

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

**AT NAIROBI
MILIMANI LAW COURTS**

CIVIL CASE NO. 1935 OF 1996

NDURUMO MUCHOKI.....PLAINTIFF

-VERSUS-

THE HON. THE ATTORNEY GENERAL.....DEFENDANT

RULING

Mr. Rotich on behalf of the Attorney General raised a preliminary objection based on the grounds that the present case is resjudicata because the same claim had been raised in the HCCC No. 510 of 1996. In this suit which was filed on behalf of the estate payment for compensation had been paid in full settlement. He informed the court that what actually happened was that after the suit was filed the advocate acting on behalf of the plaintiff who was Joseph Kinyua Rua had instructed M/s. K.J. Kinyanjui & Co. Advocates to act for him. The advocate entered into negotiation with the State Counsel acting for the Attorney General and struck a settlement in which the advocate was paid in total the sum of Shs.1,787,500/-

The advocate did not pay the money to the plaintiff, Joseph Kinyua Rua and subsequently the advocate was charged with the offence of stealing by an Agent, Contrary to Section 283© of the Penal Code.

He submitted that since the money was paid to the advocate duly instructed by the plaintiff another claim can not be sustained as it would be unfair to ask the Attorney General to pay twice for the same claim.

In reply Mrs. Wambugu for the plaintiff in the present suit said that the plaintiff in the present suit is different from the plaintiff in HCCC No. 510 of 1996. The plaintiff in the present suit is the father of the deceased and has obtained letters of administration of the deceased estate. The case therefore is not Resjudicata.

I have looked at the plaint in the HCCC No. 510 of 1995. The parties in this suit are Jospheh Kinyua Rua against the Attorney General. In the plaint the plaintiff does not state what relationship he had with the deceased. The suit was filed on 30.11.1995. In the present suit the parties are Ndurumo Muchoki as the plaintiff against the Attorney General. In the plaint the plaintiff state that he is the Administrator of the Estate of the deceased Simon Miano Rua.

A perusal of the file HCCC No. 3510 of 1995 reveals that no order had been made in the file except an entry showing that a memorandum of appearance had been entered on 10.5.1996 by the Senior Litigation Counsel for the Hon. Attorney General. It is from the Judgment in Criminal case No. 2247 of 1996 it comes out that Joseph Kinyua Ruwa is the brother of the deceased. Giving evidence in that case, he says that:

“After burial he was called to Kinyanjui & Company Advocates offices and was shown by Wanjohi a list of people who had died in the accident. He was told that the firm was going to pursue the claim on his behalf. He got a letter from the firm telling him that he was acting for the people who died in the accident. That he was now going to pursue the matter on their behalf”

According to this evidence it is the advocate who called Joseph Kinyua Ruwa and convinced him that his firm was acting for the estate of the people who died in that accident. This explains why the plaint was filed incomplete without the details of dependants and without the capacity of the plaintiff to file the suit.

I find that the plaintiff in the suit HCCC 3510 of 1995 had no instructions to file the suit on behalf of the Estate and further that he did not have the capacity to file the suit, as he was not the administrator of the Estate.

As against this finding the plaintiff in the present suit is the administrator of the estate of the deceased. The plaintiff was not a party to the HCCC No. 3510 of 1995 and did not take part in whatever went on in that suit.

Mr. Joseph Kinyua Ruwa, the plaintiff in HCCC 3510 of 1995 testified in the Criminal Case that the advocate, Mr. J.K. Kinyanjui did not pay him any money and therefore he gave no money to the plaintiff in the present suit.

The fact that some money was paid allegedly for the estate would not act as a bar to the present suit. It was upon Counsel for the Attorney General to satisfy himself that the person who sued as a plaintiff had the capacity to sue on behalf of the estate before making any payment. The best evidence in this case would have been the production of Letters of Administration to show that indeed the alleged plaintiff could file the suit. There were no Letters of Administration produced to support that the person claimed to be the plaintiff was indeed a plaintiff. It follows therefore, that the advocate Mr. J.K. Kinyanjui had no instructions to act for the estate of Simon Miano Rua and any negotiations conducted and any settlement arrived at on behalf of the estate by this advocate are not binding on the true representative of the estate in this case the present plaintiff. The plea raised and based on Resjudicata does not satisfy the provisions of Section 7 of the Civil Procedure Act. The Section requires that: "For the court not to try a suit because it is resjudicata, the parties in the former suit must be the same in the latter case or be between parties under whom they or any of them claim, litigating under the same tittle....."

The parties are not the same one having no capacity to sue in the earlier suit.

The objection is therefore overruled.

Dated and delivered this 17th day of July 2000.

KASANGA MULWA

JUDGE