



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCC CAUSE NO. 729 OF 2013

IN THE MATTER OF THE ESTATE OF PAULINE MUTHONI NYAGA.....DECEASED

WARUI NYAGAAPPLICANT

V E R S U S

JOHN GATIMU NJUKI.....1ST PETITIONER/RESPONDENT

MUCHIRI NYAGA.....2ND PETITIONER(DECEASED)

ZAKAYO KARIUKI NYAGA.....3RD PETITIONER/RESPONDENT

WAKARIA NYAGA.....4TH RESPONDENT/RESPONDENT

RULING

1. Introduction:

Warui Nyaga, the applicant filed an application dated 23/4/2018 **under Section 76 of the Law of Succession Act Rule 44, Rule 73 of the Probate & Administration Rules** seeking the following orders:-

1) Spent

2) That the Honourable Court be pleased to issue a temporary injunction restraining the respondent's from dealing further and from interfering with land parcel number Baragwe/Kariru/1956, Mwea/Ngucwi/551 and Plot Number DI Kianyaga pending the hearing and determination of prayer 3,4 and 5 herein below.

3) That the honourable court be pleased to issue a temporary injunction restraining the respondents from interfering in any with Land Parcel Number Baragwe/Kariru/1956, Mwea/Ngucwi/551 and Plot Number D1 Kianyaga DI Kianyaga pending the hearing and determination of this application.

4) That the honourable Court be pleased to revoke and or annul the certificate of confirmation of grant for having obtained fraudulently and by concealment of material facts.

5) That the costs of this application be provided for.

2. The application is based on the following grounds:-

a). That the deceased herein Pauline Mthoni Nyaga was the mother to the applicant and the 1st, 2nd and 3rd respondents. The 4th respondent was a co- wife to the deceased.

b). The 1st respondent, 2nd Respondent & the 3rd Respondent secretly moved court and petitioner for Letters of Administration for the estate of Pauline Muthoni Nyaga without involving the applicant who was the eldest son.

c). That the Letters of Administration were confirmed and a certificate of confirmation of grant was issued on 12th October 2015.

d). That the 1st, 2nd and 3rd respondents allegedly shared out compensation of the share of land parcel number Baragwe/Kariru/1956 which amounted to a total of Kshs 4,215,296/-.

e). That the respondents left out Kianyaga Plot Number DI and Land parcel Number Mwea/Ngucwi/551 in which the deceased had a share.

f) That Plot Number Kianyaga DI has been distributed without a proper succession being done for the share of Pauline Muthoni Nyaga (deceased).

g). That the applicant is entitled to a share of the estate of the deceased.

h). That the certificate of Confirmation of Grant should therefore be annulled/revoked for a proper succession to be done.

i). That it is fair and just for the court to allow this application.

3. The application was opposed by the respondent and Wakaria Nyaga (4th Respondent) filed a Replying Affidavit contending that the application is based on falsehoods as the applicant was involved and attended court. During the succession and was given a share. The estate of the deceased, Land Parcel No. Baragwe/Kariru/439 was distribution with her co-wife getting 2/3 share with her sons including the applicant and upon sub-division they got Parcel No. Baragwe/Kariru/1956.

4. Land Parcel No. Mwea/Ngucwi/551 did not belong to the estate of the deceased. As for plot No. D1 it was registered jointly between her and her co-wife and was shared equally between the two houses. She depones that the applicant is motivated by greed.

5. The respondents filed a summon (General Form) and contends that the issue of Baragwe/Kariru/1956 is res judicata, the same having been directly and substantially. In issue between inter alia the same parties herein in the High Court Succession Cause No. 640/2015 Kerugoya. They further state that the applicant came before this court to revoke an earlier grant that had been issued to the respondents on the mode of distribution of the said property. That the matter was dealt with and the suit was dismissed.

“In response, the applicant stated that he had moved court in Succession No. 640 of 2015 seeking to have the title deed in respect of Baragwe/Kariru/1956 rectified and to have his name included in the title which name had been erroneously left out when the grant was being registered. After the conclusion of the case, the deceased’s wife inherited properties registered in her name jointly with the 4th respondents.

That the current succession relates to the estate of Pauline Muthoni Nyaga and he has moved for revocation of grant issued to the 1st and 2nd respondent on the basis that he was never notified of the proceedings and some properties were left out. That Law of Succession Act does not deal with the issue of res judicata.”

6. The parties proceeded by way of written submissions. For the applicant it is submitted that he has moved the court seeking revocation of the grant that was issued to 1st & 2nd Respondent and that he was not notified of the succession and some properties of deceased were left out. That Res Judicata is not provided under the **Law of Succession as rule 63 of the Probate and Administration Rules** does not include Section -7- of the Civil Procedure Act which provides for Res-judicata among the provisions that apply in the Law of Succession Act.

7. The applicant further submits that it is now a well settled principle that a preliminary objection consists of points of law which should be straight forward and with the potential of determining the entire case or application. He relies on the decision of **Mukisa Bisquits Manufacturing Company Limited (1969) E. A 690** which sets out the principles of a preliminary objection and dismiss the pre-liminary objection. It is submitted that the issues in succession cause No. 640/2015 and the present one are not the same. That there are facts in the application for revocation of grant which have not been ascertained.

8. The applicant relied on the decision by Justice Limo in **Andrew Mwangi Kabungo –v- Robinson Gichobi Richard & Another (2017) eKLR**. They pray that the P.O be dismissed.

9. For the respondents it is submitted that the issue is whether the application is res’ judicata. They rely on **Uhuru Highway Development Limited –v- Central Bank of Kenya & 2 Others (1996) eKLR** where the Court of Appeal Held that –

“In order to rely on the doctrine of res judicata there must be:

i) A previous suit which the matter was in issue.

ii) The parties were the same or litigating under the same title.

iii) A competent court heard the issue.

iv) The issue has been raised once again.”

10. It is submitted that in Succession Cause Number 640/15 the applicant came before this court to revoke an earlier grant that had been issued to the respondents on the mode of distribution of Baragwe/Kariru/1956. The matter was addressed by the court and was dismissed. That the doctrine of res judicata is essentially a bar to subsequent proceedings involving the same issue which was finally and conclusively

decided by competent court between the same parties. They urge the court to find that the application is res judicata.

11. I have considered the application and the submissions. There are two issues which arise:

i) Whether res judicata is applicable in succession matters.

ii) Whether the applicant's application for revocation of grant is res judicata.

12. The doctrine of res judicata has been ably argued by the parties in the submissions. The doctrine has been expounded under **Section -7- of the Civil Procedure Act** which provides:-

“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.”

13. There are three conditions which have to be satisfied for the court to apply the doctrine. These are:-

i) There is a former suit or proceeding in which the same parties in the subsequent suit had litigated.

ii) The issue in dispute was directly or substantially in issue in the former suit.

iii) That a court with competent jurisdiction had heard the matter and finally determined it.

14. This was the holding by the Court of Appeal in the case of **Uhuru Highway Development Limited –v- Central Bank of Kenya & 2 Others** cited by the Respondent.

15. The doctrine of res judicata is aimed at ensuring that litigation must come to an end and affords litigants an end a respite from being faced with a vicious circle of disputes which have been determined by a competent being taken back and forth. It is designed to protect litigants from time and resource consuming endless litigation. Without such control which the doctrine is meant to ensure there would be endless litigation by parties filing multiplicity of suits in different courts hoping to obtain favourable outcomes. Judicial process would thus be abused and to disrepute. The basis for the doctrine being embedded in the Civil Procedure is to ensure public confidence in the finality of decision made by the courts.

16. A preliminary objection should be purely based on a point of law. Res judicata is a point law as where it urged successfully it would have the force of determining the dispute. The doctrine applies in disputes of civil nature where the circumstances of the case would allow a party to raise it. The application of the doctrine to succession matters would depend on the circumstances of the matter in issue. My view is that considering the rule the doctrine of res judicata serves, it is applicable in all disputes of civil nature including succession matters. Where the conditions for the application of the doctrine exists, the doctrine can be successfully argued in succession disputes.

17. The second issue is whether the application is res judicata. The respondent states the issue of Baragwe/Kariru/1956 is res judicata in Succession Cause 640/2015.

18. The applicant on the other hand states that the issue in 640/15 concerning the land was rectification of grant. These are issues of facts which need to be verified and the court would have to look at the proceedings in succession cause No. 640/15. There is a issue as to whether what the applicant raised was an application for revocation of grant or a rectification. As stated in the case of **Mukisa Bisquits** cited by the applicant, a preliminary objection must be clear and have the potential of determining the case in a persuasive decision by Justice Musyoka in **A. K. N –v- JNM (2014) eKLR** it was stated:-

“This court is of the considered view that the issues raised in the Preliminary Objection herein are of a nature that would apparently require calling of evidence, it raises questions of fact and law The Preliminary Objection is thus not sustainable. A party, who raises a Preliminary Objection, must do so only on a pure point of law and nothing else.”

19. The pre-liminary objection raised by the respondent is not based on a pure point of law. It is based on disputed facts. It is not a pure point of law and thus does not meet the threshold for a preliminary objection.

20. In conclusion I find that the preliminary objection lacks merits. It is dismissed.

Dated at Kerugoya this 7th day of March, 2019.

L. W. GITARI

JUDGE