



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 316 OF 2012

IN THE MATTER OF THE ESTATE OF RICHARD MUSE IMBUCHE (DECEASED)

NANCY WITAMBULA AMBULA &

ROSE IKAMBILI AMBULA.....PETITIONERS

VERSUS

AGNES ANDENYI MBUCHI.....OBJECTOR

RULING

1. The petitioners (**NANCY WITAMBULA AMBULA & ROSE IKAMBILI AMBULA**) raised a preliminary objection on September 28th 2019 on the grounds that;

a) The entire objection application is an abuse of the court process and ought to be struck out with costs.

b) The court lacks jurisdiction to hear and determine the issues in the objection as the same have been subject of an Environment and Land Court Suit filed by the objector against the petitioners this the it is an effort to circumvent the ruling of the ELC court in ELC 400 of 2017 that had finally determined the dispute between the parties in relation to the proprietorship of the parcel of land known as KAKAMEGA/LUMAKANDA/3274.

2. The petitioners argue that the Objector's application is res judicata as the ELC court sitting in Kakamega had jurisdiction to hear and determine the objector's suit and its decision to strike out the suit on grounds of limitation finally determined the matter with respect to proprietorship of the suit land.

3. It is their contention that the objector (**AGNES ANDENYI IMBUCHI**) has not demonstrated in any way or form a clear legal right to administration of the estate, and has no credible grounds to sustain the present cause of action. The petitioners urged the court to take judicial notice of the fact that the objector to this action took out an **Originating Summons in ELC 94 of 2019** claiming adverse possession of the suit property and further to take Judicial Notice of the ruling in **ELC 400 of 2017** dismissing the same for being statute barred. The petitioners urged the court to dismiss the objector's application.

4. The objector submitted that the disputes were not related since the present suit raised different issues. The issue of determination herein is the annulment of grant which is different from what was raised in the ELC court.

5. The objector cited **section 2 of the Law of Succession Act** on jurisdiction of the court pointing out that the mandate of the probate court under the Act is limited to succession proceedings only and not the determination of ownership of land. She cited the case of **Nancy Mwangi t/a Worthlink Marketers v Airtel Networks (K) Ltd & 2 others [2014] EKLR** on the requirements for a case to be considered res judicata.

6. That, the suit in Kakamega was dismissed on a preliminary objection that addressed the issue of jurisdiction, and the outcome was a ruling and not a judgment. Therefore, the case was not really heard.

7. WHETHER THE APPLICATION IS RES JUDICATA

The Civil Procedure Act, Section 7, states that;

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 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.

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. — (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.

In the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**, the Court of Appeal held that:

“Thus, 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.”

The Court explained the role of the doctrine thus:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

8. The issue in the present suit was an objection (filed in October 2013) to the confirmation of grant of letters of administration on the grounds of fraudulent subdivision of her land by the deceased after which he transferred the parcel **KAKAMEGA/LUMAKANDA/3274** to himself. She sought to place this piece of land beyond consideration as part of the estate of the deceased. She also grounded the objection on the allegation that the petitioners had secretly applied for the letters of administration without involving her in-laws.

9. The objector filed a suit in the **Eldoret ELC** court on June 9th 2016 which was later transferred to **Kakamega as ELC 400 of 2017** based on territorial jurisdiction. The suit was struck out on February 26th 2019 due to being time barred. The issue in that suit was the proprietorship of the parcel **KAKAMEGA/LUMAKANDA/3274**.

10. The issue in the application is proprietorship of the suit land, something which was already determined by the ELC court. On what basis would she be able to claim ownership of the suit land? I find none. The issue of proprietorship was already determined. The issue was between the same parties and it was finally determined as the claim was time barred.

11. However, the issue of *res judicata* covers only one ground. There is the ground that claims the proceedings to obtain the grant were done secretly and without the knowledge of the other beneficiaries, yet what will that achieve, when for distribution of property to be merited or otherwise, the ownership of the asset must first be established. Is the objector a beneficiary as defined under section 29 of the Act or is she making her claim as an owner of the distributed asset? I think we will be going around in a circle akin to the chicken and egg theory, and in the premises the preliminary objection succeeds to the extent that the issue of proprietorship of the suit land was already determined and it is part of the estate of the deceased.

Delivered and dated this 12th day of February 2020 at Eldoret

H. A. OMONDI

JUDGE