**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**SUCCESSION CAUSE NO. 9 OF 2018**

**IN THE MATTER OF THE ESTATE OF JECINTER NJOKI OKOTH**

**ANTHONY OTIENO OKOTH .....APPLICANT**

**VERSUS**

**SIMON SHIELS.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Kiyondi Nyachae Advocates for the applicant**

**Khaminwa & Khaminwa advocates for the Respondent**

**RULING**

The Applicant through his counsel brought an application summons dated 4th December 2020 supported by the sworn affidavit of ANTHONY OTIENO OKOTH. The respondent filed a notice of preliminary objection and a replying affidavit both dated 28th December 2020.

**BACKGROUND**

The application is premised on section 76 and 29 of the Law of succession Act, Cap 160 of the Laws of Kenya and Rules 44(1) and 73 of the Probate and Administration rules and seeks the following prayers;

1. **THAT the grant of letters of administration intestate issued on 23rd June 2020 to Simon Herold Shiels be revoked/annulled on account of fraud and concealment of material facts.**

2. **THAT this honourable court be pleased to expunge the name of the petitioner and his associates from the list of beneficiaries of the estate of the deceased as he was neither a spouse or dependant of the deceased.**

3. **THAT this honourable court be pleased to issue letters of administration intestate to the ATHONY OTIENO OKOTH (the applicant herein) and MARY AKINYI OKOTH being the only beneficiaries to the estate of the deceased. (sic)**

4. **THAT this honourable court be pleased to order the Respondent/Petitioner herein to provide full account of assets of the deceased from 21/1/2018 to date.**

**APPLICANT'S CASE**

Vide the Affidavit in support of summons for revocation of grant, the applicant states that he is the biological son to the deceased JECINTER NJOKI who died intestate. He states that the Respondent/petitioner has taken over as the administrator of the estate of deceased despite not being a beneficiary or spouse of the deceased and that the Respondent committed perjury and lied to this honourable court that he was married to the deceased in the year 2011 in order to be issued with letters of administration whereas at the time, the deceased was married to a Mr. Allan Smith. He further states that the deceased was never married to the respondent as she was married to one Mr. Allan Smith from 20/02/2006 to 30/1/2013 which marriage was dissolved and the divorce decree made absolute on 9/4/2013.

The applicant avers that the claims of a customary marriage are not true as at the time of the alleged marriage the Respondent had not been issued with a passport and further the Respondent had no capacity to marry the deceased. He states that the Respondent first visited Kenya in the year 2013 and later in the year 2017 and had he been married to the deceased he would have come as a citizen for an unlimited period. He

further states that the letters of administration were issued to the Respondent on 23rd June 2020 fraudulently and by concealment of material facts. That he was just a boyfriend or acquaintance to the deceased and therefore does not qualify as an administrator or beneficiary and that the court should revoke the letters of administration and issue them to him (the applicant) and his sister Ms. Mary Akinyi Okoth as they are the legal beneficiaries of the estate of the deceased.

The applicant filed a supplementary affidavit dated 4th March 2021 stating that the respondent who has taken over the estate of the deceased was wasting away the assets of the deceased without the knowledge of the beneficiaries. He attached copies of motor vehicle search for motor vehicle KCF 225X and KCG 510C both previously owned by the deceased and now sold to other parties.

He stated that the Respondent was intermeddling with the assets of the deceased without any lawful cause and it is in the best interest of justice that the letters of administration be revoked and issued to the legal beneficiaries.

**RESPONDENT'S CASE**

In his replying affidavit, the respondent states that the Applicant has had no history of the relationship between him and the deceased and he only got to know about the Applicant upon the demise of the deceased and Ms. Mary Akinyi Okoth was known to him as a cousin to the deceased. He stated that this court had already pronounced itself regarding the issue of being a spouse and that the same cannot be re-opened as the court is ***functus officio***. The Applicant did not appeal the judgment of 10th March 2020.

In response to his capacity to contract a marriage, the respondent stated that the deceased was already divorced as at 9th April 2013 and his marriage was conducted by Kikuyu elders who are knowledgeable about customs. He annexed affidavits from the deceased relations and close family friends who were aware of his marriage to the deceased under the Kikuyu Customary law after having gone through all rites. He stated that the application before court is irregular, improper and unprocedural and an attempt by the applicant to get the court review and/or sit on appeal over its own judgment delivered on 10th march 2020. That the application is Res judicata whose attempt is to reopen a suit with regard to an issue that had already been determined. The court had already made its determination that the Respondent (Simon Shiels) was the husband of the deceased. He therefore opposes the application and prays that the Applicant be condemned to costs.

The respondent filed written submission. the Applicant did not file theirs. The respondent submits that this court issued a judgment on 10th march 2020 validating the marriage between him and the deceased under Kikuyu customary law and the same cannot be revisited as it was not appealed. That it is upon this validation that the court granted letters of administration. He framed his issues for determination as below;

**a) Whether the deceased was married to Allan Smith. To this he submitted that section 59(1) of the Marriage Act No. 4 of 2014 provides on what evidences marriage in Kenya. That the marriage between the deceased and Allan Smith had been dissolved before his marriage to the deceased.**

**b) Whether the respondent was present in Kenya at the time of his marriage to the deceased or whether a kikuyu can marry a foreigner. To this he submitted that witnesses had testified and cross examined previously and had confirmed that a ceremony had taken place as per the Kikuyu Customary laws and practices.**

**ISSUES FOR DETERMINATION**

i. Whether this application is *res judicata.*

ii. *Whether the application is competent under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.*

iii. Whether the application is merited.

**WHETHER THE APPLICATION IS *RES JUDICATA***

The doctrine of res judicata is set out in section 7 of the Civil Procedure Act. This doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. This doctrine applies if the following is proved;

**i. The suit or issue raised was directly and substantially in issue in the former suit.**

**ii. The former suit was between the same party or parties under whom they or any of them claim.**

**iii. That those parties were litigating under the same title.**

**iv. That the issue in question was heard and finally determined in the former suit.**

**v. That the court which heard and determined the issue was competent to try both the suit in the issue was raised and subsequent suit.**

The court considers it expedient to address the application by the applicant and his submissions on revocation of grant for being res judicata forthwith. The importance of this doctrine has been succinctly dealt with in several cases to wit **Henderson v Henderson [1984] 3 Hart 100 at 115, Green Haigh vs Mallard [1974] 2 ALL ER 255 at 257, Yat Tung Investment Co. Ltd v Dao Hong Bank and Another [1975]**

**AC 58.** In terms of the above citations the judgements given demonstrated the following:

> **"Res judicata is not confined to the issues which the court is actually asked to decide but covers issues or facts which are so clearly part of the subject matter of litigation and so clearly could have been raised. That it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.**
>
> **The shutting over of a subject of litigation power which no courts should exercise but after scrupulous examination of all the circumstances is limited to the cases where reasonable diligence would have caused a matter to be earlier raised moreover, although negligence, inadvertence, or even accident will not suffice to excuse, nevertheless, special circumstances are reserved in case justice should be found to require the non-application of the rule". (**See also **G.V. Odunga's Digest on Civil Case Law and Procedure 3rd Edition Volume 9 pg 6873 at paragraph (b) (c))**. **This approach has been followed in numerous cases in this jurisdiction as exemplified in Green Field Investments Ltd v Baber Alibhai Mawji CA No. 160 of 1997, Benson Ngugi v Francis Kabui Kinyanjui & Others [1989] KLR 146, Cane Land Ltd & Others v Delplus Bank Ltd CA No. 20 of 2000. Simply put interalia in a litigation its expect that parties to a dispute being forth their whole case on the subject matter without piecemeal prosecution, awaiting to re-open the same subject matter at a later date. The court in Green Field emphasized that res judicata applied also to every point which properly belonged to the subject of litigation and which the parties exercising due diligence, might have brought forward at the time."**

In Benson case, the court observed that "section 7 of the Civil Procedure bars in mandatory terms, the court from any fresh trial of the concluded issue, the judge cannot competently get round; that bar by obtaining the consent of the parties to arbitration or a suit for that matter or inviting them to do so by consent. The spirit of the provisions if not the letter forbids it."

On the other hand, the common law doctrine of estoppel favours the respondent against the application for summons for revocation. In the case of **Carl Zeiss Stifthing vs Rayner v Keeler Ltd No. 3 JNCA** the court held that:

> **"A party is prohibited from contending the contrary of any precise point which having once been distinctly put in issue has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different the findings on a matter which came directly (not collaterally or incidentally) in issue in the first action and which is embodied in a judicial decision that as final, is conclusive in a second action between the same parties and their privies the principle applies whether the point involved in the earlier decision is one of fact or law or a mixed question of fact and law."**

There is no doubt in the previous litigation one Akoth vehemently litigated against the respondent Simon Shiels as to whom between them was the lawfully wedded husband either under customary law or Christian or civil system of marriage to the deceased one Jecinter. It was established by the same court after evaluating the evidence of witnesses in support of the necessary ingredients of a customary marriage as known within Kikuyu Customary Law, that the respondent was a lawful husband to the deceased. In those circumstances the earlier decision settled the issue that the respondent Simon Shiels was lawfully married to the deceased as espoused in the evidence admitted on oath from the mother and other independent witnesses.

In this regard, the summary of the averments that the deceased was legally married to Smith and not Simon Shiels is neither here nor there. In the wider sense Anthony Akoth Jnr is admitting that directly there was no existence of any marriage known in law between his father and the deceased. It is essential to note that the nature of the cause of action and its effect as I understand it is to the extent of getting access to the estate of the deceased by all means at his disposal.

In my view it becomes an abuse of the court process for the applicant to raise in subsequent proceedings, matters to do with the marriage of the deceased, which for all purposes and intents should have been litigated in the earlier proceedings. The purport of this so called application for revocation of grant at all material times is for the applicant attempt to have a second bite at the cherry. If indeed the applicant knew of existence of another marriage solemnized between the deceased and one Smith he should have raised its existence as evidence at the material time of the suit, instead of now trying to re-litigate on it as if it's a new cause of action.

The view I hold in the first instance considering all the litigation history of the dispute to the estate of the deceased captures the following salient features; firstly, the issue between the parties that the marriage between Anthony Akoth and One Jecinter, now deceased had been cast in doubt and resolved as such, making it res judicata in the present application. At most not that the validity of a judgement may be res judicata, merely because it was rendered, but that a finding of fact on which that issue of marriage was based and conclusively determined thus directly and indirectly estop Anthony Akoth or his privies from asserting the invalidity of the judgement itself. Secondly, if it is true that the decree did not really end the marriage, a stronger case in which on grounds of public policy collateral attack by the applicant on that same judgement for the second time ought to be permitted can hardly be imagined by this court. Thirdly, if the marriage was not ended by that decision, the applicant is estopped from introducing new evidence as to its validity to a third party who was never a party to the earlier proceedings or in the present application. Fourth, if there is any criminal liability on the part of the respondent for having a claim over the deceased estate as his wife neither could that issue be canvassed in the application for revocation under section 76 of the Law of Succession Act to defeat the doctrine of res judicata as a consequence of the follow-up re-litigation. Fifth, the characteristic of the relief given or denied in the primary phrase of the case and the resultant decree between the parties which formed the basis of the decision marriage had been adjudged not to exist as a fact. At least in general parlance of things the subject matter adjudged with a proximity cause to whom was the deceased married to during her life time in other proceedings is truly res judicata. Hence the maxim that there should be an end to litigation is relevant to the facts of this application.

Secondly, if there is doubt whether the applicant's application is not **res judicata**, I wonder whether it can succeed under section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules on review. The grounds for review of judgement, rulings or order in which no appeal has been preferred or allowed and whereby in or on discovery of new and important matter of evidence not within his or her knowledge or could not be provided by him or her at the time may seek leave of the court to have that judgement reviewed or set aside for that matter.

In **Nyamogo & Nyamogo v Kogo [1985] KLR 229, at 234** the court enumerated the following principles which renders a decision for review:

> **"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record where an error on substantial point of law stares on in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out……. Mere error or wrong view is certainly no ground for review though it may be one for appeal."**

In the persuasive precedent by the High Court of Uganda in **FX Mabunke v UEB Misc. Application No. 98 of 2005** the court stated as follows:

> **"That the grounds for review falls within the rubric of a mistake or manifest mistake or error apparent on the face of the record. That there is discovery of new and important evidence which after exercise of due diligence was not within the applicant's knowledge or could not be produced by him or her at the time when the decree was passed or the order made that any other sufficient reasons exists."** (See also **Tokesi Mambili & Others v Simon Litsanga [2004] eKLR. Hassan Karim & Co, Ltd v Africa Import & Export Central Corp Ltd [1960] EA 396, Shah v Dharamich [1981] KLR 560**.

Here, the contention by the applicant Anthony Otieno Akoth in his affidavit for revocation admits that the deceased was never married to his father but once Allan Smith with effect from 20/2/2006 – 30/1/2013.

The gist of the solemnization on oath by the applicant is to proof the fact that the deceased was never married to Simon Shiels, the respondent to the summons for revocation. Thus, for each of these claims, the applicant contention is that the respondent should not be entitled as of right to be an administrator or a spouse to the deceased estate. The respondent as it were on oath and coupled with the petition for letters of administration had discharged that fact in rebuttal in the former suit. Further on the basis of the evidence by the mother to the deceased and other independent evidence on corroboration, did proof on a balance of probabilities existence of a marriage then as relied upon in the ensuring judgement of the court. The situation here is then that the applicant acknowledges of being in existence of that other marriage. It might be true that in the normal course of events, the deceased had a relationship with so called Allan Smith. In my consideration view the applicant's application based on the aforesaid marriage is procedurally fatal as Allan Smith has never been a party to either of the concluded litigation or the instant revocation proceedings against the respondent. The whole matters deponed to by the applicant, the sources of information and believe were not stated and to me that affidavit is incompetent and could not support or determine the issues in controversy. Ordinarily as envisaged under Order 18 rule 3(1) and (6) of the Civil Procedure Rules the affidavit by Anthony Akoth, offends the Evidence Act and the aforesaid annextures may have been contrived or unlawfully obtained. In this case the mother to the applicant had died sometimes back while cohabiting as a spouse with the respondent. The respondent succeeded her to safeguard the property of the estate. The applicant has never applied for grant of letters of administration as a putative heir to the deceased estate. The applicant's application is premised upon the provisions of section 76 of the Law of Succession. The grounds for the exercise of discretion to revoke the grant are clearly set out in that provision.

From the affidavit evidence there are no defects in the proceedings by the respondent to obtain the grant for letters of administration which have been challenged in the affidavit sworn by the applicant.

As regards to the objection to the respondent being appointed an administrator owing to the grounds on no-disclosure or misrepresentation of facts to the existence of a marriage I am constrained to rule the applicant of being out of order for reason of res judicata. It is clear from the record of proceedings that the biological father to the applicant highlighted this issue against the respondent and to my findings he lost the legal battle.

I note that this latest numerous application by the "children" of the deceased in this cause are in all a deliberate move to delay the due and proper administration of the estate of the deceased. I do not think the applicant is the right party to re-litigate the issue on the validity or invalidity of the marriage of his deceased's mother and her partners during her lifetime. When a question arises as to the identity, share or estate of the deceased person or any other person claiming beneficial interest thereon, such consideration can be determined by the grant-holder at the stage of confirmation hearings.

So here too, in my respectful view, sympathetic as it may sound, there is nothing deponed from the affidavits that can be applied to invoke section 76 of the Law of Succession, to render the action incompetent. I wish to make it clear that the applicant concern is to protect the interest of the deceased who is now deceased. However, he should not lose sight that under section 66 of the Law of Succession, the respondent remains the administrator to the estate of the deceased. Therefore, under section 82 of the Act as a personal representative he has power to enforce by suit or otherwise all causes of action which by virtue of any law survive the deceased or arise out of her death for her estate.

In this court's view by strong and irresistible analogy from the record, the applicant's application on revocation presents no evidence on an error on the face of the record, mistake apparent on the face of the record discovery of new evidence or any sufficient reason that could not have been obtained despite due diligence.

In the instant case the issue of marriage between the father of the applicant and the respondent featured prominently in the pleadings as drawn by the objector. However, inspite of all that the judgement rested in favour of the respondent. The same has been raised by the son, but the court's satisfied that nothing drastically changes the position taken as such on that issue of marriage. All these issues being agitated by the applicant on perjury, forgery or fraudulent evidently remain in the realm of averments not proved on a balance of probabilities for a review of the earlier judgement to take effect.

In the instant application, the applicant raises issues regarding the legality of the Respondent's marriage to the deceased. This issue was dealt with and several witnesses testified to the effect that there was a valid marriage under the Kikuyu Customary Law and practices. The applicant's father had an opportunity to cross examine the said witnesses. This led to the determination by this court on 10th March 2020 recognising that the Respondent and the deceased consummated a relationship which qualified such as husband and wife. This decision is yet to be challenged. This application abides the doctrine of *res judicata.*

**WHETHER THE APPLICATION IS MERITED**

The issue for determination is whether the Applicant meets the threshold for the revocation of a grant within the meaning of **Section 76** of the **Law of Succession Act.** That Section states;

> **"Section 76: A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -**
>
> **(a) that the proceedings to obtain the grant were defective in substance;**
>
> **(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**
>
> **(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**
>
> **(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -**
>
> **(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or**
>
> **(ii) to proceed diligently with the administration of the estate; or**
>
> **(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**
>
> **(e) that the grant has become useless and inoperative through subsequent circumstances.**

In my view, the applicant has not proved any breach of Section 76 of the Law of Succession Act. ***Waweru J in Nairobi High Court Probate and Administration No. 659 of 1889 stated that; applications premised on section 76 of the Law of succession Act must be based on the grounds set out on that provision or they fail.***

For the foregoing reasons the argument advanced on behalf of the applicant under section 76 of the Law of Succession Act to the pending probate proceedings fails for reason of being res judicata in substance on facts and point of law with the previous judgement of the court. The previous judgement has been held to be a bar against the present application to revisit and re-litigate the issue of marriage between the deceased and the respondent Simon Shiels. In the court's considered view, there is lack of locus *standi* for the applicant as a son, to the previous objector and father to re-open the proceedings as to the validity of marriage between his father and the deceased. The applicant's relief if allowed by this court would undermine section 7 of the Civil Procedure Act, in form and substance.

Finally, no language in section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules remotely suggest existence of a cause of action sufficient to review the judgement of the court dated 10/3/2020. There is no compelling reason however in law requiring that the applicant must have been a party, or in privity, with a party to the earlier litigation in order to bring himself or herself within the provisions of section 7 of the Civil Procedure Act. It is clear that the court has to give a plain interpretation to the provisions on res judicata and review to exclude any other re-litigation premised on the same subject matter. It is no doubt that I cannot perceive any greater possibility of embarrassment in litigating the validity of a claim in which issues have been considered and judgement pronounced conclusively.

Accordingly, the applicant's summons for revocation is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF APRIL, 2021.**

**.....**

**R. NYAKUNDI**

**JUDGE**

***NB:***

*In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the*

*last known email address thereby waiving Order 21(1) of the Civil Procedure Rules. (khaminwakhaminwaadvocatesmsa@gmail.com. khaminwamalindi@yahoo.com knaadvocates2016@gmail.com)*