



REPUBLIC OF KENYA



KENYA LAW
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**Issack v Hared & another (Civil Appeal 8 of 2019)
[2024] KEHC 8741 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL 8 OF 2019
JN ONYIEGO, J
JULY 19, 2024**

BETWEEN

OMAR ABDI ISSACK APPELLANT

AND

MALEBO HARED 1ST RESPONDENT

FATUMA HASSAN 2ND RESPONDENT

RULING

1. The matter for determination before this court is an application dated 19.07.2022 as filed by the firm of Chesikaw & Kiprop Advocates seeking for the following orders:
 - i. Spent.
 - ii. That this Honourable Court be pleased to issue an order for stay of the hearing of the appeal pending the hearing and determination of this application.
 - iii. That pending the hearing and determination of the appeal, this Honourable court be pleased to direct the Court Administrator and/or Executive Officer of the Kadhi's court at Garissa to produce the original petition that was filed on 06.04.2017 at Garissa Succession Cause No. 16 of 2017, listing the assets of the deceased to be: 2360 cattle, 1650 goats and sheep, 30 donkeys, 150 camels, 2 water dams, 317 cattle as gift to his children, 3 plots in Garissa town and a car.
 - iv. That pending the hearing and determination of the appeal, this Honourable Court be pleased to issue orders directing the court administrator and/or Executive Officer of the Kadhi's court at Garissa to produce the original copy of typed proceedings in Garissa Succession Cause No. 16 of 2017 showing the site visit done by the court.
 - v. That the costs of the application be provided for.



2. The application was supported by the affidavit of Malabo Hared sworn on 19.07.2022 wherein it was deposed that upon perusing the record of appeal, it came to his attention that it did not reflect the true position of the lower court file. It was his case that paragraph 5 of the petition dated 06.04.2017 was altered to exclude 3 plots in Garissa town and a car from the list of the deceased's assets. That the petition that was served upon the applicants and that which was prosecuted during the proceedings before the Kadhi's court is different from the petition that has been produced before this court and more so at pages 4 to 7 of the record of appeal and specifically on page 5 of the record of appeal.
3. That it is clear that the same was meant to mislead this Honourable Court into believing that the petitioner never acknowledged the fact that the deceased left behind three plots in Garissa town together with a car. In the same breadth, it was averred that during a site visit of the plots in Garissa Town in the company of the appellant, the respondent, their advocates, chief of location and other beneficiaries of the estate of the deceased the 3 plots in Garissa Town were pointed out.
4. The applicants thus urged that the action of the appellant of interfering with the record is a clear indication of his motive to deprive the other beneficiaries of the estate of the deceased their rightful share in the said estate. As such, this court was urged that upon hearing of this application, the prayers sought therein be allowed.
5. In opposing the said application, Asha Abdi Issak, a personal representative of the appellant/respondent filed an affidavit sworn on 22.11.2022 wherein it was deposed that on 18.05.2022, this matter came up for mention before Aroni J. (as she was then) to confirm whether the appellant had filed its record of appeal and to take further directions from the court. That as a response, the applicants/respondents objected to their record of appeal alleging that the same had been edited and particulars of the list of properties missing.
6. It was stated that the applicants made an application seeking production of the original petition filed in Succession Cause 16 of 2017 and further an order directing the Executive Officer of the Kadhi's Court at Garissa to produce the said petition for inspection. The Honourable Court directed that the original court file in Kadhi Court Succession Cause No. 16 of 2017 be brought for inspection and upon examination, ruled that there was no alteration on the petition.
7. It was urged that the issues raised in this application were res judicata as the same had been conclusively decided by this court and as such, this court be pleased to dismiss the application herein.
8. I have considered the application herein and the response by the respondent. The main issue for determination is whether the orders should to issue.
9. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under section 7 of the *Civil Procedure Act*. In Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. The court went further to identify the elements as follows;
 - “(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.”

10. The application before the court is not for setting aside or review of the court order/s. Its seeking for orders staying the hearing of the appeal pending the hearing of this application for the reason that the record of appeal did not reflect the true position of the lower court file. It was alleged that paragraph 5 of the petition dated 06.04.2017 was altered to exclude 3 plots in Garissa town and a car from the list of the deceased’s assets.
11. Upon perusing, the record and specifically the proceedings of 18.05.2022, the court notes that a prayer similar to the current one was also made and this court, although differently constituted, dealt with the issue conclusively. The court noted that the original appeal is similar to the copy of the record. The court further gave directions on how the appeal was to be heard.
12. In expounding further on the essence of the doctrine, the Court in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR pronounced itself as follows:

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon.

It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”
13. The court went further to reason that the essence of the principles of res-judicata is to not only to protect the courts from disrepute, but also to protect litigants from unending litigation; that this principle is so classic in that it includes points or issues that ought to have been brought before the court but which did not find their way there due to the inadvertence of the parties or their counsel. [See *Henderson vs Henderson* 3 Hare 100,67 ER 313].
13. Accordingly, the court finds that the elements set herein above with regards to the doctrine of res-judicata are relevant and applicable. As such, I do not find merit in the application as the same amounts to resjudicata. Accordingly, the application is dismissed with no order as to costs. The matter shall proceed as directed by Hon. Justice Aroni.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JULY 2024

J. N. ONYIEGO

JUDGE

