



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**SUCCESSION CAUSE NO. 76 OF 2010**

**In the matter of the Estate of GRACE WANGAI AMASHA Alias GRACE WANGAI AMASA**  
**(Deceased)**

JAMES T. MUNYI AMASHA.....APPLICANT/CO-ADMINISTRATOR

VERSUS

GLADYS WANDIRI NDWIGA.....RESPONDENT/ADMINISTRATOR

**RULING**

The applicant James T. Munyi Amasha in his summons dated 19th March 2014 brought under Section 47 and 71 of the Succession Act and Rule 49 and 73 of the Probate & Administration Rules seeks for the following orders:-

- (a) *That the honourable court be pleased to give direction on sub-division of the estate.*
- (b) *That the parties do agree on a single surveyor to conduct sub-division of the estate from the date of the order and in default the chairman of the surveyors of Kenya does appoint a surveyor on behalf of the parties to conduct the sub-division.*

In the supporting affidavit the applicant avers that the grant was confirmed in terms of distribution in equal shares for LR. Mbeti/Gachuriri/933 between the two houses of the deceased. The two widows of the deceased Grace Wangai Amasha (now deceased) and Gladys Wandiri Ndwiga (respondent herein) were the co-administrators and beneficiaries on behalf of their children. The first widow Grace died after the confirmation of grant and the applicant herein in his capacity as her son was substituted in the place of his mother.

The parties thereafter sought directions from the court on sub-division of the land which were given by Khaminwa, J in her ruling delivered on 24th April 2008. The applicant claims that the respondent hired a surveyor and sub-divided the land without following the directions of the court.

Infact, she did not give access to the water and roads for the applicant's portion as directed by the Judge. The applicant is aggrieved in that his land has lower value in comparison with that of the respondent and urges the court to grant the orders sought. The land was sub-divided into two equal parcels measuring 1.62 ha. LR. Mbeti/Gachuriri/2786 for the applicant and 2769 for the respondent.

The respondent in her replying affidavit opposed the application stated that the court gave directions as to the sub-division of the land on application by the applicant's mother. The parties got a surveyor who sub-

divided the land and took into account the court's direction as to access to water and roads. The parties then signed mutation forms which were duly filed. However, the applicant refused to sign the necessary documents for issue of title prompting the respondent to file an application dated 24/2/2014 seeking for orders that the Deputy Registrar be authorized to sign the documents in place of the respondent which is still pending. The respondent opposes the application and calls for its dismissal.

Both parties filed submissions in support of their arguments. One of the issues that was raised by the respondent is that the application is *res judicata* following the one of the applicant's mother dated 5/6/2007 which led to the ruling of the Judge on 24/4/2008 in which similar directions were given.

The issues arising in this application is two fold:-

- i. Whether this application is *res judicata*;
- ii. Whether the orders sought should be allowed.

Section 7 of the Civil Procedure Act defined *res judicata* in six explanations as follows:-

*“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.*

*Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.*

*Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.*

*Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*

*Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*

*Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.*

*Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.*

A matter would be said to be *res judicata* if it has been directly and substantially in issue in a former suit between the same parties and has been decided by a competent court. The application dated 5th June 2007 was brought by the applicant's mother who was at the material time the co-administrator to the respondent. It sought for directions of the court on sub-division of LR. Mbeti/Gachuriri/933 having regard to access to water and roads. The application was determined by a court of competent jurisdiction on 28/4/2008 and directions given as prayed. The applicant herein stepped into the shoes of his mother in this cause after she died.

The matters in issue in the earlier application were the issue of sub-division in a manner that would give both parties access to water and road access. This application seeks for orders that “the parties agree on a single surveyor to conduct sub-division and in default, the chairman of the Institute of surveyors do appoint a surveyor on behalf of the parties”.

The averments in the affidavit are to the effect that the respondent chose a surveyor without involving the applicant and that the portion given to the applicant was not accorded access to water and roads as directed by the court earlier. The subject herein is still sub-division and access to water and roads clothed in a different language.

It is my considered opinion that the parties in this application are basically the same as in the earlier application considering the substitution of the 1st administrator by her son, the applicant. The issues in the earlier application are substantially and directly in issue in this application and were decided by a court of competent jurisdiction.

The applicant has not come before this court for review of the earlier orders but seeks new orders of the same nature as in the application dated 5/6/2007 and which are intended to achieve the same effect. The contents of the affidavits of the parties leave no doubt that the court will be dealing with the same issues determined by a competent court. I reach a conclusion that this application is *res judicata* and ought not to be entertained.

I wish to add that the court did not believe the applicant when he alleged that he was not involved in appointing the surveyor who did the sub-division. It is not in dispute that he has signed all the necessary documents for sub-division including the mutation. The change of mind must have been influenced by other factors but not that a surveyor was forced on him. If he had not consented to the surveyor doing the work he would have objected to the mode of sub-division from the beginning and not at this late hour.

This application is struck out for the foregoing reasons. Each party to meet their own costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF APRIL, 2015.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Ms. Muthoni for Ms. Wairimu for Administrator**