

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, AKIWUMI, J.J.A. & BOSIRE, AG.J.A.)

CIVIL APPEAL NO. 138 OF 1996

BETWEEN

FRANCIS KABAA APPELLANT

AND

1. NANCY WAMBUI

2. JANE WANJIRU RESPONDENTS

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Justice sheikh Amin) dated 14th day of September, 1994

in

SUCCESSION CAUSE NO. 206 OF 1994)

JUDGMENT OF THE COURT

The short point in issue in this appeal is whether the matter before Amin, J. namely, Succession Cause No. 206 of 1994 which had been filed in the High Court was res judicata. This suit had been filed as a result of an unchallenged consent order made that the previous suit Succession Case No. 46 of 1981, in the District Magistrate's Court, Kikuyu be set aside and the matter heard de novo in the High Court by way of a succession cause which materialized as Succession Cause No. 206 of 1994. Indeed, this was recognized by Shah, J. as he then was, when dealing with another matter Civil Suit No.

1055 of 1994 which he held was res judicata and in which ruling, he drew attention to the fact that Succession Cause No. 206 of 1994 was unaffected. It would seem that when the matter came before Amin, J. he failed to distinguish between Civil Case 1055 of 1994 was Succession Cause No. 206 of 1994. If he had considered this and the pleadings before him carefully, he would certainly not have held in his brief ruling that Succession Cause No. 206 of 1994 was res judicata.

We are of the view that the order of Mbiti, J. still subsists and it cannot therefore be said that Succession Cause No. 206 of 1994 was res judicata. In the result the appeal succeeds with costs for the appellant. It is so ordered.

Dated and delivered at Nairobi this 13th day of June, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.