



REPUBLIC OF KENYA



**In re Estate of David Ndua Thuo (Deceased) (Succession Cause E093 of 2021) [2024] KEHC 5634 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5634 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE E093 OF 2021**

**A MSHILA, J**

**MAY 17, 2024**

**(FORMERLY NAIROBI SUCCESSION CAUSE NO. E2363 OF 2021)  
IN THE MATTER OF THE ESTATE OF DAVID NDUA THUO (DECEASED)**

**BETWEEN**

**GODFREY ALFRED HINGA NDUA ..... APPLICANT**

**AND**

**WAMIKEY ESTATE LIMITED & 16 OTHERS ..... RESPONDENT**

**RULING**

**Background**

1. Before court is the Grounds of Opposition and/or a Preliminary Objection dated 9<sup>th</sup> May, 2023. The 1<sup>st</sup> - 9<sup>th</sup> Respondents oppose the Applicant's application dated 2<sup>nd</sup> May 2023 on the grounds that:-
  1. The said application is misconceived, bad in law, mischievous, incompetent and an abuse of the court process.
  2. The application therein offends the principle of Res Judicata as provided under Section 7 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya in view of the fact that there are two previous injunction applications filed by the Applicant in High Court Succession Cause Nos. E2363 of 2021 and E093 of 2021 as follows:-
    - a) Summons for preservation application dated 22<sup>nd</sup> November 2021 filed by the Applicant in High Court Succession Cause No. E2363 of 2021 was determined to the effect that there was a probate cause H Succ Cause E093 of 2021;



- b) Notice of Motion dated 2<sup>nd</sup> March 2022 was determined by this Honourable Court by her Lady Justice Kasango on 5<sup>th</sup> May 2022; 7<sup>th</sup> July 2022 was determined by this Honourable Court by Lady Justice Kasango on 23<sup>rd</sup> February, 2023;
- c) Notice of Motion application dated 26
- d) That the issues raised and subject matter in the two earlier applications were directly and substantially similar as in the present application as they were heard on merit and determined by this Honourable Court (we invite this Honourable Court to review prayers 1, 2, 3, 4, 6, 8 and 12 of the present application and the applications of 2<sup>nd</sup> March 2022 and 26<sup>th</sup> July 2022, instant);
- e) That in view of the earlier injunction application aforesaid the hearing of the present application is barred by virtue of the Express provision of section 6 of the [Civil Procedure Act](#) Cap 21 of the Law of Kenya;
- f) That in the whole the applicant herein is a vexatious and frivolous litigant and the proceedings herein are an abuse of the court process and the application should be struck out and the directions of the court to prove the WILL affirmed;
  - 1. The application offends Order 45(1) of the [Civil Procedure Act](#) and which is applicable to succession matters by virtue of rule 63 of the [Probate and Administration rules](#) clearly sets out the parameters for review:-
    - 1. Discovery of new and important matter or evidence
    - 2. Mistake or error apparent on the face of the record
    - 3. Any other sufficient reasons.

3. The instant case, there is no discovery of new and important matter or evidence. Nor is there or shown to be a mistake or error apparent on the face of the record. There is no other sufficient reason given to warrant a review. The prayer for review was a misplaced one and is not available to the applicants.

4. The Respondents shall rely on In the matter of the [estate of Johana Tatei Kagithi \(Deceased\) \(High Court of Kenya at Nyeri\)](#) [2015] eKLR where the presiding judge quoting a Court of Appeal judgment stated that:-

“It will not be a sufficient ground for review that another judge could have taken a different view of the matter ... nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law issues for appeal cannot be considered in an application for review.”

5. The application offends the rule of Joinder and the spirit of the law of succession on the following terms: -

i. Section 5 of the [Law of Succession Act](#) provide that:-

“... any person of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses”.



- ii. The Deceased died Testate on 7<sup>th</sup> May 2021 having made a will and testament dated 8th January 2021.
- iii. Prayer (2) of the said application is a fallacy and cannot be entertained, the Deceased died Testate and there is a valid executor appointed by a court of law in addition:-
  - (a) The application herein offends "the primary function of a probate court which is to distribute the Estate of a Deceased person"
  - (b) The 10<sup>th</sup> -18<sup>th</sup> Respondents have no relationship with the Deceased Estate they are third parties and have not been properly joined as parties to the suit;
  - (c) Law on perpetual succession has since been determined and crystalized in *Salmon Vs. Salmon & Co. Limited* (1897) AC had this to say:-

“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act... When the memorandum is duly signed and registered though there be only seven shares taken, the subscribers are a body corporate "capable forthwith" to use the words of the enactments, "of assuming all the functions of an incorporated company"

- 6. The application herein offends "the primary function of a probate court which is to distribute the Estate of a Deceased person". The 1<sup>st</sup> and 2<sup>nd</sup> Respondent is an asset of the Estate; its management and affairs cannot be adjudicated in this forum and the application thereof is misplaced;
- 7. By dint of the ground 6 above the issues as to running the affairs of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent can only be determined in the commercial court owing to the fact that the deceased Estate is limited to his (deceased) shareholding in the company, and by virtue of this ground, this Honourable Court lacks Jurisdiction in handling the present application;
- 8. Prayer 9 of the said application offends the principal of separation of powers, the office of the Director of Criminal Investigations (DCI) is independent.
- 9. The parties were directed to canvass the Preliminary Objection by way of written submissions. Hereunder are the parties rival submissions.

### **Applicant's Submissions**

- 10. The Applicant submits that the application is not barred by the doctrine of res judicata as there is fresh evidence from the previous summons. Reliance was placed in the case of *Gladys Nduku Nthuki vs Letshego Kenya Limited; Charles Maingi (intended Plaintiff)* (2022) eKLR. It was submitted that the basis of fresh circumstances is to prevent the litigant from falling foul of the doctrine of res judicata by demonstrating that the issues giving rise to the fresh proceedings did not exist at the time of the previous proceedings. The Applicant submits that the court has jurisdiction to deal with matters relating to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. It was submitted that the Applicant has made a prima facie case that the 11<sup>th</sup> to 15<sup>th</sup> Respondents have intermeddled with the deceased's estate warranting the court to order for preservation of the estate. Reliance was placed in the case of *Stanley Anyamba Ageyo & another vs*



*Musa Matu Riunga & 5 others* (2022) eKLR. It was submitted that an award of damages will not be sufficient to remedy the injury caused on the Applicant if the court does not intervene. Lastly, it was submitted that the balance of convenience should tilt in favour of the Applicant.

### 1<sup>st</sup>-9<sup>th</sup> Submissions

11. It was submitted that the application dated 2<sup>nd</sup> May, 2023 is a replica of other applications which have been dealt with by a court of equal status as such it offends the principle of res judicata. The 1<sup>st</sup> to 9<sup>th</sup> Respondents contend that there is no discovery of new evidence nor is there mistake or error apparent on the face of the record. It was further submitted that the Applicant has not properly joined the parties as no application for joinder has been filed. Reliance was placed in the case of *re estate of Stone Kathuli Muinde (deceased)* (2016) eKLR. The 1<sup>st</sup> and the 2<sup>nd</sup> Respondents were said to be assets of the estate and that their affairs cannot be adjudicated in this forum therefore, the application is misplaced. In regard to whether the Applicant has demonstrated a prima facie case to warrant the orders, the issue was said to have been dealt with by a competent court as well as the issue of rendering accounts. Lastly, the court was urged to dismiss the Applicant's application.

### Issues for Determination

12. The Court has considered both Applications the rival written submissions and finds only one issue for determination; Whether the application dated 2<sup>nd</sup> May, 2023 is res judicata.

### Analysis

13. The court's jurisdiction has been challenged by the Respondents but it is this Court's considered view that the key issue for determination is really on the principles of res judicata and this court has jurisdiction to deal with the issue of res judicata as a preliminary technical legal point before delving into the issues in dispute between the parties relating to review of orders granted previously by the court.
14. The doctrine of res judicata is stipulated in the *Civil Procedure Act* at Section 7 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 can 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.”
15. This Court opines that for the doctrine of res judicata to apply, in this instance, there should be demonstration that the same issues have been heard and determined by a court of competent jurisdiction, same parties litigated under the same title and issues have been raised once more in this application.
16. In case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, it was held that:

“for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms; a) The suit or issue was directly and substantially in issue in the former suit. b) That former suit was between the same parties or parties under whom they or any of them claim. c) Those parties were litigating under the same title. d) The issue was heard and finally



determined in the former suit. e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

17. The *Civil Procedure Act* provides explanations with respect to the Application of the res judicata rule. Explanations 1-6 states thus:

“Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

18. The Applicant is the same party who fully participated in the applications dated 27/11/2021, Notice of Motion dated 2/03/2022 and 26/07/2022 and having perused the instant application of 2/05/2023 indeed this court notes that said application is a replica of the previous applications which issues were canvassed before a competent Court with concurrent jurisdiction and the issues were dealt with conclusively on merit and the Applicant is thus barred under the principle of “res judicata”.
19. In this instance the addition of more Respondents by the Applicant to this instant application is found to be an attempt by the Applicant to circumvent the principle of res-judicata and amounts to an abuse of due process.

### **Findings and Determination**

20. For the forgoing reasons this court makes the following findings and determinations;
- i. This court finds that the instant application 2/05/2023 has all the elements of res judicata;
  - ii. The Preliminary Objection dated 11<sup>th</sup> May, 2023 is hereby upheld.
  - iii. The application is found to be incompetent and it is hereby struck out
  - iv. The Applicant shall bear the costs.
  - v. For highlighting on 4<sup>th</sup> June, 2024. -

Orders Accordingly

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 17<sup>TH</sup> DAY OF MAY, 2024**

**A. MSHILA**

**JUDGE**



In the presence of;

Mourice Court Assistant

Githui for the 1<sup>st</sup> – 10<sup>th</sup> Respondents

Wangechi Akedi for the objector/applicant

Obuli for the Interested parties

Mwangi for 12<sup>th</sup> – 14<sup>th</sup> Respondents

