



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 325 OF 1984**  
**IN THE MATTER OF THE ESTATE OF**  
**WAINAINA ICHARIA - (DECEASED)**

**PENINAH NJUHI MBARUKU.....1<sup>ST</sup> APPLICANT/OBJECTOR**

**WAMBUI GIKWA alias**

**WAMBUI WAINAINA ICHARIA.....2<sup>ND</sup> APPLICANT/OBJECTOR**

**VERSUS**

**REUBEN KARONGO WAINAINA.....1<sup>ST</sup> RESPONDENT**

**WAMBUI GIKWA alias**

**WAMBUI WAINAINA ICHARIA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The deceased herein died intestate on 27<sup>th</sup> October 1982. A grant of letters of administration intestate was issued to the respondents (who are two of his children) on 7<sup>th</sup> January 1988 and confirmed on 28<sup>th</sup> June 2011. On 1<sup>st</sup> July 2011 an application under **section 76(a), (b) and (e)** of the **Law of Succession Act (Cap. 160)** and **Rules 44 and 73** of the **Probate and Administration Rules** seeking to have the grant annulled and/or revoked on the ground that there was concealment of the fact that the 1<sup>st</sup> applicant was the daughter of the deceased who was entitled to benefit from the estate. Her case, which the 2<sup>nd</sup> applicant/2<sup>nd</sup> respondent supported, was that she was made aware of the Cause, her existence was not disclosed to the Court and she was excluded from the sharing of the estate. There is no dispute that the 1<sup>st</sup> applicant and 2<sup>nd</sup> respondent were the daughters of the deceased.
2. The 1<sup>st</sup> respondent swore a replying affidavit to state that the 1<sup>st</sup> applicant fully participated in the proceedings in which she informed Justice E.M. Githinji (as he then was) that she was a daughter to the deceased, was married and was not interested in sharing in the estate. He stated that the 2<sup>nd</sup> applicant/2<sup>nd</sup> respondent was his co-administrator of the estate who also took part and was aware of what had transpired. It was on this basis that the court distributed the estate to the exclusion of the 1<sup>st</sup> applicant. The sharing was contained in a ruling delivered on 20<sup>th</sup> December 1991.
3. The 1<sup>st</sup> respondent filed a notice to preliminary objection to the summons for annulment and/or

provocation in which he stated that the issues being raised are the same ones that had been directly and substantially litigated and decided upon by Justice E.M. Githinji, and were therefore *res-judicata*. His case was further that now that the 1<sup>st</sup> applicant had indicated that she was not interested in sharing in the estate and a decision made on that basis, she was estopped from turning round and seeking to re-open the dispute. The 1<sup>st</sup> applicant swore a further affidavit to reiterate that she had not participated in the proceedings and neither had she asked not to be included in the sharing.

4. MR. JAOKO for the applicants and MR. OSORO for the 1<sup>st</sup> respondent filed written submissions on the preliminary objection. I have considered the submissions and the authorities cited by either side.
5. It does not appear to be in dispute that the deceased was the owner of land parcel No. KIAMBAA/KIHARA/512. He had three wives as follows:-
  - a. WANJIRU WAINAINA (deceased) who had only one child GEORGE KARONGO who was mentally ill but had a wife and son;
  - b. WANGUI WAINAINA (deceased) who had three daughters NJUHI MBARUKU (married) (1<sup>st</sup> applicant,) WAMBUI GIKWA (2<sup>nd</sup> applicant) and WANJIKU MWANIKI (deceased); and
  - c. NYOKABI WAINAINA who had eight sons including the 1<sup>st</sup> respondent.
6. The record shows that on 4<sup>th</sup> July 1991 the case was before Justice E.M. Githinji when both the applicants and the respondents were present. The 1<sup>st</sup> applicant informed the court as follows:-

**“I do not claim a share in the estate but my other two sisters are entitled to a portion.”**

She stated that she was married and was not making any claim to the estate. The Court was left to determine whether the 2<sup>nd</sup> respondent/2<sup>nd</sup> applicant was entitled to inherit. Some parties were claiming that she was a married daughter who was not entitled to inherit from the estate of the deceased. Her case was that she had been married but had divorced. Otherwise, the other children of the deceased were to benefit. The Court received evidence and concluded that the 2<sup>nd</sup> applicant/2<sup>nd</sup> respondent had been married under Kikuyu Customary Law but had since been divorced. The court observed that under the **Act** the fact only that she was a married daughter was not going to disentitle her. She received a share equal to what each son/daughter received. The 1<sup>st</sup> applicant, it was found, had opted out of the sharing. She had, as it were, renounced her share.

7. The record is clear that the 1<sup>st</sup> applicant was not only present in Court during the proceedings but also renounced her claim to the estate. The question that the 1<sup>st</sup> respondent is asking is whether the 1<sup>st</sup> applicant can turn around on the instant application to reopen the dispute so that she can benefit from the estate. He contends that the issues being raised are *res-judicata*, and that, because she informed the Court that she was not interested in her late father's estate, she is estopped from laying claim to it now.
8. It is not in dispute that the Court that heard the parties had the competence to hear and determine the dispute. The matter in issue was the determination of who the beneficiaries of the estate of the deceased were, and what their respective shares were. Both applicants were present and were heard. The 2<sup>nd</sup> applicant/2<sup>nd</sup> respondent laid claim to the estate and was successful. The 1<sup>st</sup> applicant informed the Court that she was not interested in the estate, although she was the daughter of the deceased. She was, on that basis, excluded from the sharing. The plea by the 1<sup>st</sup> respondent, therefore, is that the issues being raised are *res-judicata*; that they have been heard by a competent court and decided upon. In **JUDICIAL HINTS ON CIVIL PROCEDURE VOL. 1 by R. KULOBA, paragraph 77 of page 44** it was observed that in *res-judicata* is founded on:-

**“the rule that a final judgment rendered by a court of competent jurisdiction on the**

**merits is conclusive as to the rights of the parties and their privies, and, as to then constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.”**

The case of **TIMOTHEO MAKENGE V. MANUNGA NGOCHI, Court of Appeal at Nairobi, Civil Appeal No. 25 of 1978** was referred to and in it the Court held that the essence of *res-judicata* as a fundamental doctrine of all courts, is that there must be an end to litigation.

9. I find that the issue being raised is a pure point of law as was envisaged in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD. VS WEST END DISTRIBUTORS LTD [1969] EA 696**. The facts are not in dispute. The record is clear.

10. It cannot be successfully argued that the principle of *res-judicata* is not applicable in Succession cases. This is because the principle of law that litigation must come to an end applies to all kinds of litigation. It would be an abuse of the process of the Court to re-open matters that have been heard and decided on merits, unless the Court is dealing with review or appeal. That is not the case here.

11. My conclusion is that the objection has merit and is sustained. The applicants' application raises issues that have been litigated upon and determined on merits and cannot be reopened. The 1<sup>st</sup> applicant is estopped from laying claim to the estate which she had openly renounced. The objection is allowed with costs.

**DATED and DELIVERED at NAIROBI this 11<sup>th</sup> February 2015**

**A.O. MUCHELULE**

**JUDGE**