REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 139 of 1998

IN THE ESTATE OF JUSTUS KIRUMA M'RUTERE…….DECEASED

JANE MUKOMBURIA MWORIA.....APPLICANT/INTERESTED PARTY

V E R S U S

MARGARET MUKOMUNENE…..….....….....….PETITIONER

MISHECK NGURWE…….....……..……..OBJECTOR

RULING ON A PRELIMINARY OBJECTION

1. The oral preliminary objection raised on 23.4.2007 by Mr. Kirima, learned advocate for the Administrator in this cause is as follows:

That the Application dated 1.10.2001 by Jane Mukomburia Mworia is bad and should be struck off as it is barred by the doctrine of res judicata. The reason for this he says, is that a similar Application dated 4.10.1999 was made by her husband, Mworia Rutere and the same was heard and dismissed by Tuiyot J on 17.9.2001. Similar issues are now being raised without regard to the fact that no Appeal has been lodged against that prior decision.

2. To buttress the submissions on this point, Mr. Kirima points to another Application by one Misheck Ngure, brother-in-law of Jane Mworia aforesaid which also exists on record and raises similar issues as the other two. All the Applications in any event seek orders under s. 76 of the Law of Succession Act that the grant issued to Margaret Mukomunene be revoked because she is a stranger to the estate of Justus Kiruma M'Rutere and she obtained the same fraudulently.

3. Mr. Kioga for the Administrator argues on the other hand that the orders of Tuiyot J. issued on 17.9.2001 cannot be the basis for saying that the Application dated 1.10.2001 is res judicata because in fact Tuiyot J did not determine any matter on the merits, and the parties to the prior Application were not the same, neither are their interests the same. That Margaret Mukomunene was seeking to revoke the grant herein in her own capacity and not as an agent of her deceased husband who had made the Application that was dismissed by Tuiyot J.

4. Before determining whether the doctrine of res-judicata is applicable, I should detour briefly and say this; I have seen the record in this matter and specifically the orders of Aganyanya J. made on 22.11.1999, 14.2.2000, 13.3.2000 and the judgment of Tuiyot J. made on 17.9.2001. I may have my own views as to whether the original letters of administration were properly issued or not but I am not at this instance

sitting in any position where I can say anything about matters raised by Mr. Kioga with regard to those orders specifically. When I am properly seized of the opportunity I will then say something about them. What is before me however is the simple question whether the Application dated 1.10.2001 should be struck off and I will remain faithful to that brief.

5. The Application dated 4.10.1999 was brought to court by Mworia M'Rutere and he sought orders that the grant issued to Jane Mukomunene be revoked because;

(i) she had no relationship with the deceased, Justus Kiruma M'Rutere.

(ii) She filed the cause secretly and fraudulently without reference to the deceased's rightful heirs and

(iii) The provisions of the Law of Succession Act, cap 160 were not followed when applying for letters of administration.

6. Before the Application could be prosecuted, Mworia M'Rutere who claimed the estate as a brother of the deceased, Kiruma, who had no wife and children, also died. On 14.2.2000, Aganyanya J. recorded an order by consent allowing one Misheck Ngurwe to be substited in Mworia's place as the Applicant. On 13.3.2000, "**the dispute**" was referred to the District Officer, Kinoru, for arbitration. I should pause here and note that by this time, the grant had been confirmed and the only pending matter was the Application for revocation dated 4.10.1999.

7. I note from the record that on 11.5.2000, the District Officer, Kinoru, filed her award and the claimant was listed as Jane Mukokaburia Mworia and in her evidence she is recorded as giving her relationship with the deceased and finally stating:-

"**My prayer is that the land should be reverted** *(sic*) **to Justus Kiruma M'Rutere and be registered in his name after which the family will sit and agree on the administrators of the estate of the deceased."**

It is also clear that the other claimant was Misheck Ngurwe and he too testified before the arbitration panel and he is recorded as saying:

"**I have come here to state that I do not know who has sub-divided my deceased brother's land and nobody in our family knows this person. This is thuggery and I would like this land to revert back to the original owner, the deceased Justus Kiruma M'Rutere. We shall then convene a family meeting and agree on the distribution of the estate"**

9. Both Jane and Micheck were subjected to cross-examination by Margaret Mukomunene and the arbitration panel and they also called witnesses who were similarly questioned. Margaret Mukomunene also testified and gave her side of the story regarding the deceased's estate and called witnesses. In the end in any event, the elders made the following decision;.

"**AWARD**

The elders unanimously agreed that the land under reference NTIMA/IGOKI/461 which has already been sub-divided be shared out as follows:-

1. 1st Petitioner – Jane Mukokaburia Ntima/Igoki/6037 - 0.32 ha.

2. 2nd Petitioner – Micheck Ngurwe Ntima/Igoki/6038 - 0.32 ha.

3. Objector - Margaret Mukomunene Ntima/Igoki/6039 - 0.045 ha.

4. Purchaser - Francis Muthuri Ntima/Igoki/6040 - 0.045 ha.

The elders further reached a consensus that the objector pay a hundred thousand (Ksh.100,000) to the first and second petitioners as a customary fine before receiving her share of land, since she defrauded the first and second petitioners by obtaining succession letters and a confirmation of grant as an administrator of the deceased estate and for sub-dividing and subsequently selling family land without their knowledge.

CONCLUSION

The unanimous award reached by the elders was in line with evidence adduced before them".

10. The above award was read out to parties on 4.9.2000 and it is on record that C. Kariuki Esq. Advocate was present for the Petitioner while the Respondent was present in person. On 28.9.2001, Micheck Ngurwe filed a Notice of Appeal against that decision but there is no evidence that in fact any Appeal has been filed. The same Micheck Ngurwe however also filed an Application dated 30.9.2001, seeking orders that the award read on 4.9.2000 be set aside and that the court do proceed and determine the matter. On 13.11.2000, the advocates for the parties appeared before Tuiyot J. and reached a consent that the award be set aside but for some inexplicable reason, a clerk, one Mung'iria from the firm of C. Kariuki and Company Advocates appeared in the registry and fixed the Application dated 30.9.2001 for hearing on 9.7.2001. Obviously the same had been dispensed with by the consent order of 13.11.2000.

10 In any event, on 9.7.2001, advocates for the parties appeared before Tuiyot J and recorded the following consent order;

"**By consent hearing to be by way of affidavits. Parties are allowed to file further affidavits or replying affidavits."**

12. On 27.7.2001, the matter was fixed for mention on 13.8.2001 and on that day, judgment was fixed for 17.9.2001 and the judgment ended up being for the Application dated 4.10.1999.

13. Mr. Kioga has taken issue with the fact that judgment was made based on that Application but in fact there was at that time no other matter pending because the award had been set aside and the Application dated 30.9.2001, had therefore been disposed of and with that single act, parties returned to where they were on the date of reference to the arbitration panel i.e. 13.3.2000 and at that time the only '**dispute**' pending would be and remained as of 13.8.2001, the Application dated 4.10.1999 which Tuiyot J. ended up determining in the following words inter- alia;

"**It is quite unfortunate for the objector to allege that the petitioner is not the daughter of the deceased and yet he knows that she is.**

For the above stated reason, I hereby dismiss the objector's application dated 4.10.1999 with costs to the Petitioner."

14. Mr. Kioga has urged the point that Tuiyot J. never heard the Application to enable him write his judgment but my reading is that based on the order of 9.7.2001, and the appearances before him on 13.8.2001, parties were in agreement, which is not unusual, that he should make his decision on the affidavits on record. I hasten to add that on 13.8.2001, Mr. C. Kariuki Advocate and Mr. Kirima and Mr. D.J. Mbaya Advocate were present and representing the objector and petitioner respectively and Mr. Kirima attended the delivery of judgment and sought removal of inhibitions which had apparently been registered against the title to the suit. He acted on the instruction of the Petitioner.

15. I have deliberately set out the above matters to show one fact; the judgment of 17.9.2001 was properly made with the consent of the parties and based on the only issue before the court; revocation of grant as sought by Misheck Ngurwe who had taken up the issues as a substitute to his deceased brother, Mworia Rutere, husband of Jane Mworia who is the Applicant in the Application under challenge.

16. To ensure that the issues do not get muddled up again in this file, I should add as follows;-

17. Mulwa J. heard the Application dated 1.10.2001 and delivered a Ruling on 8th July 2002 and dismissed it with costs but in a subsequent ruling on 22nd May 2003, he set aside the order of dismissal and stated at the end as follows:-

"**I will make a ruling on the objection raised on the issue of Res Judicata separately**."

18. On 26.3.2007 and following up from above I ordered parties to address that issue before any other matter could be addressed and so they did.

19. Res Judicata is best expressed in the language of s.7 of the Civil Procedure Act which provides 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".**

20.In Sarkar, the Code of Civil Procedure 6th Edition at page 96, it is added as follows:

"**The binding force of the plea of Res Judicata depends not upto the Civil Procedure Code, section 11 (*equivalent to s. 7 above*) but upon general principles of law. If it were not so, there would be no end to litigation."**

20. I make this point because issue has been taken with the fact that there has been no previous "**suit**" as the two applications in question were all filed within the same "**suit".** To my mind and in line with the statement in Sarkar (supra), the general principle of law embodied in the doctrine of the Res Judicata is that a court should not determine the same issue between the same parties over and over again otherwise disputes would never be speedily resolved.

21. Having so said, are the parties to the Applications the same; are the issues the same and have the issues been previously heard and finally decided?

22. It is not in doubt that Misheck Ngurwe as did his deceased brother, Mworia Rutere and his wife, Jane did the same issues throughout; that Margaret is a stranger and cannot be allowed to inherit the estate of the deceased which should be a matter to be determined by his family and they have said that they are that family. It must be understood that the application dated 4.10.1999 was filed by Jane's husband and it was taken over by her brother-in-law, Micheck, who had heard and determined. It is now argued that Micheck, his late brother Mworia are different from Mworia's wife who is entering the case in her own capacity and not representative of either Micheck or Mworia's interest. One may be tempted to agree with that proposition but not in the face of the Affidavits on record. Although Jane swears by her Affidavit of 1.10.2001 that she was filing the Application in her own capacity and on behalf of her unnamed children, the fact is that she has no relation to the deceased other than through her husband, Mworia, whose claim on the very same grounds as herself was dismissed by Tuiyot J. To my mind even if her claim is camouflaged as a personal claim, beneath the camouflage would be found that obvious piece of evidence submitted by her late husband and later through Misheck and she would only then be saying one thing; Margaret not being related to the deceased, unlike her husband and through him, herself, ought not to inherit the estate. Tuiyot J. heard that argument and dismissed it and notice of appeal against it filed. No other court should attempt to re-open that debate and res-judicata has been properly invoked. As Kuloba J. said in Mwangi Njongu vs Meshack Mbogo Wambugu and Another HCCC 2340/91 and paraphrasing Hukum Chand in Law of Res Judicata, 1894

"**Justice requires that every cause should be once fairly tried, and public tranquility demands that having been tried once, all litigation about that cause should be concluded for ever between those parties and their privies……if it were not for the conclusive effect of all such determination, there would be no end to litigation and no security of any person; the rights of parties would**

involve endless confusion and great injustice often done under the cover of law; while the courts stripped of their most efficient powers to stop repetitive litigation, would become little more than meaningless halls of debate, or at best, mere advisory bodies; and thus, the most important function of the state, namely that of ascertaining and enforcing rights, would go unfulfilled."

24.I know that what is in issue here are applications and not suits properly so called but as was said in Mburu Kinyua vs Gachiri Tuti [1978] KLR 69, "**The wider principles of res-judicata apply to applications within the suit……There must be an end to interlocutory applications as much as there ought to be an end to litigation**." In fact in the present case, the order refusing to revoke the grant is akin to and *Mutatis Mutandis* must be placed in the same corner as a trial judgment as no other matter should be done in a Succession Cause upon refusal to revoke the grant. Lastly and in conclusion, parties may sue by proxies or privies, wives after husbands have failed, brother-in-laws after in-laws have been shut out but in the end, once it is apparent that the doctrine of res-judicata applies, our courts will sharply invoke it to ensure that courts do not become endless talk shows or that they be rendered repetitive rewinded organs.

25.In the case before me, the objection for reasons of res judicata is clearly merited and the Application dated 1.10.2001 is struck out with costs.

26.If any advise is needed, let the Applicant pursue other avenues known to law in addressing what injustices may have occurred in this file in the past, if at all.

27.Orders accordingly.

Dated, signed and delivered in open court at Meru this 22ND day of May 2007

ISAAC LENAOLA

JUDGE

In The Presence Of

Mr. Kirima Advocate for the petitioner

Mr. C. Kariuki holding brief for Mr. KiogoraAdvocate for the Objector

ISAAC LENAOLA

JUDGE