



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 48 OF 2017

FORMERLY NAIROBI SUCCESSION CAUSE 853 OF 1998

IN THE MATTER OF THE ESTATE OF BERNARD MUTIE MUNYAKA (DECEASED)

MACKENZIE SILA MUTISO.....APPLICANT

VERSUS

TERESIA WAMBURA MUTIE.....RESPONDENT

RULING

1. This ruling relates to the preliminary objection dated 1.11.2018 and filed on 02.11.2018 in response to the application dated 9th January, 2017 for revocation of grant and for injunction in respect of Land Reference No. Machakos/Kiandani/245. The gist of the preliminary objection is that the entire application is Res Judicata and an abuse of the court process. My issues for determination are Firstly, whether the application filed on 9th January, 2017 is *res judicata*; Secondly, whether the issues raised in the application filed on 9th January, 2017 are wholly or substantially similar to issues raised in a concluded suit, that is ELC No. 22 of 2017, Machakos (hereinafter referred to as the cited case) where judgement was delivered on 10.12.2018.

2. The preliminary objection was canvassed vide written submissions. The Respondent raised the issue of whether the application before the court and the suit is *res-judicata* and should be dismissed. Counsel cited the provisions of Section 7 of the Civil Procedure Act and the case of **the Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR** where the court of appeal listed the 5 prerequisites to be met for a matter to be deemed as *res judicata*, to wit;

a. The suit or issue was directly and substantially in issue in the former suit;

b. The former suit was between the same parties or parties under whom they or any claim;

c. Those parties were litigating under the same title

d. The issue was heard and 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 was raised.

3. With respect to the first requirement, counsel submitted that the parties in this application are the same as those in the cited case and the subject matter and cause of action is the same, hence because the matter in the instant suit has been resolved by a court of competent jurisdiction, the application is *res judicata* and should be dismissed with costs.

4. The applicant in his submissions cited the provisions of Section 7 of the Civil Procedure Act and listed the five elements of the doctrine of *res judicata* viz;

a. The suit or issue was directly and substantially in issue in the former suit;

b. The parties were the same;

c. Those parties were litigating under the same title;

d. The court that formerly heard and determined the issue was competent to try the subsequent suit;

e. The issue was heard and determined in the former suit.

5. On the first element, counsel submitted that the matter before the court is a succession issue about the revocation and annulment of a grant of letters of administration issued to the respondent herein and this matter has not been in issue in that In **ELC 22 of 2014**, the issues are different.

6. On the question of the parties, counsel submitted that the parties in ELC 22 of 2014 are the same as in the instant application.

7. On the element of a competent court, counsel submitted that the ELC court is not competent to hear and determine this application which emanates from Section 76 of the Succession Act and therefore the competent court is the instant court.

8. On the aspect of whether the issue was heard and determined, counsel submitted that the issue of revocation of the grant of letters of administration of the Estate of the late Bernard Mutie Munyaka had not been heard and determined by any court and thus the preliminary objection was incompetent.

9. On the aspect of the issues being raised again in a fresh suit, counsel submitted that the prayers in **ELC 22 of 2014** have not been raised in the instant application seeking for revocation of grant issued to Teresia Wambura Mutie.

10. To ascertain the second issue for my determination, it is necessary to closely examine the issues raised in the cited case and the issues presented in this case. Paragraph 21 of the judgement reads in part:-

"Instead it is the plaintiff who has proved that the defendant is only entitled to the land that he bought in 1977 measuring 100 feet by 260 feet"

11. Paragraph 23 reads that:-

"a) An injunction be and is hereby issued restraining the Defendant, his servants, workmen and agents from entering on and or from erecting or causing to be erected thereon any structures or from in any way interfering with the plaintiff's use and enjoyment of a parcel of land known as Machakos/ Kiandani/243 (save for a parcel of land measuring 100 feet by 260 feet which the defendant bought in 1977).

b. An order for eviction of the Defendant be and is hereby issued from the said suit property (save for a parcel of land measuring 100 feet by 260 feet which the defendant bought in 1977).."

12. **Unlike** what counsel for the respondent had stated in his submissions, despite the ELC court not having framed issues for determination, the bone of contention in the ELC 22 of 2014 was the right, entitlement and claim of the applicant over *Machakos/ Kiandani/243 measuring 0.47 hectares*.

13. The ELC court then went ahead to make a final determination on the entitlement to the *Machakos/ Kiandani/243* as reproduced in paragraph 11 above.

14. From the foregoing, I find that what was framed as prayers 2 and 4 in the application were conclusively handled by the trial court in the cited case.

15. Nevertheless prayer 3 in the application was not resolved in finality because the cited case had not made any determination and it has no requisite jurisdiction to make any determination on revocation of grant under Section 76 of the Law of Succession Act. Therefore I find that not all of the issues for determination in the cited case are the same for determination in the instant application.

16. I shall now address what I framed as the first issue for determination. On what constitutes *res judicata*, I adopt the following passage in the dictum of Wigram V-C, in **Henderson vs Henderson(1843) 67 ER 313** as it summarizes *res judicata*:-

" ... where a given matter becomes the subject of litigation in, and 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 point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

17. When *res judicata* is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case- to ascertain; **(i)** what issues were really determined in the previous case; and **(ii)** whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

18. The test of determining whether a matter is *res judicata* was also summarized in ***Bernard Mugo Ndegwa v James Nderitu Githae and 2 Others, (2010) eKLR*** as follows: - **(a)** The matter in issue is identical in both suits; **(b)** the parties in the suit are the same; **(c)** sameness of the title/claim; **(d)** concurrence of jurisdiction; and **(e)** finality of the previous decision. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

19. Prayers 2, 3 and 4 capture the issues raised in this case and having found that prayer 3 was not finally determined, it means that the same is yet to be determined on its merits.

20. Upon analysing the cited case and the instant case and found that some of the issues raised by the applicant are yet to be resolved, I find and hold that this preliminary objection partially fails. The only issue not resolved is on the question whether the grant should be revoked. The applicant should be allowed to ventilate his case regarding the issue of the grant which should be entertained by this court. Consequently I dismiss this preliminary objection with no orders as to costs.

It is so ordered.

Dated, Signed and Delivered at Machakos this 2nd day of July, 2019.

D. K. Kemei

JUDGE