

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 698 OF 2002

KAMBORA KAMAU NJOROGE.....PLAINTIFF

VERSUS

ESTHER NYAMBURA KIRIMA.....DEFENDANT

RULING

In this application dated on 27th September, 2002 and filed on 30th September, 2002 Mrs Esther Nyambura Kirima the defendant/applicant seeks orders setting aside the exparte order made herein on 22nd May, 2002 and striking out of the suit on the grounds inter alia that it was made without service on her and that the suit is in any case res judicata.

Briefly, the plaintiff/respondent is the son of one Kamau Njoroge, who allegedly was entitled to 3 acres through succession in Probate and Administration Cause No. 190 relating to the estate of one Kimani Kambora the husband of the applicant herein and brother to the respondents said deceased father. The succession matter is however still before the court and as fate would have it, the respondents father passed away on 10th February, 2002. As the applicant was not willing to allow the respondents father to be buried on land which was still in her husband's name, the respondent filed a suit number HCCC NO. 286 of 2002 to compel the applicant to accept the deceased to be buried on her husbands land. After hearing the case, the court declined the suit and dismissed it as it was essentially a claim for land and yet the respondent had not taken out Letters of Administration. I entirely agree with that

Due to the above set back, the respondent then quickly obtained representation to his fathers estate and filed the consent suit for orders inter alia that the applicant should be permanently restrained from interfering with the grave of the respondents father on the 3 acres of land and that the plaintiff should be restrained from interfering with the respondents possession of the 3 acres. At the same time, the respondent sought an interlocutory injunction restraining the applicant from interfering with the burial of the respondents father on the 3 acres of LR NO. LO 1/...../58 on any date pending the hearing and determination of the suit.

The application for interlocutory order came up for hearing on 22nd May, 2002 when it was alleged by counsel for the respondent but the application was served on 10th May, 2002 and that the applicant had declined to sign for the documents. The court then proceeded to hear the application and granted the orders sought. The applicant now contends that she was not served and that the orders should be set aside. She also contends that the matter was res judicata and should be struck out.

The main issue which this matter raises is that it would be just to set aside the exparte orders restraining the applicant from stopping the respondents to burry his father on the suit premises. In this regard, it is observed that the main suit and not seek such a prayer nor did the prayer follow from those sought in the plaint, namely for quiet possession of the suit premises which could only arise if the respondent had proved ownership of the suit premises. As a succession grant is not proof of ownership, I find that if the orders are set aside the court would then determine if it was entitled to grant the restraining orders. As it is also contended that the applicant may not have been served with the prayers herein, I find that it would be in the interest of justice to reopen the matters herein.

This now leads me to the issue on as to whether the applicants suit is res judicata. Only reading of the earlier suit and the courts determination to the application for similar orders as herein, there is no doubt that as herein the claim was predicated on ownership. As the respondent had it by then obtained

representation he could not maintain the suit on behalf of the estate and had to struck out without having its merits considered. The respondent has however not obtained representation and is entitled to act on behalf of the deceased and as the earlier suit was not struck out on merits, its dismissed does not give rise to the plea of res judicata. This plea is before misplaced.

In view of the above, I hereby set aside this courts order of 22nd May, 2002 and order of be heard. I however dismiss the prayer for striking out the suit aside as in my view the suit is res judicata. The costs shall be in the cause. Orders accordingly.

Delivered and signed this 11th day of December, 2002

G.P. MBITO

JUDGE