

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Succession Cause 11 of 2004

IN THE MATTER OF: THE ESTATE OF MARGARET WAHU KIMANI ..DECEASED

AND

IN THE MATTER OF: NDUNGU KIMANI.....APPLICANT

VERSUS

FLORENCE EMILY WANJIRU.....RESPONDENT

R U L I N G

By a summons dated 12th March 2008, the applicant herein, Ndungu Kimani sought for the following orders interalia:

- a) *An order to restrain Florence Emily Wanjiru, the respondent herein from dealing in any way with the estate of Margaret Wahu Kimani (deceased) until further orders.*
- b) *An order to enjoin the applicant herein as a co-administrator in the estate of Margaret Wahu Kimani (deceased).*
- c) *Costs of the application.*

The summons is stated to be brought under section 76 of the Law of Succession Act and the rules therein and under Order XXXIX rules 1 and 2 of the Civil Procedure rules. The applicant filed an affidavit he swore in support of the summons. When served with the summons, Florence Emily Wanjiku raised a Preliminary Objection against it contained in the notice dated 22nd April 2008.

The Preliminary Objection had to be disposed of first before hearing the substance of the application. It is the submission of Mrs. Kipsang, learned advocate for the Respondent that the summons is res judicata in that a similar application had previously been filed, heard and determined. For this reason, the learned advocate urged this court to find that the application is frivolous and an abuse of the court process hence it should be struck out.

Mr. Kiume Kioko, learned advocate for the applicant opposed the Preliminary Objection, on the basis that the principle of res judicata does not apply to applications but only to suits. It is Mr. Kioko's view that this court should consider the application in order to enable it rectify an anomaly which is stated in the application.

I have considered the rival submissions. I have further considered the issues raised in the application and the notice of Preliminary Objection. It is not in dispute that Ndungu Kimani had filed the application dated 10th May 2006 in which he sought for interalia: the revocation of the letters of administration in respect of the Estate of Margaret Wahu Kimani (deceased) issued to Florence Emily Wanjiku. The application was finally dismissed on 19th October 2006. In the summons now before this court, the applicant is complaining that the Respondent herein did not involve other family members when applying for the grant. It is also alleged that the Respondent intends to consume alone the Estate of Margaret Wahu Kimani (deceased). In the summons for revocation of grant dated 10th May 2006, the applicant had accused the Respondent of failing to involve him and other family members when applying for letters

of administration in respect of the Estate of Margaret Wahu Kimani (deceased). That issue was also raised in paragraphs 5 of the affidavit, the applicant swore in support of the summons dated 12th March 2008. It is obvious the issues being raised now were actually raised, heard and determined in the summons for revocation of grant of 10th May 2006. The question which remains for me to determine is whether or not the principle of res judicata applies to this application. I am of the humble view that the principle of res judicata applies not only to suits but also to interlocutory applications like in this case. The court of Appeal expressed itself succinctly in the case of Uhuru Highway Development Ltd. =vs= Central Bank of Kenya & 2 others C.A. No. 36 of 1996 as follows:

“There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say that, there must be an end to applications of similar nature: that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that courts could and would be inundated by new applications filed after the original one has been dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of our Civil Procedure Act caters for.”

It is clear from the above statement of law that the doctrine of res judicata applies to interlocutory applications. Consequently I find the preliminary objection as well founded. I uphold the preliminary objection by striking out the summons dated 12th March 2008 with costs to the Respondent.

Dated and delivered at Mombasa this 2nd day of May 2008.

J. K. SERGON

J U D G E

In open Court in the presence of Mr. Stonik h/b Mrs. Kipsang for the Respondent and Mr. Kiume Kioko for the applicant.