



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 3264 OF 2014

IN THE MATTER OF THE ESTATE OF DAVID WANG'ANG'A GICHUHI (DECEASED)

JACOB GICHUHI WAG'ANG'A.....APPLICANT

VERSUS

HANNAH WANJIRU WANG'ANG'A.....RESPONDENT

RULING

1. The Applicant Jacob Gichuhi Wang'ang'a through an application dated 15th January, 2019 pursuant to Rule 73 and 74 of the Probate and Administration Rules seeks orders to set aside and/or vary the Order dismissing the Originating Summons dated 8th January 2016 which decision was issued on 26th March 2016. He prays that the Originating summons be reinstated.

2. The application is supported by an affidavit of the applicant dated 15th January, 2019 where he depones that on 8th January 2016, when the originating summons came up for hearing, his advocate on record Omollo & Company Advocates failed to attend court and his application was dismissed for non-attendance. That he later instructed Shako & Company advocates who proceeded to file an application dated 7th February 2017 seeking to set aside the orders dismissing the Originating Summons. However, the court stated that M/S Shako was not properly on record and proceeded to dismiss the application on 19th September, 2017. The applicant further states that M/s Shako and company advocates filed another application seeking that the orders of 19th September, 2017 be reviewed but the same was dismissed on 25th October, 2018.

3. The applicant asserts that there are substantial issues for determination in the Originating Summons that are yet to be determined involving the property of the deceased wherein the respondent is a trustee. He further contends that it is in the interest of justice that he be given an opportunity to be heard and the mistake of his counsel should not be visited upon him. He prays that the originating summons be heard on merit to its logical conclusion.

4. In opposition to the application, the respondent filed a notice of preliminary objection and a replying affidavit. The grounds upon which the objection is founded are that:

i. The Application offends the provisions of Section 7 of the Civil Procedure Act as the issues raised are res judicata having been conclusively determined by this Court.

ii. The Application offends the provisions of Section 66 of the Civil Procedure Act

iii. This court is *functus officio*

5. The respondent also filed a replying affidavit dated 30th June, 2019 in which she depones that there is no order issued on 26th March 2016, or an originating summons dated 8th January, 2016 hence the application is fatally defective. She asserts that for the court to grant the orders sought, there has to be an error apparent, or omission on the part of the court to warrant an order setting aside its decision. Further, that the applicant has not given sufficient reason why he himself or his advocate were not before court on the material day when the application was dismissed. She alludes that the said firm of advocates never filed any affidavit to explain the failure to attend court on 26th April, 2016 and the court should not consider the allegations that they are culpable. She asserts that the matter is *res judicata* and the best remedy is to appeal the ruling. She urged the court to dismiss the application with costs.

6. The court directed that the matter be canvassed by way of submissions on both the Preliminary objection and the substantive application. The applicant through Moka advocates submitted that the issues addressed by the applicant in the Originating Summon have never been determined and therefore not res judicata. On whether the application offends the provisions of Section 66 of the Civil Procedure Act, it was submitted that the applicant is rightly before court. That he had the option of either applying for setting aside the orders or making an appeal

before a higher court. On the third issue of whether this court is *functus officio*, it was submitted that the court has the power to revisit a decision where it was not determined on its merits. He relied on the case of **Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 other employees of Telkom Kenya Limited) [2014] EKL.R.**

7. For the respondent, Mungai Kalande Advocates submitted that the application is *res judicata* contrary to **section 7** of the Civil procedure Act for the issues herein were directly and substantially in issue in the Notice of Motion dated 7th February 2017 which sought reinstatement of the Originating summons dated 8th January 2015. Secondly, that the notice of motion dated 7th February 2012 was between the parties herein. The parties in the notice of motion were litigating under the same title and the matter was heard and conclusively determined. It was submitted that the court having been seized with a similar application and rendered its ruling on the same, it became *functus officio*. Reliance was placed on the case of **Raila Odinga & 2 other v Independent Electoral and Boundaries Commission & 3 other [2013] EKL.R.**

8. The parties filed a second bundle of submissions on the substantive application. I have considered the Application, the respective Affidavits in support and opposition thereto and the submissions on the Preliminary objection and the substantive application. The issue for determination is whether this application is *res judicata* and whether this applicant has met the threshold for setting aside orders of the court.

9. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

10. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

11. On the first ground, the respondent alleges that the application is *res judicata* having been already litigated and conclusively determined by this court. Further that the issues were directly and substantially similar to the issues in the Notice of Motion dated 7th February 2017 which sought reinstatement of the Originating summons dated 8th January 2015. On the other hand, the applicant claims that he is rightly before court and has the option of either making an application to set aside or filing an appeal before a higher Court.

12. I have considered the entire record and note that on 26th April 2016 this Court dismissed the summons dated 8th January, 2015 for want of prosecution where the applicant was seeking an enhancement of the monthly allowance payable by the respondent. On 7th February, 2017 the Applicant filed an application seeking setting aside of those orders and reinstatement of the summons dated 8th January, 2015. In its decision of 19th September, 2017 regarding the application seeking reinstatement of the summons, the court found that the firm of M/s Shako & Company Advocates was not properly on record having failed to file a notice of change of advocates and the application was therefore found to be incompetent and dismissed. On 26th September, 2017 the applicant filed another application seeking review and setting aside of the decision of 19th September, 2017 but the said application was similarly dismissed on 25th October, 2018 for failing to meet the threshold for granting of review orders.

13. The applicant has now returned to this court seeking an order of reinstatement of the summons dated 8th January, 2015. The respondent alleges that this matter has already been litigated and is *res judicata*. This Court is guided by the provision of the Civil Procedure Act, under **Section 7** which 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.”

14. Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in a recent appeal; **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**,

“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 and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

15. 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. That is:

- 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.

16. The respondent argues that the from the conditions stipulated, issues herein are directly similar to the application dated 7th February, 2017 which also sought reinstatement of the Summons dated 8th January 2015. Further, the former application was between the same parties who were litigating under the same title, and the issue was heard and determined by a court of competent jurisdiction. On the other hand, the applicant argues that this applications that were dismissed were not heard and determined on their merit but on technical issues that arose.

17. The record of the court indicates that the summons dated 8th January 2015 was not dismissed on merit. The court found that the failure of the advocate to attend court to prosecute the matter was the reason for the dismissal. Similarly the application of 7th February, 2017 as per paragraph 11 of the ruling, the court found that in the absence of a notice of change of advocates the application was incompetent having been filed by a firm of advocates who are not properly on record and proceeded to dismiss the application.

18. I make reference to the decision of Ngugi, J in **MWK vs. AMW [2016] eKLR** where the learned Judge cited the Court of Appeal decision in **Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97** and rendered himself thus:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata.”

19. From the determination of the court in the ruling that is the subject of this application, it is clear that the court did not make substantive findings on the issue of enhancement of the monthly allowance sought by the applicant in the summons. From the foregoing jurisprudence, it is clear that the issue of enhancement of monthly allowance cannot be said to be *res judicata* because it is yet to be heard and determined on merit to its conclusion.

20. On whether the application offends the provisions of **Section 66** of the Civil Procedure Act, reference is made to the specific Section which provides that:

66“Appeal from decree of High Court Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.”

It is to be noted that all that section 66 prescribes is that an appeal shall lie from the decree or any part of decrees and orders of the High Court to the Court of Appeal except where otherwise provided in that Act. This not being an appeal, this ground is not applicable in the preliminary objection.

21. On whether this court is *functus officio* and has exercised its authority over the matter, one should look at the order or relief which is being sought in the application despite a ruling having already been rendered by the court. The notice of motion herein seeks not one but several orders. The respondent has opposed it arguing that the court is *functus officio*.

22. Black's Law Dictionary, 10th Edition, page 787, defines *functus officio*, thus:

“[having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

23. The principle of *functus officio* implies that once a court passes a valid decision after a hearing, it no longer has authority to re-examine the matter and, therefore, cannot reopen the case. In other words, the authority of the court that has made such a decision has come to an end. This principle limits the authority of the court to take up such a case once it has pronounced the final order. The principle frowns upon reopening of litigation.

24. In that regard, the court of Appeal stated in **Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR**, that;

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon”

The Court, however, went on to state that:

“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions...”

25. Therefore the compelling principle, must be to do substantive justice so that justice must not only be done, but must also be seen to be done in every litigation that comes before the court rather than lay emphasis on the preference to the principle of finality in so far as this application is concerned. The orders sought in this application were also sought in previous applications that were not determined on their merit. For this Court to declare itself *functus officio* would prevent the determination of the substantial issue in dispute which is yet to be determined on its own merit. The effect of the above analysis is that this Court is competent to handle the application in issue. The upshot of the above analysis is that the Preliminary Objection dated 8th March, 2019 fails.

26. On the merits of the application herein, the applicant sought orders to set aside and/or vary the Order dismissing the Originating Summons dated 8th January 2016. He submitted that the respondent is a trustee of the estate and that he was raising a substantial issue that was yet to be determined. Further, that the Respondent was in the process of disposing estate property without the consent of the beneficiaries. That the beneficiaries of the estate had been left to borrow money for their own personal use.

27. On whether the order dismissing the summons should be set aside, the power to set aside an order or judgment is also an exercise of discretion. The Court of Appeal in **Simon Thuo Mwangi Vs Unga Feeds Limited Civil Appeal No.181 of 2003 [2015] eKLR** observed that:

The court is not bound to set the judgment aside. On reasons presented, it takes course to set aside or refuse to set aside. The court thus exercises a judicial discretion all the time having in mind what is just and fair in the case. The reason to set aside must therefore be based on good grounds or reasons advanced not on a whim or caprice.

28. The ground advanced by the applicant for setting aside the order is that his application has never been heard on its merits. The main consideration for courts is to do justice to the parties in a suit. There is need to elevate substantial justice to the parties over and above the strictures of rules of procedure, which have been stated to be mere hand maidens of justice. This is especially in view of the saving provisions of Article 159 (2) (d) of the Constitution which obligates courts and tribunals to exercise judicial authority without undue regard to technicalities.

29. No doubt the applicant or his counsel should have been more vigilant or keen in the prosecution of the summons. However, upon dismissal for want of prosecution, the applicant made an attempt to reverse the court’s decision through an application dated 7th February, 2017 but his efforts were thwarted by the failure by his then advocate to file an notice of change of advocates, thus his application was dismissed. A third attempt to review the decision of the Court failed for failing to meet the strict standards set for an application for review.

30. What is clear, is that the applicant has made concerted efforts to have his day in court with regard to the merits of the summons in issue. In **Essanji & Another v Solanki (1968) EA 218** it was observed;

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”

31. Taken in totality, the circumstances herein should entitle the applicant to have his day in Court to fully ventilate the claims he has against the Respondent and bring it to a conclusion in merit. This is especially since a hearing would cause no greater prejudice to either party. However, lack of it, would greatly prejudice the applicant.

32. The upshot of the above analysis is that the Court will exercises its discretion in the interest of justice and make the following orders:

- i. The Orders issued on 26th April, 2016 dismissing the summons dated 8th January, 2015 be and are hereby set aside.
- ii. The Summons dated 8th January, 2015 be and is hereby reinstated.
- iii. Costs be in the cause.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 2ND DAY OF DECEMBER, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Applicant

In the presence of.....Advocate for the Respondent