



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**MISC.APPL.NO.56 OF 2015**  
**IN THE MATTER OF THE ESTATE OF**  
**CHARLES PETER ANGWENYI – DECEASED**

**AND**

**PETER SIRO NYARIKI ANGWENYI.....APPLICANT**

**AND**

**SUSAN NJERI ANGWENYI.....RESPONDENT**

**RULING**

**Introduction**

1. This application involves the **Estate of Charles Angwenyi (deceased)** and pits the applicant herein **Peter Siro Nyariki Angwenyi** the first born son to the deceased against the respondent who is his mother. The applicant has filed this **Notice of Motion under Section 83(f) and (g) and rule 73 of the Probate and Administration Rules of Succession Act Cap.160** seeking the following orders:-

1) *Spent*

2) *That this Honourable Court does interpret the will of the deceased dated 13<sup>th</sup> May 1982 and determine the beneficial interests and entitlements of the applicant thereunder.*

3) *That this Honourable court be pleased to issue an order directing the respondent as sole executrix of the deceased's estate to distribute to the applicant all his entitlement under the will and to execute all assets and other relevant documents that may be necessary to complete the vesting of all the applicant's beneficial interest under the will.*

4) *That this Honourable Court be pleased to issue an order directing the respondent to make such periodic payments to the applicant as shall be determined by this Honourable Court (either monthly, quarterly or annually) from the residuary estate of the deceased to cater for the welfare of the applicant.*

5) *That this Honourable Court does order that the Registrar of the High Court or any person deputizing him to sign and execute any papers, documents or transfers as may be necessary on behalf of the executrix in the event she refuses to sign or execute upon seven days notice.*

6) That the Honourable Court be pleased to grant any other and/or further orders as it may deem fit to grant in the interests of justice.

7) That costs incidental to this application be provided for.

### **Applicant's affidavit**

2. The above application is premised on a supporting affidavit sworn by the applicant in which he depones that he is the first born son of the deceased, that the deceased's estate comprised inter alia the following properties:-

**i) Plots at Kisii town**

**ii) Plots at Karen Nairobi**

**iii) Plots at Nairobi**

**iv) Plot at Gigiri, Nairobi**

**v) Shares from net rents and profits from the properties of the Estate of the deceased as mentioned in the will.**

**vi) Other and further properties whose full and better particulars are well within the knowledge of the objector/applicant according to will left.**

3. He further contends that despite his entitlement to the property listed in the will, all his efforts to get the respondent to make the distribution of his entitlement have been futile thereby making it necessary for him to file this application so that this Honourable Court can interpret the will and determine his entitlement and when it should pass to him as a beneficiary. He now seeks the court's interpretation of the following clauses so as to make the necessary orders and directions:

**1) "Whether under clause 6 of the will, he is entitled to an interest in Land Reference Number 143 Section 10 plot 4 in Kisii town. It is common knowledge that his grandfather passed away in August 1991.**

**2) Whether under clause 7 of the will, land Reference Number 6001/3 Kericho, having not been sold to date, he should not get any share in the property to vest in him directly. This is also taking note of the fact that he does not get any rentals from it. Further considering that he is now an adult with his own family, whether the trust created under this clause should continue to run indefinitely.**

**3) Whether I am entitled to benefit from residuary estate under clause 8(c), considering that I am also a beneficiary whose welfare should be catered for.**

**4) There are at least properties known to me that are not mentioned in the will. These are Land Reference Number 12146/5 in Karen, Nairobi and Nairobi/Block 91/219 in Gigiri. As of now, no letters of administration intestate have been taken out, but there are rental proceeds from the properties being earned. I ask this Honourable Court to determine whether as a beneficiary, I should also be getting a portion of the rental proceeds as may be necessary."**

4. The applicant further states that he has tried to get the respondent to amicably consider his requests to no avail and that this matter is urgent to him since he has pressing financial needs. He seeks the court's determination of his entitlement under the will.

5. Lastly, he acknowledges that in his previous attempts to get the respondent address his concerns, he filed two unsuccessful applications in Cause No.580 of 1991 in the High Court Nairobi in which he

sought for full accounts of the estate as well as an injunction to restrain the respondent from dealing with the estate.

### **Respondent's Notice of Objection**

6. The respondent on her part opposed the above application by filing a Notice of Objection dated 29<sup>th</sup> July 2015 in which she has cited the following grounds:

1. That the High Court Succession Cause No.580 of 1991 in the matter of the Estate of **Charles Peter Angwenyi, Peter Siro –vs- Susan Njeri Angwenyi**, was filed before the High Court, Nairobi regarding the estate of Charles Peter Angwenyi.

2. That by an application dated 30<sup>th</sup> October 2006, in the said **Nairobi Succession Cause brought under Sections 83(f), (g), (h) and (i) and 95 of the Law of Succession Act, Cap.160 and Rules 49, 58 and 59 of the Probate and Administration Rules** the applicant applied for orders that:

**“a) This application be certified urgent and that service thereof be dispensed with in the first instance;**

**b) Pending the hearing and final determination of this application, the Executrix be restrained by injunction from dealing with the estate in any manner whatsoever;**

**c) Susan Njeri Angwenyi, the Executrix of the estate of the said Charles Peter Angwenyi (deceased) be ordered to provide full and detailed accounts including income and expenditure of the estate of the deceased.**

**d) The said Executrix Susan Njeri Angwenyi be ordered to distribute the assets of respective beneficiaries as per the last will and testament of Charles Peter Angwenyi (Deceased).**

**e) In default, the beneficiary, Peter Siro Nyariki Angwenyi be at liberty to make an application under Section 76 (d) (ii) and (iii) of the Law of Succession Act and rule 44 (i) and (2) of the Probate and Administration Rules.**

**f) Also, in default, the said Executrix of the Estate of the deceased be condemned to criminal action by virtue of the provisions of Section 45(2) of the Law of Succession Act.**

**g) The costs of this application be provided for.”**

3. That the said application was extensively argued before Honourable Justice (retired) B. P. Kubo who delivered his ruling on 5<sup>th</sup> February, 2008.

4. That by a chamber summons dated 15<sup>th</sup> February 2008, the plaintiff herein filed an application to review Honourable Justice Kubo's ruling of the 5<sup>th</sup> February, 2008 and on 27<sup>th</sup> July 2008 Justice (retired) Kubo dismissed the application for review.

5. That the applicant has engaged Namachanga & Mbugua advocates, Hurlingham Park, Argwings Kodhek road, P. O. Box 16301-00100, Nairobi to represent and advise him in the High Court Succession Cause No.580 of 1991.

6. That the matters raised in the Notice of Motion are Res Judicata and

7. That they were subject of previous applications at the Nairobi High Court aforesaid.

8. That this present application in Kisii High Court is therefore incompetent for inter alia failing to

disclose that they have been subject of proceedings in Nairobi.

### **Applicant's response to the Notice of Objection**

7. The applicant, in a swift rejoinder to the Notice of Objection, has filed a replying affidavit dated **11<sup>th</sup> September 2015** in which he depones that the principle of Res Judicata does not apply to the present application which was filed in 19<sup>th</sup> June 2015 as it raises matters which were not addressed in the previous application of 20<sup>th</sup> October 2006 and its rulings. He thus contends that the previous and present application are very different in both content and intention and that although both applications deal with issues relating to the same Estate, the basis of the subject matters differ substantively. He further contends that unlike the previous application this new application seeks a comprehensive interpretation of the will.

8. When the matter came before me in **22<sup>nd</sup> September 2015** the applicant who was present in person submitted that he wished to rely on his affidavit dated 11<sup>th</sup> September 2015.

### **Respondent's Submission's on Notice of Objection**

9. Mr. Odero for the respondent opposed the application while relying on the grounds on the Notice of Objection dated 27<sup>th</sup> July 2015. He submitted that the gist of opposition is as outlined in the Notice of Objection and the main objection was that the instant application is Res Judicata, having been dealt with in Nairobi HCCC Succession Cause No.580 of 1991 regarding the same estate of the deceased. He attached copies of the decisions in the said previous applications to the Notice of Objection. He thus prayed for the dismissal of this application because it is constructed, independently of a succession cause that is already in court contrary to the provisions of the Probate and Administration Rules.

### **Applicant's Submissions**

10. The applicant submitted that his affidavit dated 11<sup>th</sup> September 2015 seeks to show that the Notice of Objection is misleading. He further submitted that he disclosed the existence of an earlier case at paragraph 11 of his affidavit in support of the application and therefore the doctrine of Res Judicata does not apply to this case because the instant application raises matters that are different from the previous case. He submitted that this present application seeks a comprehensive interpretation of the will and his beneficial interest in the estate of the deceased and hence there is no dispute over the previous rulings.

11. The applicant further contended that Res Judicata relates to matters which have already been heard and yet the present application raises general matters that have not been determined such as his beneficial interest to the estate under clause 7 of the will which had not been determined in the previous rulings. Lastly, he contended that this is a new case on the same estate.

### **The issues and determinations**

12. I have considered the applicant's notice of motion and supporting affidavit, the respondent's notice of objection and annexures together with the applicant's further supporting affidavit. I note that the main issue in contention is whether the instant application offends the doctrine of Res Judicata and by extension whether the respondent's Notice of Objection raises pure points of law.

13. The circumstances under which a Preliminary Objection may be raised were explained by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd. -vs- West End Distributors Ltd [1969] EA 696 as follows:

**“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

14. Both parties in this case are in agreement that there already exists a Nairobi Succession Cause No.580 of 1991, over the same estate and between the same parties, which case had been heard and determined. What is disputed is whether the existence of the said Succession Cause makes the present Miscellaneous Application Res-Judicata and therefore an abuse of the process of court.

15. The above in my view, is a pure question of law that properly falls within the purview and province of Preliminary Objection. I will therefore proceed to consider the point of law raised by the respondent herein, being the doctrine of Res-Judicata.

16. **Section 7 of the Civil Procedure Act** defines the doctrine of Res Judicata as applying to a suit or issue in which a matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. The said section is mandatory in its provision and provides that:

***“No court shall try any suit 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.”***

17. The court of Appeal in Kamunye and Others –vs- Pioneer General Assurance Society Ltd [1971] EA 263 at 265, stated as follows:

**“the test whether or not a suit is barred by Res Judicata seems to me to be - is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If so, the plea of Res Judicata applies not only to points upon which the first court was actually required to adjudicate but 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?”**

18. The conditions for application of doctrine of Res Judicata were further authoritatively laid down in the case of the Estate of James Karanja alias James Kioi (Deceased) [2014] eKLR as follows:

**“For the doctrine of Res Judicata to apply three basic conditions must be satisfied. The party relying on it must show:-**

**a) That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated.**

**b) The matter in issue in the latter suit must have been directly and substantially in issue in the former suit.**

**c) That a court competent to try it had heard and finally decided the matters in controversy between the parties.”**

19. In Re Estate of James Karanja (supra) Hon. Musyoka J. had this to say on Res Judicata:

**“The plea of Res Judicata applies not only to points which the court was actually required by the parties to form opinion and pronounce judgment, but every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time.”**

The Applicant in the instant application seeks an interpretation of the will of the deceased dated 13<sup>th</sup> May 1982 so that his beneficial interests and entitlements can be determined.

20. The Respondent has however in his notice of objection to the present application attached documents relating to Succession Cause No.580 of 1991 involving the same parties as in this case and the same deceased whereby the same applicant at prayer 4 of an application dated October 2006 sought the following orders:

**"That said executrix Susan Njeri Angwenyi, be ordered to distribute the assets of respective beneficiaries as per the last will and testatement of Charles Peter Angwenyi (deceased)."**

21. I find that the prayers sought by the applicant in the instant case are identical to the prayers he had sought in the earlier application which had been heard and determined. In essence therefore the will of the deceased and its interpretation with a view to determining the respective shares thereto of each beneficiaries were matters that were substantially and directly in dispute between the same parties as in the instant application.

22. The applicant has argued that the issues he has raised in the present application are new and not the same as the ones that were raised before the Nairobi Court. I find the applicant's argument to be without basis as the documents attached to the Notice of Objection tell a different tale altogether and speak for themselves. If the applicant's claim that he had come across new matters that were not within his knowledge at the time the earlier application in Nairobi was heard and determined is to be believed, then nothing would have been easier for him to do than to file this instant application before the Nairobi court that is already seized with the succession cause.

23. What the instant applicant has done is a kin to a losing party filing a fresh suit against the same party over the same subject matter in which has lost in a different court in the hope that he would get a different outcome. I find that all the issues surrounding the applicant's entitlement to the estate of the deceased were exhaustively dealt with and decided upon by Hon. Justice B. P. Kubo (*as he then was*) in his ruling of 5<sup>th</sup> February 2008 and any dissatisfaction with the said ruling would automatically call for an appeal to the Court of Appeal.

24. In my view this instant application goes against both the rules on Res Judicata and Res Sub-Judice. I note that a case already exists before Nairobi Court being Succession Cause No.580 of 1991. The applicant is fully aware of the existence of the said case in which he has made at least two unsuccessful applications. One then wonders why the applicant chose to file this present Miscellaneous application before this court knowing fully well that the Nairobi court was already seized with the cause involving Probate and Administration of the deceased's estate. I hold that the proper place for the applicant to lodge any application over the estate of the deceased is before the Nairobi Court in Succession cause No.580 of 1991.

25. It is therefore my finding that the applicant, having been a party to the case at Nairobi, which case was heard and determined by a court of competent jurisdiction is precluded from filing this current application before a different court. Even assuming, as the applicant claims, that all the issues surrounding the estate of the deceased were not exhaustively determined before the Nairobi court, the applicant would still not be entitled to file the instant application before a different court as to do so would contravene the clear rules of Res sub Judice.

26. **Section 6** provides for the doctrine of *Sub Judice* as follows:

***"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having the same jurisdiction in Kenya to grant the relief claimed."***

27. In the instant case, I find that there already exists a succession cause in Nairobi in which both the applicant and respondent are parties. The matter regarding the interpretation of the will was substantially and directly in issue before the Nairobi court and therefore what the applicant is attempting to do is to

bring before this court, in another form, a new matter in a transaction which had already been put before a court of competent jurisdiction in earlier proceedings that had been adjudicated upon. The applicant was under a duty, during the previous applications, to bring before the court all the issues that properly belonged to the subject of the interpretation of the deceased's will. However if for any reason there exists any outstanding or new issues between the said parties over the estate of the deceased, then the already existing Nairobi court case would be the proper place to address such issues.

28. From the ruling made **5<sup>th</sup> February 2008** by Hon.Kubo J. in the Nairobi application, I am satisfied that all the different clauses of the deceased's will were addressed and interpreted and furthermore when the applicant attempted to file a review of the above ruling on the guise that he has discovered new and important matters which even after exercise of due diligence, were not within his knowledge or could not be produced when the said orders were sought, Hon. Kubo J, in his ruling dated 25<sup>th</sup> July 2008 opined that the applicant's application was grounded more on his (*applicants*) fundamental disagreement with the court's ruling and held that it would be better for the applicant's grievances to be addressed through appeal to a higher court than review by this court.

29. Having already enumerated the meaning of Res Judicata, and Res Sub Judice and having analyzed the ruling of the court on 5<sup>th</sup> February 2008, I agree with the respondent that indeed the matters raised by the applicant in the present application have already been dealt with in the ruling of Kubo J on 5<sup>th</sup> February 2008. In any case, if the applicant believes that certain properties owned by the deceased were not included by the will, the proper procedure is to apply for letters of administration (intestate) in accordance with the order of priority under **Section 66 of the Law of Succession Act, Cap.160.**

30. In a nutshell, I find that the applicant's instant application offends both the rules of Res Judicata Res Sub Judice and therefore amounts to an abuse of court process.

31. With that said, I uphold the Respondent's Preliminary Objection and dismiss the application dated 17<sup>th</sup> June 2015 with costs to the respondent.

**Dated, signed and delivered in open court this 3<sup>rd</sup> day of February, 2016**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- N/A for the Applicant
- N/A for the Respondent
- Omwoyo: court clerk