REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 45 of 1987

IN THE MATTER OF THE ESTATE OF JAMES WAMBUGU NGURI..... DCD

AND

JANET WAGATWE WAMBUGU …….…… PETITIONER

VERSUS

BITHA WAMBUGI WAMBUGU ……. OBJECTOR

RULING

The petitioner in this matter filed a bill of cost for taxation on 5th March 2007. After taxation the Deputy Registrar delivered his ruling on 20th April 2007. The respondent moved the court by notice to motion dated 29th May 2007. That notice of motion was heard by the Deputy Registrar. It sought the following prayers:-

(i) That the orders of the taxing officer of 5th March 2007 be reviewed.

(ii) That the said orders be set aside.

The Deputy Registrar on hearing that application proceeded to dismiss the same by his ruling of 16th July 2007. The respondent had filed a Chamber Summons dated 12th July 2007 seeking the following prayers;-

(i) That there be stay of execution pending hearing of this application.

(ii) That the orders of the Deputy Registrar be set aside and/or vacated.

When the matter came up for hearing for the chamber summons dated 12th July 2007 the petitioner raised a preliminary objection. The basis of the objection was that that application was Res judicata. In support of the application the advocate for the petitioner submitted that the affidavits in support of that application indicated that the respondent was relying on the same grounds as in the application by notice of motion dated 29th May 2007. That after the taxation of the bill of cost on 20th April 2007 the respondents filed the application 29th May 2007 because they were dissatisfied with the orders of the Deputy Registrar in his ruling on taxation. The petitioner therefore argued that the application dated 12th July 2007 is Res judicata. In his response the respondent's advocate contended that the application was not Res judicata. He stated that the application of 29th May 2007 sought review but the application of 12th July 2007 was seeking to set aside the taxation order. The advocate for the respondent further argued that even if the

court was persuaded by the argument of the petitioner the court should find that the orders of the Deputy Registrar were a nullity because the Deputy Registrar had assumed jurisdiction in carrying out the taxation when there was no orders for costs.

The application dated 29th May 2007 sought a prayer to set aside the taxation. The application of 12th July 2007 similarly sought the setting aside of the taxation and/or vacation of that order. In both those applications the respondent in the affidavit in support stated that the basis upon which they were made was that there was no order made by the court for costs. That being the case the petitioner is correct in arguing that the respondent's application of 12th July 2007 was Res judicata. To best understand the definition of Res judicata I would refer to some cases. A case in point is **POP-IN (KENYA) LTD & 3 OTHERS –V- HABIB BANK AG ZURICH.** The holding of that case was in the following terms:-

"***The plea of*** *Res judicata* ***applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time."***

The court in making decision in the above case also approved the finding of the case of **HOYSTEAD AND OTHERS V TAXATION COMMISSIONER, (1925) ALL ER RE 56 AT P6** as follows:-

"***The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgement upon a different assumption of fact; …..Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is principle of law that this cannot be permitted."***

The *locus classicus* of that aspect of *res-judicata* is the judgement of WIGRAM VC IN HENDERSON V HENDERSON (1843) HARE 100, 115 where the Judge says as follows:-

"***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 of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement, 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."***

Bearing in mind the two applications before court I do make a finding that the respondent's application dated 12th July 2007 is caught by the doctrine of Res judicata. Accordingly I do hereby dismiss that Chamber Summons with costs to the respondent.

Dated and delivered at Nyeri this 13th December 2007.

MARY KASANGO

JUDGE