



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 1642 OF 2010**

**(CONSOLIDATED WITH SUCCESSION CAUSE NO. 423 OF 2004)**

**IN THE MATTER OF THE ESTATE OF LAURENT NTIRAMPEBA (DECEASED)**

**ADAM GASONGO.....APPLICANT**

**VERSUS**

**BEATRICE KANZAYIRE**

**EDDIE NTIRAMPEBA.....RESPONDENTS**

**RULING**

1. On 7<sup>th</sup> October, 2019 the Respondents filed a Notice of Preliminary Objection to the Applicant's two Notices of Motion dated 27<sup>th</sup> May, 2019 and 2<sup>nd</sup> July, 2019 respectively. The Respondents are seeking to have the two applications struck out with costs on grounds of *res judicata*. According to the Respondents, the issues canvassed in both applications have been directly and substantially in issue between the same parties herein vide the ruling of this court delivered on 3<sup>rd</sup> October, 2018. That the Applicant should therefore appeal instead of re-litigating the same matter over and over, an act which amounts to abuse of the court process.

2. In the application dated 27<sup>th</sup> May, 2019 brought by way of a summons under certificate of urgency, the Applicant sought revocation of the grant made to the Respondents on the ground that it was obtained fraudulently by concealment of material facts. The application is based on the ground that the deceased never married Beatrice Kanzayire and the marriage certificate produced in court is a forgery. That as such, the grant confirmed to the Respondents was procured in a fraudulent manner and ought to be revoked.

3. The Applicant swore an affidavit on 27<sup>th</sup> May, 2019 in support of the application in which he deposed that he is a brother of the deceased. He asserted that the deceased never married Beatrice Kanzayire and the marriage certificate produced in court is a forgery. The copy of the marriage certificate on the record which is of serial number 450218 indicates that Ntirampeba Laurent, the deceased herein, and one Kanzayire Beatrice solemnized their marriage on 4<sup>th</sup> July, 1987 at C.P.K. Church, Karen.

4. In the application dated 2<sup>nd</sup> July, 2019 also brought by way of a summons, the Applicant also seeks revocation of the grant confirmed to the Respondents on 18<sup>th</sup> April, 2007. The application is premised on the ground that the grant was obtained by deceit and concealment of material facts. The Applicant swore an affidavit on 2<sup>nd</sup> July, 2019 in support of the application in which he reiterated the contents of his affidavit of 27<sup>th</sup> May, 2019. He asserted that the deceased died without marrying either the Respondent or any one at all.

5. The preliminary objection which is for determination is premised on the ground that both the applications dated 27<sup>th</sup> May, 2019 and 2<sup>nd</sup> July, 2019 are *res judicata*. The doctrine of *res judicata* is set out under **section 7** of the **Civil Procedure Act** 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”**

6. This court had delivered a ruling in this matter on 3<sup>rd</sup> October, 2017 in which it dismissed a summons for revocation of grant which had been filed by the Applicant herein. At paragraph 14, 18 and 19 of the ruling, this court deliberated on the issue of the marriage certificate and the marriage between the Respondent and the deceased as follows:

**“14. Counsel for the Respondent in his submissions argued that the Applicant was not a wife of the Deceased and relied on a letter**

from one Reverend Catherine Njagi an Assistant Pastor at the A.C.K. St. Francis Church Karen Nairobi confirming that such a Marriage Certificate did not exist in their records. Counsel for the Respondent asserted that the Marriage certificate was a forged document. He prayed that the court do dismiss the Applicant's application dated 14<sup>th</sup> April, 2015.

18. The A.C.K. Church in that letter however stated that the Marriage Certificate in question was issued by the C.P.K. Church, Karen, a distinct and separate legal entity from theirs. Furthermore, at the hearing, the Witness summoned by the Respondent to address the issue concerning the validity of the Certificate did not testify. The validity of the Marriage Certificate cannot therefore be questioned based on records from an entirely different religious institution to that which issued the Certificate.

19. Besides the validity of the marriage certificate the Applicant demonstrated that she was the widow of the deceased and her children are the result of their marriage, for purposes of the Law of Succession. She demonstrated that there had been long cohabitation with the deceased and they had built a reputation as husband and wife."

7. From the ruling of this court it is evident that the issue of the authenticity of the Marriage Certificate was alive before the court in the previous suit and was deliberated upon by the court in its ruling. In holding that the Respondent Beatrice Kanzayire was a wife of the deceased and therefore a beneficiary of his estate, the court stated that even if the marriage certificate was to be discounted, it had established that there existed an irrefutable presumption of a marriage between the deceased and the Respondent. The Court went on to hold that the marriage certificate had not been shaken by the evidence tendered.

8. In the instant applications, the Applicant states that he lodged a complaint with the Directorate of Criminal Investigations who have since procured confirmation from the Office of the Registrar of Marriages that there is no record of a marriage solemnized between the parties. Further that their office did not issue a Certificate of Marriage of serial number 450218 to C.P.K. Church in Karen as indicated. He annexed a copy of a letter dated 24<sup>th</sup> April, 2019 as proof thereof.

9. The Applicant also annexed a copy of a letter dated 9<sup>th</sup> October, 2017 from one Reverend Njagi from A.C.K. St. Augustine Parish – Madaraka which clarifies that C.P.K. Church Karen is now known as A.C.K. St. Francis Church Karen. There is also a letter dated 11<sup>th</sup> April, 2019 from St. Francis Church Karen to the effect that there is neither a record in their marriage register that Laurent and Beatrice got married at ACK St. Francis Church nor a counterfoil of their marriage certificate in their certificate books.

10. I note however that these are issues which touch on the authenticity of the marriage certificate, an issue which was dealt with by this Court in its ruling of 3<sup>rd</sup> October, 2017. The court considered the evidence that was available at the time of the ruling and dismissed the Respondent's application for revocation of grant. The reliefs sought in the instant applications and those that were sought by the Applicant in his application dated 24<sup>th</sup> April, 2015 which was dismissed in the ruling of 3<sup>rd</sup> October 2017 are therefore identical and with regard to the same issue. In any event, the Marriage Certificate was not the sole reason upon which the court found that the Respondent was a widow of the deceased.

11. The main question for determination is whether the issues raised in the two applications now before court could have been litigated in the previous application. Richard Kuloba in his book, *Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition*, states thus:

***"The plea of res judicata applies not only to points upon which the first Court was actually required to adjudicate 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. The subject matter in the subsequent suit must be covered by the previous suit for res judicata to apply."***

12. In the case of *Mburu Kinyua vs Gachini Tuti* [1978] KLR 69-82 pg 71-73 the Court of Appeal (Madan, Wambuzi & Law, JJ.A.) rendered itself thus on the question of *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 the 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, in advertence 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 subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." (emphasis mine)**

13. Wigram V.C in *Henderson v Henderson* (1843) 67 ER 313 summarized *res judicata* as follows:

***"...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 a 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."***

14. The principle of *res judicata*, or claims preclusion, prevents the re-litigation of a claim or cause of action that has been finally

adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit. A subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in a prior suit. See **Barr v Resolution trust Corp. 837 S.W. 2d 627 (1992)**.

15. From the foregoing jurisprudence, a suit is *res judicata* if it is brought to court to remedy failure in a first suit, which was dismissed due to an inadvertent omission of part of that case. A litigant cannot, therefore, file another suit to remedy failure of a first suit which was dismissed for lack of merit.

16. Both the applications dated 27<sup>th</sup> May, 2019 and 2<sup>nd</sup> July, 2019 raise issues which were litigated upon in the previous suit and upon which this court made a ruling on 3<sup>rd</sup> October, 2017. It is thus evident that the instant applications are a mere attempt by the Applicant to have a second bite at the cherry and reintroduce a suit which was properly heard and finally determined on merit by this court. Any grievance with the view of this court as adopted in its ruling of 3<sup>rd</sup> October, 2017 ought to be examined on appeal.

17. The upshot of the foregoing is that the Preliminary Objection brought by way of a Notice dated 7<sup>th</sup> October, 2019 has merit and is hereby allowed. The applications dated 27<sup>th</sup> May, 2019 and 2<sup>nd</sup> July, 2019 and filed by the Applicant are *res judicata* and are hereby struck out. Costs shall be borne by the Applicant.

It is so ordered.

**SIGNED DATED AND DELIVERED IN OPEN COURT THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2019.**

.....

**L. A. ACHODE**

**HIGH COURT JUDGE**

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

**In the presence of .....Advocate for the Respondents.**