



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1940 OF 1996

CONSOLIDATED WITH SUCCESSION CAUSE NO. 1860 OF 1996

IN THE MATTER OF THE ESTATE OF FREDRICK POLWARTH KUBAI – DECEASED

ANDREW KUBAI.....APPLICANT

VERSUS

CHRISTINA GAKUHI KUBAIRESPONDENT

RULING

1. The deceased FREDRICK POLWARTH KIBUTHU KUBAI died on 1st June 1996. Succession Cause No. 1860 of 1996 was filed by CHRISTINA GAKUHI KUBAI (the respondent) for grant of probate of a written will made by the deceased on 19th January 1991. Her case was that she was the deceased's widow. The will named her as an executor. TIMOTHY KIBUTHU KUBAI, MOSES MENDZA KABUTHU KUBAI and others filed objection to the petition. Their case was that the respondent was not a widow to the deceased, that the deceased did not leave a will and that the purported will was a forgery.
2. In Succession Cause No. 1940 of 1996 SAMSON OWEN KUBAI KIBUTHU, STEPHEN GIDEON KIBUTHU F. KUBAI, GIDEON BLACKLAW KUBAI and MARTIN GIDEON KUBAI petitioned for the grant of letters of administration intestate in respect of the same deceased. They presented the petition in their capacity as sons of the deceased. The grant was issued and was subsequently confirmed. The respondent filed an application to have the grant revoked and/or annulled on the basis that she held a valid will. She sought interim restraining orders which were granted.
3. The two petitions were consolidated. It was decided that two preliminary issues be resolved by the taking of witness evidence. The issues were whether the deceased died leaving a valid will and whether the respondent was a widow of the deceased. In the judgment delivered on 19th December 2013 Justice Musyoka found that the deceased left a valid will and that the respondent was a widow of the deceased. Consequent upon those findings, the judge revoked the grant of letters of administration intestate that had been issued to the family of the deceased and issued a grant of probate to the respondent.
4. The applicant ANDREW KUBAI, MOSES MENDZA KIBUTHU KUBAI and STEPHEN KIBUTHU KUBAI filed an application seeking the review and setting aside of the judgment

delivered by Justice Musyoka. The ground on which the application was based was that the documents relied on by the court to grant probate to the respondent were forged. Their case was that after the judgment, the Deputy Registrar of this Court had on 18th February 2014 sent certain documents to the CID for forensic examination to establish their authenticity. The documents included the death certificate relied on by the respondent and her national identity card. A report came to say the two documents were forged. The application was contested by the respondent. The same was heard by Justice Kimaru who found that the matter was *res judicata*. He observed that:

“The 1st applicant was aware that the issue as to whether the two documents were valid documents or not was the subject of the trial. It was apparent that, in bringing the present application, the 1st applicant was attempting to introduce new evidence which he ought to have produced at the time of trial. A litigant is required to produce all the evidence that he intends to rely on during trial. It will not do for such litigant to seek to adduce such evidence after the court has delivered its judgment. This Court is of the view that the evidence that the 1st applicant seeks to rely on in his application for review ought to have been presented to the court during the trial and not after the court had rendered its decision. In any event, the court did render its opinion in respect of the allegations of forgery that was made by the applicants. If the applicants were aggrieved, they ought to have appealed instead of seeking to review the said decision before a court of concurrent decision.”

5. The applicant (the 1st applicant in the above application for review) filed the present application dated 25th November 2014 seeking the revocation and/or annulment of the grant of probate issued to the respondent on 19th December 2013 on the grounds that the death certificate presented by the respondent was forged, the deceased’s will was forged and that the respondent’s national identity card was also forged. He relied on the CID forensic report that had been relied on in the application for review and a further CID forensic report dated 13th October 2014 that was of the opinion that the will relied on in this case had in fact not been signed by the deceased; that it was a forgery. He is the grandchild of the deceased.
6. The respondent filed a notice of preliminary objection to say that the application was *res judicata* for the reason that it was raising issues that had been raised before and on which a judgment had been rendered on 19th December 2013 and a ruling on 4th June 2014. This Court asked to be addressed on the objection. The same was prosecuted by DR KAMAU KURIA for the respondent and by the applicant who was not represented.
7. The issue for determination is whether the applicant’s summons for revocation and/or annulment is *res judicata* as pleaded in the notice of preliminary objection.
8. Under **section 7** of the **Civil Procedure Act** the doctrine of *res judicata* is explained in the following terms:

“No court shall try any suit 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.”

9. It is trite law that for the doctrine of *res judicata* to apply, four basic conditions have to be satisfied. They are the following:-
 - a. a previous suit or proceeding in which the matter was in issue;
 - b. the parties were the same or litigating under the same title;
 - c. a competent court heard the matter in issue and determined it; and

- d. the issue has been raised once again in a fresh suit or proceeding (**ABOK JAMES ODERA V. JOHN PATRICK MACHIRA , Civil Application No. 49 of 2001 at Nairobi**). In **KAMUNYE AND OTHERS V. THE PIONEER GENERAL ASSURANCE SOCIETY LTD [1971] EA 263, 265 LAW, AG. V. P.** had this to say:-

“The test whether or not a suit is barred by *res judicata* seems to be – is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *res judicata* applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time – GREEN-HALGH V MALLARD, [1947]2 ALL ER. 255. The subject matter in the subsequent suit must be covered by the previous suit, for *res judicata* to apply – JADVA KARSAN V HARNAM SINGH BHOGAL (1953), 20 E.A.C.A. 74.”

10. The doctrine of *res judicata* has been lauded as a fundamental doctrine of all courts, its essence being that there must be an end to litigation. The doctrine is to the effect that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action (**KULOBA, R. JUDICIAL HINTS ON CIVIL PROCEDURE, VOL. I Page 44 Paragraph 77**).
11. Lastly, *res judicata* applies to applications just as it applies to suits.
12. I have considered the applicant’s application that seeks the revocation and/or annulment of the grant of probate that was issued to the respondent on 19th December 2013. He states that the certificate of death that was produced by the respondent to support the petition was forged. Also forged were the deceased’s will and his national identity card. It is quite clear that in the application whose judgment was delivered by Justice Musyoka on 19th December 2013 the applicants therein had claimed that the death certificate, will and national identity card had been forged. The same documents now subject of this application. The court determined that the issue of the forgery of the documents had not been proved and went on to find that the deceased had made a valid will, and that the petition had been competently brought by the respondent. She was found to be the deceased’s widow.
13. The applicant and others then filed an application to review the judgment on the basis of forensic expert evidence that showed that the death certificate and the identity card were forged. Justice Kimaru observed that the forensic expert evidence ought to have been placed before the court that had tried the matter; that such evidence ought not to have been sought after the case was finalized. The application for review was dismissed and the applicants advised to appeal the decision of Justice Musyoka. Presently the applicant has gone for further forensic expert evidence to show that the will was not in fact signed by the deceased, and that in fact it is a forgery. In my view, he is litigating the issue of forgery in instalments. He is not saying that upon the exercise of reasonable diligence he could not have secured all the necessary forensic expert evidence to prove the allegation of forgery before Justice Musyoka. This application is substantially the same as the one that was found by Justice Kimaru to lack merits. Once again, it should be noted 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 not brought forward only because they have, from negligence, inadvertence or even accident, omitted part of their case. *Res judicata* applies also 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 which was cited with approval in GREENFIELD INVESTMENTS LIMITED V. BABER ALIBHAI MAWJI, Civil Appeal No. 160 of 1997.

14. In conclusion, I find that the application dated 25th November 2014 and filed on the same day raises issues that have been heard and finally determined by a competent court and is therefore *res judicata*. The same is therefore struck out with costs.

DATED and DELIVERED at NAIROBI this 13th day of March 2015

A.O. MUCHELULE

JUDGE