dated 25th April, 2016 whose main issue for determination was whether to grant an injunction restraining the Appellants herein from dealing with a parcel of land known as KWALE /NG'OMBENI /1104 which is the only asset of the estate of the deceased.

5. The Appellants prayed for the following:

a) THAT this Honourable Court be pleased to set aside the entirety of the ruling/decision and orders of Honourable Said Hamisi Bedzenga, Kadhi 1, Kwale Law Courts, delivered on the 29th day of August, 2016.

b) THAT the Respondent's Application dated the 25th April, 2016 be dismissed with costs to the Appellants.

c) THAT the Appellants' Preliminary Objection dated 11th May, 2016 be allowed with costs to the Appellants.

d) THAT the Respondent be condemned to pay the costs of this Appeal.

6. Parties filed their submissions which were highlighted before me with the Hon. Chief Kadhi sitting as assessor pursuant to Section 65(1) (c) of the Civil Procedure Act which provides:

“(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court...

(c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”

7. For the Appellants, it was submitted that by dismissing the preliminary objection and allowing the Application, the Hon. Kadhi challenged the orders of this Court. The Hon. Kadhi admitted that there were proceedings in the High Court and having done so, he ought to have downed his tools and advised the Respondent to seek redress in the High Court. He however arrogated to himself jurisdiction he did not have and granted orders he had no jurisdiction to grant. It was further argued that the issues raised by the Respondent were *res judicata* having been dealt with by the High Court in Succession Cause No. 444 of 2011 before the High Court. It was further argued that the Respondent has no interest in the estate of the Deceased not being an heir or beneficiary of the estate of the deceased.

8. The Respondent acting in person submitted that *res judicata* would only have been relevant if he had been a party in the succession matter in the High Court which he was not. He further poses the question of how they, not being heirs would have filed an objection to the succession matter in the High Court. He urged the Court to direct a way forward. He further argued that the Appellants have had themselves included as interested parties in High Court Succession Cause No. 138/2017 also dealing with the same property without raising the issue of *res judicata* as they have been quick to raise it in the matter herein.

9. It was further submitted that the matter in the Kadhi's Court is not prejudicial to the Appellants at all. The Appeal herein is being used by the Appellants to stop the Respondent from proceeding with the said matter. All the Respondent sought was status quo be maintained pending the conclusion of the matter. The Respondent submitted that neither he nor his siblings are not heirs of the deceased and have no interest in her estate. Their interest in the property which belonged to their parents who entrusted the same to the deceased, their aunt to hold it in trust for the Respondent and his siblings who were minors. The property does not form part of the estate of the deceased as she fraudulently registered the same in her name instead of in trust for them. The Respondent submits that the Appeal seeks to terminate the Respondent's claim and thus deny him a fair trial. He prayed that the Appeal which is frivolous, dishonest and mischievous be dismissed with costs.

10. The only issue for determination is whether the issues raised in Petition No. 88 of 2015 are *res judicata*. The Appellants relying on Section 7 of the Civil Procedure Act argue that the issues raised by the Respondent in the Kadhi's Court were *res judicata* having been determined by the High Court in Succession Cause No. 444 of 2011. The principle of *res judicata* is enunciated in Section 7 of the Civil Procedure Act. Section 7 of the Civil Procedure Act is not applicable to this matter being a succession cause. This notwithstanding, *res judicata* is a doctrine of general application that is applicable to all litigation including succession matters.

11. The Court of Appeal set out the essentials of a defence of *res judicata* in Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR as follows:

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.

12. The record shows that a Grant of Letters of Administration of the estate of the deceased was issued on 24.9.12 and confirmed on 28.9.15. The listed beneficiaries of the estate of the deceased are the Appellants and the estates of Amina Salim Mwacharo, and Fatuma Mwinyikombo Mwakutema. The asset is Title No. Kwale/Ng'ombeni/1104. The Certificate of Confirmation of Grant dated 30.10.15 indicates that the estate is to be distributed equally amongst the beneficiaries. The Petition in the Kadhi's Court relates to the estates of Mama Hasina Mohamed, Fatuma Mwinyi Mwakulema and Amina Salimu Mwacharo. The property in question is Title No. Kwale/Ng'ombeni/1104. The Respondent sought the distribution of the estate to the heirs and a vesting order.

13. In his ruling regarding res judicata the Hon. Kadhi stated:

The Succession Cause No. 444 of 2011 filed in the High Court of Kenya at Mombasa bi Kibibi Mwanamadi Hamisi, Rukia Salim Mwacharo and Khadija Salim Mwacharo was an application for Confirmation of Letters of Administration on the estate of Hasina Mohamed Hamisi also known as Mama Hasina Mohamed. The application involved one party the respondents only and thus cannot be regarded as previous proceedings between the parties named herein in the subject matter. I found that the matter directly and substantially in issue was neither heard nor decided by the High Court. The plea for res judicata is not sustained.

14. Going by the essentials of *res judicata* set out in the Uhuru Highway Development Limited case (supra), High Court Succession Cause No. 444 of 2011 is a previous suit in which the distribution of the estate of the deceased was in issue. The Appellants were parties in the High Court matter. The matter was heard by the High Court which is a competent Court. The issue of distribution of the estate of the deceased was once again raised in Kadhi Court Succession Cause No. 88 of 2015. It is my finding that the Hon. Kadhi erred in rejecting the plea of res judicata for the reason that “*the matter directly and substantially in issue was neither heard nor decided by the High Court*”. By dint of the Certificate of Confirmation of Grant issued by the High Court, the distribution of the estate of the deceased was finally and conclusively determined by the High Court

15. The other reason the Hon. Kadhi gave for rejecting of the plea of *res judicata* plea is that the Respondent was not a party in High Court Succession Cause No. 444 of 2011. To determine whether the fact that the Respondent was not a party in the matter in the High Court is sufficient to oust the doctrine of *res judicata* herein, it is necessary to consider the rationale of the doctrine.

16. The Court of Appeal in John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR, the Court of Appeal observed:

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.

17. *Res judicata* is a fundamental principle of law that goes to the jurisdiction of the court. The reasoning behind the principle is that litigation must come to an end and removes the possibility of inconsistency in judgments of different courts. It would be an abuse of the process of the Court to re-open matters that have been heard and decided on merit by a competent Court unless on appeal or review. To allow the Kadhi's Court, a subordinate Court, to re-open the issue of the distribution of the estate of the deceased is tantamount to allowing the Hon. Kadhi to sit on appeal of the decision of the High Court, a superior Court that conclusively determined the issue. This is completely unacceptable, ultra vires and an abuse of the Court process.

18. The jurisdiction of any Court is derived from the Constitution or statute or both. This was well articulated by the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR as follows:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

19. For the Kadhi's Court to assume jurisdiction over a matter that has been dealt with and concluded by the High Court is to arrogate to itself jurisdiction it does not have. In the premises, I do find that the Hon. Kadhi erred in finding that the matter before him was not *res judicata*.

20. Hon. Sheikh Al Muhdhar A. S. Hussein, Chief Kadhi was of the opinion that the Appeal should be allowed and stated in part:

There was a High Court Succession Case No. 441 (sic) of 2011 at Mombasa. which was heard and determined and confirmation granted...

I'm of the opinion that that the learned Kadhi erred in denying the Preliminary Objection and to disagree with the resjudicata issue which is very clear.

I would therefore concur with the appellant's argument that the appeal be allowed, the orders made by the Kadhi on 29.8.16 be

set aside and the preliminary objection be upheld.

21. I agree with the Hon. Chief Kadhi. I am of the view that the remedy for the Respondent was not to file a separate matter in another Court but to file an appropriate application in High Court Succession Cause No. 444 of 2011 as a party interested in the property and prove his claim that the deceased held the property in trust for him and his siblings.

22. In the result, I allow the appeal and make the following orders:

- i) The entire ruling/decision and orders of the Hon. Kadhi of 29.8.16 in Kwale Kadhi Succession Cause No. 88 of 2015 is hereby set aside. .
- ii) The Appellants' Preliminary Objection dated 11.6.16 is hereby upheld.
- iii) Kwale Kadhi Succession Cause No. 88 of 2015 is hereby struck out for being *res judicata*.
- iv) The Respondent's Application dated 25.4.16 is hereby struck out
- v) Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 21st day of September 2018

M. THANDE

JUDGE

In the presence of: -

.....**for the Appellants**

..... **for the Respondent**

.....**Court Assistanta**