



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

MISC SUCCESSION CAUSE NO. 138 OF 2015

IN THE MATTER OF THE ESTATE OF JUMA YUSSUF ( DECEASED)

FATUMA GATITU MUHAMAUO.....1<sup>ST</sup> PETITIONER/APPLICANT

ZUBEIR ABDALLA.....2<sup>ND</sup> PETITIONER/APPLICANT

VERSUS

HAWA KAINDA.....1<sup>ST</sup> RESPONDENT

YUSUF JUMA.....2<sup>ND</sup> RESPONDENT

RUKIA JUMA.....3<sup>RD</sup> RESPONDENT

HUSSEIN JUMA.....4<sup>TH</sup> RESPONDENT

RULING

1. The Application dated 5<sup>th</sup> October 2018 is seeking for inhibitory Orders on the estate property namely **Ntima/Igoki/610**. The application was opposed by the Respondents through preliminary objection and Replying affidavit sworn by **Yusuf Juma; both** dated 16<sup>th</sup> October 2018. The major argument by the respondents is that the issues raised by the applicant are *Res Judicata* since the subject matter and issues were the same and directly in issue in **Isiolo Kadhi Court Succession cause No. 8 of 2015** and **H.c. Meru Civil Appeal No. 48 of 2017**.

2. On 20th February 2019 the Court directed the parties to file their respective submission to the Application and the Preliminary Objection. Both Parties have filed their submissions which I have duly considered.

3. On 8<sup>th</sup> May 2019 this Honourable Court also directed in a partial ruling that the proceedings in the Kadhis Court be forwarded to this court. The file was not forwarded. However, annexed to the Respondent's replying affidavit dated 16<sup>TH</sup> October 2018 is certified pleadings, proceedings and the Judgement of the Kadhi's Court. These documents have not been disputed and ascertain the type of proceedings that were before the Kadhi.

**Analysis and Determination**

4. This proceeding is a citation under the Law of Succession Act. The citation was filed by the petitioners and is dated 19<sup>th</sup> May 2015. Quickly thereafter, the 2<sup>nd</sup> Respondent filed **Succession Cause No. 8 of 2015 In the Matter of the Estate of Juma Bin Yusuf (deceased)** at Isiolo Law Courts on 25th May 2015.

5. The Principal Kadhi heard the testimonies of both, Yusuf Juma (the petitioner in the cause) and Zubheir Abdalla (the Respondent). On 31<sup>st</sup> May 2017 the Principal Kadhi delivered his judgement distributing the estate of the deceased in line with Muslim Law. He invoked his authority as laid out in **Section 2(3)** and **Section 48 (2) of the Law of Succession Act**.

6. Being aggrieved by the aforesaid determination the 2<sup>nd</sup> Petitioner herein filed an appeal in **Civil Appeal No. 48 of 2017 Zubheir Abdalla vs Yussuf Juma**. The appeal was however dismissed by Hon Majanja. J on 31<sup>st</sup> June 2018 for failure to file Record of Appeal within the prescribed timelines. The Appellant sought to reinstate the Appeal vide application dated 31<sup>st</sup> May 2018 but the application was dismissed by court on 4<sup>th</sup> Day of October 2018.

7. The Applicants submitted that Succession Cause No. 8 of 2015 was a determination of the rightful heirs of the deceased. Hence, this

Citation is res judicata. But, the 1<sup>st</sup> Petitioner also filed a supplementary affidavit claiming that he was not a party to the proceedings in Isiolo Succession Cause No. 8 of 2015.

### **Of Res Judicata**

8. These proceedings are said to be res judicata. See the arguments by the respondents. The doctrine of res judicata is set out in the Civil Procedure Act at Section 7 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 can 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.”**

9. But I take a different view on the discussion of res judicata in these proceedings. I do not think that this is a matter of res judicata, for the reasons below. The proceeding before me is a citation which serves an altogether different purpose; to enable filing of proceedings to take out grant of representation. The cause in Isiolo is a substantive petition. These cases are therefore not comparable or capable of determining similar issues for purposes of res judicata. Accordingly, this is a matter of a citation having been spent proceeding or overtaken by events as shall become clearer later.

### **Overtaken by events**

10. Although the prayers in the Succession Cause No. 8 of 2015 were couched in a woolly language, it is clear from the evidence and the decision by the Kadhi, that the determination herein was in respect of; (1) **whether the 2<sup>nd</sup> Petitioner is entitled to a share of the estate property in Ntima/Igoki/610; (2) the legal heirs of the deceased; and (3) the distribution of the estate of the deceased.**

11. The Principal Kadhi in his determination dismissed the 2<sup>nd</sup> Petitioner's claim, identified and listed the legal heirs of the deceased, and ultimately, distributed the estate of the deceased in line with Muslim Law. He also considered the issues raised in this application i.e. **whether the land in Ntima/Igoki/610 was held in trust for the applicant or was estate property.** In paragraphs 6-12 of the judgement which is entitled Ownership of Ntima/ Igoki/610 the learned Kadhi critically analysed all arguments presented and made his determination that the property is estate property. In my considered view, probate court has jurisdiction to ascertain the estate property as did the Kadhi. See paragraph 11 the learned Kadhi held as follows;

**“ On the strength of the land certificate, absence of proof of trust document and several possibilities of why the land was registered in the name of Juma Yusuf only, I find and hold that the parcel of land Plot No. Ntima/Igoki/610 belonged to the late Juma Yusuf. IT constitutes his estate.”**

12. With the hindsight of the foregoing, I should determine the two inextricable issues before this Court; (1) whether the citation proceeding is necessary; and (2) whether inhibition is properly grounded.

13. It bears repeating that, a citation is issued to take up or refuse grant of probate or letters of administration of the estate. Once, a cause has been filed in respect of the deceased, a citation is no longer necessary. In this case, a cause was filed at Isiolo in which the rightful heirs and estate of the deceased were identified, and the estate distributed. Therefore, this citation became otiose. I so declare.

14. Of the application for inhibition, I note that the 2<sup>nd</sup> Petitioner was present and participated in the proceedings at Isiolo. I do not also find the 1<sup>st</sup> Petitioner's averment that she was not aware of the proceedings in Isiolo to be truthful. She is the mother of the 2<sup>nd</sup> Petitioner who was a respondent in the Isiolo matter. In any event, she has not taken any steps to prosecute this proceeding since 2015.

15. I therefore find and hold that this citation has been overtaken by events. In the circumstances, the application for inhibition does not have a foot on which to stand. It cannot hold or stand off the grid; it will fall off. Accordingly, the Application dated 5<sup>th</sup> October 2018 falls by the wayside.

16. Reasons whereof I hereby Order;

**a. That the citation proceedings dated 19<sup>th</sup> May 2015 is hereby declared to have been overtaken by events. It is therefore not necessary and is marked as spent.**

**b. That in light of (a) above, the Petitioner's Application dated 5<sup>th</sup> October 2018 is hereby dismissed.**

**c. This being a succession matter I do direct that each party shall bear its own Costs.**

**Dated, signed and delivered in open court this 6<sup>th</sup> June 2019**

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**F. GIKONYO**

**JUDGE**

**IN PRESENCE OF**

**Kimaita for Ndubi for respondent**

**Kiogora for petitioner**

**Zebeir Abdalla – present**

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**F. GIKONYO**

**JUDGE**