REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 38 OF 2018

CHENGO KARISA NYUCHI ..... APPELLANT

VERSUS

MWANAMKUU HARUN NDOLE & 3 OTHERS.....RESPONDENTS

(Being an appeal from the Judgment and Decree of Hon. Sheikh Twalib, Principal Kadhi,

delivered on 19.7.2018 in Kadhi Court Succession Cause No. 5 of 2016)

CORAM: Hon. Justice R. Nyakundi

J. K. Mwarandu Advocates for the Appellant

M. A. Mwinyi for the respondents

JUDGMENT

Chengo Karisa Nyuchi, the appellant his advocate **Mr. Mwarandu** asks this court to allow his appeal from the Judgment of the Kadhis court **(Hon. Sheikh Twalib)** which ruled and determined that the deceased **Amina Binti Karisa** was the wife of **Harun Ndole.** Further that in the impugned Judgment declared heirs to the estate by virtue of the aforesaid marriage.

Ms. Mwinyi Advocate represented the respondents; who urged the court to dismiss the appellant's appeal and make no such orders prayed for in the Memorandum of Appeal.

First of all, I must call as many relevant facts as I can from the record and set them out in a chronological order or else there will be no background to the conclusions I draw in the matter.

Background

On 15.6.2016 the respondents instituted Succession Cause No. 5 of 2016 before the Kadhis Court against the appellant alleging that the deceased **Amina Binti Karisa** a muslim domiciled in Kenya and a resident of Roka, Kilifi county – dated on 10.8.1992, leaving behind an estate and heirs namely: ***(a). Mwana Mkuu Ndole (b). Minana Harun Ndole***

(c). Rehema Harun Ndole (d). Chengo Karisa Nyachi.

It was also alleged that the deceased left behind the following estate for the benefit of the heirs to be distributed in accordance with Islamic Law.

a. Unregistered Parcel of Land at Roka measuring 4 acres.

b. Parcel of Land as Parcel No. 534 C located Roka settlement measuring 12.4 Acres .

c. 200 mature coconut trees

d. 50 herds of cattle

e. 30 goats.

Hon. Kadhi upon hearing both parties decreed as follows:

> ***(1). The Late Harun Ndole is a legal heir to the Late Amina Karisa Nyuchi***
>
> ***(2). The share of Harun Ndole is ½ of the estate of the Late Amina Karisa Nyuchi.***
>
> ***(3). That the share of the Late Harun Ndole be inherited by his legal heirs the respondents.***
>
> ***(4). That the respondent (reads, appellant ordered to release ½ share of the Late Harun Ndole from the listed Estate of the Late Amina Binti Karisa to his legal heirs the respondents to this appeal.***
>
> ***(5). That an order to account is not warranted.***
>
> ***(6). That costs of this petition are awarded to the respondents to the instant appeal.***

Further, sometimes back in 1993 a probate and Succession Cause No. 28 of 1993 was filed before the High Court in the matter of the estate of **Amina Binti Karisa** and the petitioner **Chengo Karisa Nyuchi** (appellant) petitioned for grant of Letters of administration in the aforesaid estate of the deceased.

In said Succession Cause, the subject free property to the estate was identical to the one particularized in Succession Cause No. 5 of 2016 heard and determined by the Learned Kadhi – **Sheikh Twalib.** So far as that Succession Cause No. 28 of 1998 was under way to be determined. **Harun Ndonde Musa** brought an application to revoke the grant of letters of administration under Section 76 of the Law of Succession on the basis that **Chengo Karisa Nyuchi** (appellant) had concealed a material factor.

That Harun was married to **Amina Binti Karisa** (the deceased in both the High Court Cause No. 28 of 1993 and Succession Cause No. 5 of 2016 adjudicated before the Kadhi's court.

In **Succession Cause No. 28 of 1993, Waki J** as he was did actually find and decide on the issues raised as follows:

> ***"It seems to me therefore, that upon a finding that Amina Binti Karisa was a Muslim, her estate should have been dealt with in accordance with Muslim Law and if there were any disputes then these ought to have been sorted out in Kadhi's courts before reaching the High Court I cannot be called upon to decide on such issues as invited by Mr. Hoke to do. There having been no formal or presumed marriage between Amina Binti Karisa and Harun Ndole, there cannot have been any concealment of that fact by Chengo Karisa Nyuchi (hereinafter the appellant) But it was incumbent upon Chengo to disclose in his application that Amina Binti was a Muslim."***

Its also clear from the record that the appellant **Chengo Karisa Nyuchi** apparently filed an appeal in Civil Appeal No. 121 of 2001 against **Juma Kombo Ahmed.**

The central point raised by the appellant was whether the issues pleaded in KCC NO.173 'B' OF 1997 in the Kadhi's Court were resjudicata in which **Harun Ndonde Musa** had sought interalia a declaration that he be declared a sole heir of the deceased **Amina Binti Karisa.** He also prayed for an order seeking for a return of 50 Heads of Cattle and two farms at Roka – Kilifi.

One issue which **Sergon J** I take judicial notice and cognizance of was the fact that the issue of whether a valid marriage existed between **Harun Ndole** and **Amina Karisa** on the basis of a marriage certificate produced before the Kadhis Court was res judicata in view of the decision by **Waki J** in P&A Cause No. 28 of 1993. The ruling by Sergon J, therefore purposed that the Kadhi's Court address itself to the counter claim of the appellant. That is the position which **Sheikh Twalib** made an entry to the proceedings including the directions given by **Waki J** in his Judgment dated 18.6.1997.

My understanding of these Judgments is that the gist of a marriage whether solemnized under customary or Islamic Law or marriage by presumption as between **Harun Ndole** and the deceased **Amina** cannot be re-opined by the Kadhis Court. The respondents have no locus standi to bring the suit on the subsistence and validity of marriage.

Determination

What then was the position of the appellant in Succession Cause No. 5 of 2016 the respondents as a matter of substance placing reliance on a copy of the marriage certificate, copy of the widower's, Death Certificate and copies of the birth certificates for the petitioners appeared to satisfy the Learned Kadhi that there existed or valid marriage between **Harun Ndole Musa** and **Amisa Karisa Nyuchi** registered on 29.4.1963. It may be appropriate were to recall what the provisions of Section 7 of the Civil Procedure Act stated for in the whole spectrum of civil justice administration which provides 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 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."***

The principles governing this area of law have been distilled in a number of cases. In **Badar Bee v Habil Mericah Noordai & others {1909} AC 615 – 623** the memorable words employed on this doctrine by Lord Mac Naghten are that:

> ***"It is not competent for the court, in the case of the of the same question arising between the same parties, to review a previous decision not open to appeal. if the decision was wrong, it ought to have been appealed from in due time."***

It is the case for the appellant counsel that in relation to the present appeal, Learned Kadhi proceeded to entertain a cause of action constituting a claim as to the validity of marriage between **Harun Ndole** and **Amina Binti Karisa**.

In seeking to answer that question Learned counsel argues that the issue of marriage flows from the reference and directions issued by **Sergon J.** in a ruling dated 15.2.2003. Therefore, in accordance with the respondents submissions the proceedings before the Learned Kadhi were not substantially part of the previous proceedings. The substance of the Learned counsel submissions was that res judicata is entirely inapplicable. This argument by the respondent has been put to rest in the statement found in **Halsbury's Laws of England 4th Edition Vol 16 – paragraph 1528** which reads:

> ***"In order for the defence of res judicata to succeed it is necessary to show not only that the cause of action was the same but also, that the plaintiff has had an opportunity of recovery and but for his own fault might have recovered in the first action that which he seeks to recover the second action. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it was actually put in issue or claimed."***

Be that as it may be the Learned Kadhi seemed to have framed the same question in his Judgment.

Whether or not that court had jurisdiction to entertain the petitioners claim is a moot question. It is true from the record Learned Kadhi, proceeded to hear and determine the issue notwithstanding that part of it was appreciated and ruled on **in High Court Succession No. 28 of 1993** and **High Court Civil No. 121 of 2001.**

The decision has been reviewed, I do consider that the appellant concerns only answered by the dictum in the case of **Hoy Stead v Commissioner of Taxation {1925} AC 155** where Lord Shaw stated that:

> ***"In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another Judgment upon a different assumption of fact. Secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views. They may entertain of the Law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of Law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to vest rights of litigants, applies to the case where a point fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bond by the Judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties rights to rest applies and estopped occurs."***

So it seems to me that on the pleadings in Succession Case No. 5 of 2016, the matters on which the Learned Kadhi assumed jurisdiction were four:

> ***(1). Whether or not the respondents to this appeal Mwana Mkuu Minana Harun Ndole, Aisha Tatu Harun and Rehema Harun Ndole claiming paternity by virtue of a marriage union between their father Harun Ndole and the deceased Amina Binti Karisa was conclusively determined in P & A 28 of 1993 at the High Court of Kenya at Mombasa by Waki J.***
>
> ***(2). Whether or not the petitioners (respondents) to the appeal are the heirs at Law of the deceased (Amina Binti Karisa and one Harun Ndole)***
>
> ***(3). What is the known estate of the deceased.***
>
> ***(4). Whether the respondent (appellant) herein, is liable to account to the respondents in respect of the estate in his possession.***

It is not indispute when a trial opened before the Learned Kadhi all these issues were alive and the witnesses stood in the witness box to tally the evidence with the facts. The court accepted evidence on all the four issues framed for determination.

I think in the real sense appraising **P & A 28 of 1993 Civil Appeal No. 121 of 2001** and by extension the executive digest of the facts in **KCC 1733 B OF 1997** and the inherent credible evidence led by **Harun Ndole Musa** on revocation of grant of letters of administration issued to **Chengo** in **P & A 28 of 1993**, was for all purposes and intents based on the issue of marriage **(Amina Binti Karisa).** True to the courts Judgment the grant of letters of administration was revoked and it was decided that there was no Islamic marriage or presumption of marriage between **Harun Ndole** and **Amina Binti Karisa**. For the Learned Kadhi to pin distribution of the estate of the deceased as filed by the petitioners in **Succession Cause No. 5 of 2016** on the existence of a marriage between **Harun Ndole Musa** and **Amina Karisa Nyuchi** grounded on the certificate of marriage dated 29.4.1963 was in all circumstances substantially and wholly determined in **P & A 28 of 1993.**

Pursuant to that Judgment, the court is satisfied beyond peradventure that the claim of a marriage is not maintainable in Law and no legitimacy of fresh decisions can save it.

The Locus classicus statement of Sir **James Wigram V. C. in Henderson v Henderson 1843 3 Hare 100 – 114 – 115** in my opinion entitles the appellant the relief sought without hesitation that holding stated interalia:

> ***"In trying this question, I believe I state the rule of the court correctly when I say their where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires, the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case the plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every part which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."***

Subsequently, the Court of Appeal in complete agreement with the principles in **Henderson v Henderson** on resjudicata in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others {2017} eKLR** by reiterating the principle as follows:

> ***"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra 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 – seneschal 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 fova, to obtain at last, outcomes favorable 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 and calumny. The foundations of res judicata thus rest in the public interest for swift, there and certain justice."***

In quantifying the various issues raised in P & A 28 of 1993 and KCC 173 B of 1997 it should suffice for me to say as follows:

In P & A 28 of 1993, **Harun Ndole** petitioned for revocation of grant of letters of administration intestate issued to **Chengo Karisa Nyuchi** to the Estate of **Amina Binti Karisa**. Although, **Harun Ndole** Claimed to be a widower to **Amina Binti Karisa** by reason of marriage, the Learned Judge Waki J however had a different view and on a logical explanation, the scale of sustaining and proving the fact of marriage weighed down heavily against the objector – **Harun Ndole**. In consequence no marriage was upheld to have subsisted between **Harun Ndole** and **Amina Binti Karisa.** It was an important factor affecting the administration and distribution of the estate of the deceased. From the decision of the **High Court in P & A No. 28 of 1993,** the prospect of **Harun Ndole** inheriting the estate of the deceased as a spouse flopped. Shortly, thereafter in **KCC 173 Bg 1997**, it would appear **Harun Ndole** sought a declaration to be recognized as the sole heir of the deceased **Amina Binti Karisa** and also a return of 50 heads of cattle and two farms at Roka – Kilifi.

In that case the Learned Kadhi revisited the issue of marriage earlier on determined in P & A 28 of 1993 to overturn the High Court decision which I note with regret that **Harun Ndole** was married to **Amina Binti Karisa.** This second attempt is a legal position that could not be maintained for so long as the decision in **Civil Appeal No. 121 of 2001** by **Chengo Karisa Nyuchi,** remains unchallenged by filing an appeal to the Court of Appeal**.** For that the issue of marriage was firmly sealed.

I further find that the hearing that proceeded and Judgment entered in **P & A 28 of 1993, KCC NO. 173 'B' OF 1997, HCCA NO. 121 OF 2001** and in the latter **Succession Case No. 5 of 2016** bear a common denominator; **Harun Ndole Musa** (new deceased) and his apparent heirs, the respondents to this appeal made a successful attempt before the Learned Kadhi, to have a second bite at the cherry to inherit the Estate of **Amina Binti Karisa.**

The marriage certificate referred to by the Learned Kadhi in the impugned Judgment to authenticate and validate the marriage between **Harun Ndole** and **Amina Binti Karisa** was extensively and exhaustively dealt with by **Waki J** in the Judgment he delivered on 18.6.1997. That same question could not be relitigated again by the respondents. What the respondents set out to do and it does appear the Learned Kadhi agreed with their conspiracy is nevertheless frowned at by the Law as laid down in **Hallsbury's Laws of England Vol. 12A 2015 paragraph 1651** where Learned authors stated:

> ***"The Law discourages relitigation of the same issues except by means of an appeal. It is not in the interest of justice that there should be retrial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions, or that there should be collateral challenges to judicial decisions, there is danger, not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute."***

What was done by the Learned Kadhi would not be regarded as a kin to those specified grounds in Section 80 of the Civil Procedure Act and in Order 45 Rule (1) (2) of the Civil Procedure Rules on discovery of who and important matter of evidence or analogous to sufficient reason or cause to confer an unfettered discretion against a Judgment of a superior court I see force in **Mr. Mwarandu** contention that the Law did not allow the Learned Kadhi to make any of such decision conclusively determining the issue of marriage, too late in the day so that the respondents could benefit through the back door as dependants of the deceased **Amina Binti Karisa.** At the time **Waki J** pronounced his Judgment the state of the evidence before the Learned Judge duly analyzed and weighing on the circumstances made no mention of dependency under Section 26 and 29 of the Law of Succession Act. The evidence on revocation which was nicely balanced between the objector **Harun Ndole** and the petitioner – **Chengo Karisa Nyuchi** – was silent on the existence or children sired as a result of the union with the deceased **(Amina Binti Karisa)** instant lifetime it is to be observed that in that cause P & A 28 of 1993 by conduct of the deceased **(Harun Ndole Musa),** the plea of acquiescence is applicable to the facts of this appeal.

In **Halsburys Law of England 3rd Edition 1956 Vol 14** It is stated:

> ***"Acquiescence operates by way of estoppel. It is quiescence in such circumstances, that the respondents have no legitimacy or locus standi to claim a remedy primarily as beneficiaries at the eligibility stage to inherit by their late father in P & A 28 OF 1993. There is no direct descent to do so in view of the words applicable to the proceedings taken in the High Court on revocation of grant."***

The gist of the revocation of grant under Section 76 of the Act was to achieve the purpose of the rules that apply to distribution to the estate of the deceased who professes and practices Islamic Law during his or life time. The question that can be posed here is, who is the person entitled to inherit the **Estate of Amina Binti Karisa ?** I say so because the fact of a valid marriage between Harun Ndole Musa and the deceased was never proved on a balance of probabilities.

At the same time Section 12 of the Births and Deaths Registration Act Cap 149 states:

> ***"No person shall be entered in the register as the father of any child except either at the joint request of the father and mother upon the production of the register of such evidence as he requires that the father and mother were married according to Law or in the case of applicant, in accordance with some recognized custom."***

I have taken considerable time to review the evidence by the Learned Kadhi, the qualifications for the respondents to inherit the estate of the deceased was made by virtue of a finding that a marriage between **Harun Ndole Musa** and **Amina Binti Karisa** was in place. Therefore, the respondents – being siblings of the deceased claim an automatic right of inheritance. By this decision, the Learned trial Magistrate erred by applying wrong principles to the claim.

In the light of the foregoing and in terms of the principles in the case **Bundi Marube v Joseph Onkoba Nyamuro {1982 – 88} IKAR 108** without adverting to the appellants other grounds of appeal, which, I think are spent by this decision and in view of what I have outlined above, I allow this appeal in circumstances under Section 7 of the Civil Procedure Act, that res judicata blurred the rest of the findings by the Learned Kadhi.

The issue of distribution of the estate of **Amina Binti Karisa** in accordance to Islamic demonstrably has not been acted upon by the Kadhis Court. That being the view I take of the matter I order that the Chief Kadhi, must and is hereby directed to adjudicate over the estate of the deceased pursuant to the Judgment by **Waki J** dated 18.6.97. Each party to bear their costs of the litigation.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL 2020

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Atiang for Shujaa for the appellant

2. Ms. Mulwa for Mwinyi for the respondents