



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISCELLANEOUS SUCCESSION CAUSE NO. 3 OF 2015**

**IN THE MATTER OF THE ESTATE OF GICHINE KABUE (DECEASED)**

**ANDREW MWANGI KABUNGO.....APPLICANT**

**VERSUS**

**ROBINSON GICHOBI RICHARD.....RESPONDENT**

**JOSEPH MUGANE NJAGI.....INTERESTED PARTY**

**RULING**

1. Before me is a preliminary objection raised by **Joseph Mugane Njagi**, the interested party in this cause. He has sought to have the summons for revocation of grant dated 9<sup>th</sup> February, 2015 struck out on the following grounds namely:

***(i) That the application is res-judicata.***

***(ii) That the application dated 9<sup>th</sup> February, 2015 is an abuse of the court process as a similar application was dismissed vide High Court Misc. Application No. 53 of 1995 (Andrew Mwangi Kabongo -Vs- Robinson Gichobi Richard).***

2. The interested party has cited **Section 7** of the **Civil Procedure Act** as a legal basis for his objection to the Summons for Revocation of Grant proceedings for hearing as in his view the section applies to all civil proceedings. It is submitted that a similar application was dismissed by the High Court sitting in Nyeri under **Rule 73 of Probate and Administration Rules** on the basis that the application had been pending unprosecuted for 14 years. The interested party has argued that the applicant in this cause cannot prosecute a similar application again because the matter is now res judicata and an abuse of court process. The respondent, Robinson Gichobi Richard has supported the interested party in his preliminary objection for the same reasons.

3. The applicant (respondent in the preliminary objection raised) has opposed the same. He contends that his application dated 9<sup>th</sup> February, 2015 is premised on among other grounds fraud and concealment of material information from court. In his view the doctrine of res judicata and more specifically **Section 7** of the **Civil Procedure Act Cap 21** does not apply in succession matters. He has submitted that succession matters are governed by Succession Act save where the said Act provides for the application of the **Civil Procedure Act**. He further contends that succession matters are not ordinary suits contemplated under **Section 81** of the **Civil Procedure Act** and that the preliminary objection raised is unfounded in law.

4. The applicant/respondent has further submitted that the dismissal of the application in Nyeri High Court (Misc. No. 53 of 1995) was on the basis of a technicality and that the decision was not based on the substance of the application. In his view the preliminary objection falls short of legal requirement that the matter needed to be substantially decided for the doctrine to apply.

5. This Court has considered the preliminary objection raised and the submissions of all the parties in this cause. A preliminary objection should be purely based on law and a party raising it need not adduce evidence to prove the same or force the respondent to adduce evidence in rebuttal. The interested party has raised a preliminary point of law stating that the Summons for Revocation of Grant dated 9<sup>th</sup> February, 2015 is *res judicata* as a similar application was dismissed vide Nyeri H.C. Misc. Cause No. 53 of 1995. The interested party has argued that this is an issue of law rather than fact. But I disagree. In the first place the proceedings in Nyeri H.C. Misc. No. 53 of 1995 is not part of the proceedings now before court. It is therefore a question of fact really whether the proceedings in Nyeri H.C.C. Misc. No. 53 of 1995 involved the same parties and whether the issues raised are similar to the issues raised in the present summons for revocation of grant herein. The interested party really needs to adduce evidence by way of further affidavit or calling for the file in Nyeri to be produced in this Court for the Court to establish the facts. That point raised by the interested party in my view is an issue that can only be established by evidence and it is trite law that a preliminary objection should be based on law and pleadings before court. Any other issue should go for trial so that the court can interrogate facts placed before it.

6. I also wish to make it clear that contrary to what the Respondent has contended, the doctrine of *res judicata* applies in all matters of a civil nature inclusive of succession matters. There are however, 3 important elements which must be established for the doctrine to apply. These are:

- (i) Existence of a previous decision on the same issue.
- (ii) A final judgment on the merits.
- (iii) Involvement of the same parties or parties in privity with the original parties.

The basis of this doctrine is basically the fact that litigation must come to end and matter decided by a competent court cannot be relitigated again and again. The desired effect or a rationale of a judgment or a ruling on any issue before court is to have a foreclosure of further relitigation to enable parties either appeal or accept the verdict and move on with their lives.

7. The question whether the decision in Nyeri High Court was based on a technicality or the merits cannot be answered satisfactorily at this stage in the absence of evidence of the proceedings in Nyeri H. C. Misc. No. 53 of 1995. This Court is unable to determine the objection raised by the interested party with finality for the same reason. In the premises, this Court finds that the preliminary objection dated 1<sup>st</sup> March, 2016 is not well taken. The same is dismissed for the aforesaid reasons. The Summons for Revocation of Grant dated 9<sup>th</sup> February, 2015 shall proceed for hearing and determination as per the directions that shall be given in this Court concerning the same.

***Dated and delivered at Kerugoya this 25<sup>th</sup> day of May, 2017.***

**R. K. LIMO**

**JUDGE**

25.5.2017

Coram: Hon. Justice R. K. Limo J.,

Wachira court assistant

Parties

Applicant present

Respondent present

Sitati holding brief for Waweru Macharia for applicant.

Wangechi for interested party absent.

**COURT:** Ruling signed, dated and delivered in the open court in presence of both parties (applicant and respondent) an Sitati holding brief for Waweru for applicant.

**R. K. LIMO**

**JUDGE**

25.5.2017