REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Succession Cause 139 of 1998

IN THE MATTER OF THE ESTATE OF LATE JUSTUS KIRUMA M'RUTERE (DECEASED)

BETWEEN

JANE MUKOMPURIA……..APPLICANT/INTERESTED PARTY

V E R S U S

MARGARET MUKOMUNENE…….….PETITIONER

MICHECK NGURE……..……..OBJECTOR

R U L I N G

By a Chamber Summons dated 8.6.2007 and purportedly brought under Order XLI, Rule 4 of the Civil Procedure Rules and Rule 49 of the Probate and Administration Rules, the Interested Party herein, sought two principal orders, namely a stay of further proceedings in respect of this suit, until the final disposal of the Intended Appeal by the said Applicant, and an order of the maintenance of the status quo on the property known as Land parcel No NTIMA/IGOKI/461 ….the estate herein and subsidiary order that costs be in the cause of the intended appeal.

When this matter came before me for hearing Mr. Kirima learned counsel for the Petitioner, objected to the hearing of the summons, and despite vehement opposition from Mr. Kioga learned counsel for the Applicant, I allowed Mr. Kirima to argue his objection being a preliminary objection on a point of law.

Mr. Kirima's point was that the grant was **finducious officio** and had no jurisdiction to hear and determine this matter, that there was nothing to be stayed, that there are no issues pending that the court had given judgment and any aggrieved party could only appeal. There had been a Notice of Appeal filed a year or so ago in fact given on 30.5.2007 and that since then no action had been taken by the Applicant as the Applicants Advocate. There was for instance certificate of Delay from the Deputy Registrar. All previous applications brought by the objector had been dismissed on the grounds of Res Judicata, and this application should suffer the same fate.

In response to the Objection raised by Mr. Kirima, Mr. Kioga learned counsel for the Applicant submitted not only that this court had jurisdiction but that a Notice of Appeal is as good as an appeal. Order XLI, rule 4 of the Civil Procedure Rules, and that the Preliminary Objection raised was not based on any law, that it was not a true preliminary objection and that the court retains jurisdiction to entertain issues of execution, that even if the Petitioner won the suit it cannot effect any distribution without coming to the court, and that the court retains jurisdiction in ownership the distribution of an estate. The court was therefore not "**findus officio.**" He asked the court to make a ruling on both the preliminary

objection and the complaint.

Mr. Kiogora's complaint was that the petitioner had sworn a scandalous affidavit against him as a person, and he would apply to have the Petitioner cross-examined on her Affidavit sworn and filed on 29.10.2007.

Those were the respective Counsel's arguments. It will only be necessary to answer in Kioga's complaint once the issue of jurisdiction, raised by Kirima in his preliminary objection has been disposed. The issue is, when is a court said to be **functus officio** or that the matter is res judicate as Mr. Kirima argued.

The Latin expression **functus officio** literally means that an authority body or person has performed that which his or her office required. In legal parlance it means that once an event has made a decision, it has diverted itself of further authority of competence because the duties of the original commission have been fully accomplished.

The Principle of res judicata again, a Latin phrase which literally means – a thing adjudicated is set out in section 7 of the Civil Procedure Act Cap 21, Laws of Kenya. It means that an issue has been definitively settled by judicial decision, and it is an affirmative defence barring the same parties from litigating a second law suit or application within the law suit, on the same claim or any other claim arising from the same transaction or series of transactions that could have been – but was not raised in the first suit or application within the suit. A defence of res judicata to be successful must have three elements namely;

(1) an earlier decision on the same issue

(2) a final judgment or ruling on the merits, and

(3) the involvement of the same parties, or parties in privity with the Original Parties.

Those being the import of the two submissions by Mr. Kirima learned counsel for the Petitioner. What is the position on the ground for the Applicant, and her learned counsel Mr. Kioga having perused the well considered ruling of my predecessor in this court, Hon. Mr. Justice Isaac Lenaola delivered on 22nd May 2007 and in which the learned Judge examined the history of this whole matter, and which is unnecessary recapitulate here, I am strengthened in the view that the court is indeed **fanctus officio**, and the entire matter is **res-judicata** in relation to the Applicants' Chamber Summons dated 8.6.2007 and filed on 13.6.2007. The same matters were litigated and determined in the application dated 4.10.1999, and determined by the late that Mr. Justice Tuiyot in his Ruling of 17.9.2001. The same matters were raised by the Applicant through the same firm of Kioga & Co. Advocates per a similar application dated 1.10.2001. That application was struck out with costs by Hon. Mr. Justice Lenaola on the same grounds of Res Judicata.

Having come to this conclusion, I only wish to add on a depressing note of the bold but unfortunate and futile attempt to would-wink the court by refusing to acknowledge that parcel No. NTIMA/IGOKI/461 ceased to exist when it was sub-divided or and shared out in the manner detented at p.4 of Ruling of Hon. Mr. Justice Lenaola, and asking the court to maintain a status quo of aparcel of land does not legally exist any more. It is a …..practice.

In the upshot, I uphold the preliminary objection raised by Kirma and strike out with costs the Applicants Chamber Summons dated 8.6.2007, and filed on 13.6.2007.

Dated and delivered at Meru this 25th day of April.2008

M. J. Anyara Emukule

Judge.