

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1430 OF 1997

IN THE MATTER OF THE ESTATE OF SAMUEL MWAURA KING'ANG'I (DECEASED)

RULING

1. On 12th July 2016 an application dated 11th July 2016 was lodged at the registry by Lucy Wanjiku Mwaura seeking review of consent orders that had been adopted by the court on 20th January 2010, on the grounds that the said consent was founded on forged documents, and seeking that the signatures on the said documents be subjected to document examination. She further seeks that the ruling of the court delivered on 2nd October 2014 be varied.
2. To that application, the respondents, James Kung'u Kibe and John Mungai Mwaura, filed replies comprised in a notice of preliminary objection dated 26th September 2016 and a replying affidavit sworn on 12th October 2016, essentially pleadings that the issues raised in the application were *res judicata*.
3. When the matter came up for hearing on 25th October 2016, the respondents urged that they be heard first on their preliminary objection. Ms. Akuya, for the second respondent, urged me to find that the matter was *res judicata* as the court had already determined the matter of the said consent orders in its ruling of 2nd October 2014. Mr. Oyugi, for the 1st respondent, agreed. He submitted that the applicant was seeking similar orders to those sought in the application the subject of the ruling delivered on 2nd October 2014.
4. In her response, Mrs. Morara for the applicant submitted that the instant application differs from the earlier one. She argued that the earlier application, dated 29th October 2013, sought the setting aside of the consent orders on the grounds that the signatures on the consents were forged. She submitted that the current application seeks review of the consent orders rather than setting aside of the said orders. Her case was that review and setting aside of orders are not the same.
5. I have perused the court record, especially the two applications and the ruling delivered on 2nd October 2014. It is plain that both applications target the consent orders for setting aside or variation or alteration, on the grounds that the orders were founded on signatures that were forged. I do not see any difference in the two applications. The arguments that the applicant advances now ought to have been raised in the application of 2013. The applicant is no doubt seeking to have a second bite at the cherry.
6. Kimaru J. had occasion to address the same issues as raised by the same applicant in the application that culminated in the order of 2nd October 2014. There is nothing new. The matters were dealt with. The instant application is clearly *res judicata*. If the applicant was aggrieved by the findings by Kimaru J., she ought to have appealed against the order instead of moving the same court seeking similar or related orders.
7. It is my conclusion that the matters sought to be canvassed were dealt with effectively in the earlier order. There is merit in the preliminary objection, the same is hereby upheld. The application dated 11th July 2016 is hereby struck out. The respondents shall have the costs.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE