



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 56 OF 2012**

**EUNICE NGONYO WAHOME .....**

**PLAINITFF/RESPONDENT**

**VERSUS**

**JOSEPH KIHARA THEURI .....**

**DEFENDANT/APPLICANT**

**RULING**

Joseph Kihara Theuri (***hereinafter referred to as the applicant***) brought this application dated 2/10/2013 against Eunice Ngonyo Wahome (hereinafter referred to as the respondent) seeking for an order that the honourable court be pleased to strike out the suit for being ***Res judicata***. The same is based on grounds that the claim herein was pleaded and a decision made on it in Nyeri High Court Succession cause number 532 of 2006 and upon the confirmation of grant and distribution of the estate it was assumed that only the “net” estate of the deceased was to be distributed and that the Succession Court found as a fact that the claim of trust in the respondent's Affidavit of Protest was not established and the same was dismissed.

The applicant believes that if the respondent wanted the issue of trust determined in a civil case, she should have applied for stay of the succession cause before the estate was distributed and that the respondent issued Notice of Appeal after her claim was dismissed and the same is still pending.

The application is supported by the affidavit of the applicant ,the defendant in this suit who is purportedly sued in his capacity as the administrator of the estate of

KIAGO KIMERE (Deceased). He states that in the year 2006 he filed a succession cause with the aim of distributing the estate of his grandfather to his beneficiaries and that after obtaining the Grant of Letters of Administration Intestate he filed Summons for Confirmation of Grant dated 14th February 2009. That he was aware that the entire estate belonged to the deceased, however, anybody who had separate claim was at liberty to ventilate it. That only the plaintiff therein decided to oppose his summons by filing an Affidavit of Protest on 22nd April 2009 because she was claiming that the deceased held 1.98 acres in **MUHITO/NJIRUINI/137** for her "husband" Wairimu Gathute in trust which dispute was heard in court and they produced witnesses and documents.

In its judgment dated 27th October 2011 the court did not identify any land that the deceased held in trust for anybody thus the respondent's claim was dismissed and applicant's grant was confirmed. He was required to file a further affidavit factoring in her interest as a beneficiary of the estate. The respondent was not satisfied with the judgment and she preferred an appeal by filing Notice of Appeal which was opposed. In spite of the decision of the probate court whose proceedings she did not stop before the grant was confirmed, the Defendant has chosen to file this suit making the same claim. The plaintiff argues that since the respondent chose to have her alleged land identified and separated from the deceased estate in the probate court, she can not come to this court to claim the same land as this claim is **Res Judicata** hence this suit should be dismissed because the issue the respondent is raising here was raised and determined in the succession cause. Moreover the respondent also had chosen to appeal to the Court of Appeal and she has not withdrawn the Notice of Appeal.

In her replying affidavit the plaintiff states that it is instructive that she has brought this suit as an administrator and legal representative of Wairimu Gathute - deceased who is just representative and administrator of the said deceased and believes that this is the only matter that is before this court regarding the cause of action as averred in paragraph 10 of the plaint that raises the issue of trust which can not be ventilated or determined in a succession cause as the applicant would wish to have this court believe. That the succession cause as shown is still pending and there is nothing wrong with proceeding with this case and therefore the suit should be heard on merit and there is nothing to fear when the court arrives at all issues on merit. She states that the application is bad in law, incompetent, scandalous and a gross abuse of the process of court.

I have considered that application and do find that the respondent brought this suit as the administratrix and legal representative of the estate of Wairimu Gathite, against the applicant as the administrator and personal representative of Kiago Kimere vide a grant issued to him on 10/7/2007 who was the registered owner of Muhito Njiruini/137 measuring 9.1 acres. It is alleged in the plaint that during demarcation, consolidation and registration, the plaintiff brought from various persons an amount of land measuring in aggregate 1.98 acres or thereabout which was consolidated and registered in the name of the defendant forming part of **Muhito Njiruini/137**.

She claims that the parcel was registered in the name of the respondent's grandfather in trust for Wairimu Gathute and the same belonged to the plaintiff for her exclusive use and no attempt was made to defend the said possession in the lifetime of the defendant. She prays for a declaration that the estate of Kiago Kimere holds 1.98 acres of land in trust for the deceased Wairimu Gathute.

The Respondent on his part dismisses these allegations and avers that the issues in the plaint were canvassed and determined by a competent court of Law and this suit is therefore **Res Judicata**. His submission in a nutshell is that in a judgment delivered on 27/10/2011 the Judge made a determination on the issue of trust. The respondent on the other hand submits that the other suit having been a succession dispute the principle of **Res Judicata** does not apply.

***Section 7 of the Civil Procedure Act provides that 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.***

The doctrine of Res-Judicata is founded on public policy and is aimed at achieving the finality of a dispute and the doctrine applies where :-,

***a)the matter is directly and substantially in issue in the the two suits.***

***b)The parties or parties under whom any of the claim are the same.***

**c)The matter has been finally determined in the previous suit.**

To begin with, the petitioner in the succession cause and the defendant in this suit are the same. It does not need an elaborate explanation to find that Eunice Ngonyo Wambugu, the applicant is the objector in the succession cause and the plaintiff in this suit hence do find that the parties appear to be the same. However, the plaintiff is claiming on behalf of the Estate of Wairimu Gathute whilst in the petition she was an objector and therefore it cannot be said with finality that the parties are the same. The position taken by Eunice Ngonyo Wambugu as an objector makes it difficult for the court to find that she was a party to the succession cause to secure the interests of Wairimu Gatuku because in the succession cause she was pursuing her personal interests. However in this suit, she comes to court as the legal representative of the Estate of Wairimu Gathute. The dispute before this court is between the Estate of Wairimu Gathute and Kiago Kimere. I do find that the parties are not the same.

Secondly the claim based on trust was ***not directly and substantially*** in issue in succession dispute. The issue before the succession court was for the confirmation letters of administration and distribution of the property of the deceased. In Nyeri Court of Appeal Civil Appeal No. 273 of 2007 consolidated with Civil Appeal No. 274 of 2007, Stephen Munene Gachuri & Muriithi Kabugu vs Wairui Karani substituted by James Mwangi Karani at paragraph 17, it was held that the respondent claim was civil in nature and therefore it was not possible to determine the same in a succession cause.

This court finds that it is not possible to determine the issue of Trust in a succession matter where reliance is placed on affidavits and therefore it cannot be said that there was finality in the decision of the High Court in the Succession cause. Moreover the issue of trust was not ***substantially in issue***.

The upshot of the above is that the application is dismissed with costs.

**SIGNED AND DATED AT ELDORET THIS .....DAY  
OF..... 2015**

**ANTONY OMBWAYO**

**JUDGE**

**DELIVERED AND SIGNED AT NYERI THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2015**

**LUCY WAITHAKA**

**JUDGE**