IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, KIAGE & SICHALE, JJ.A)

CIVIL APPEAL NO. 88 OF 2017

BETWEEN

THOMAS KANAKE GUANDARU.....APPELLANT

AND

ANNE MICERE MBOGO.....RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi

(G.B.M Kariuki, J (as he was then)), dated 26th July, 2013

in

Succession Cause No. 203 of 1987)

****

JUDGMENT OF THE COURT

This matter has been along the corridors of justice for far too long, since the initial petition was filed by **Mary Wanjiru Mbogo** (Mary), who is now deceased, under **Nairobi Succession Cause No. 203 of 1987**. She filed it in her capacity as the widow of Justus Ezekiel Mbogo (deceased) who died intestate on 14th January 1987. In the petition, Mary listed herself and 6 of her children, all of whom were adults at the time, as the beneficiaries of the estate of the deceased. A grant of letters of administration intestate was issued to her on 14th May 1987.

The controversy leading to this appeal stems from an affidavit sworn by Mary in the application for confirmation of grant which listed Thomas Kanake Guandaru, the appellant, as a beneficiary to the estate of the deceased. As a beneficiary, his share of the estate was land title No. 4418/2 (suit property). As a result of that application, a certificate of confirmation of grant was issued on 26th November 1993.

Following that confirmation various applications were filed including, crucially, a Chambers Summons application dated 2nd July 2010 that was subsequently amended on 1st December 2010. The application was founded on **Section 76 (a)** and **(c)** of the **Law of Succession Act** (the **Act**). It was by **Anne Micere Mbogo**, the respondent, in her capacity as a beneficiary of the estate of the deceased being one of Mary's six children. She sought revocation of the grant on the basis that there was an error on the face of it.

Additionally, the respondent pointed out that the appellant, who was neither a beneficiary nor an objector was erroneously listed as one of the beneficiaries and thus the subject suit property was improperly distributed to him. The distribution, which was effected through a transfer of the suit property by Mary to the appellant, was done without the consent of the respondent and her siblings. The Orders sought by the respondent were as follows;

> *a) An order for revocation and/or amendment of the grant of certificate of confirmation dated 26th November 1993 issued to Mary Wanjiru Mbogo now deceased.*
>
> *b) An order to set aside all orders consequent upon the grant of the aforesaid certificate of confirmation.*
>
> *c) An order for the rectification of the entries made in respect of LR No. 4418/2 to Thomas Kanake Gwandaru and direction that the Registrar of the lands do revert the property to the names of Justus Ezekiel Mbogo the deceased herein.*

In response, the appellant contended that he was a purchaser who got good title protected by the law. He pointed out that the respondent had tried to have the grant revoked since 1995 to no avail.

He defended the procedure by which he obtained ownership of the suit property and pointed out no fraud had been alleged and none had been proved. He prayed for the application to be dismissed as it was long overdue.

G.B.M Kariuki, J (as he was then) considered the pleadings and submissions before the court and delivered a ruling on 26th July 2013. He held that the confirmation of grant was premised on an error as it endorsed succession to the appellant who was a stranger to the deceased's estate. He granted the application as sought by the respondent.

Dissatisfied with the ruling, the appellant filed the instant appeal containing eight (8) grounds, which, condensed, are that the learned judge erred by;

a) Holding that the appellant was a stranger to the estate of the deceased.

b) Failing to hold that the application was *res judicata*.

c) Considering the application as one for review as opposed to one for revocation of grant.

The firm of **Kamau Kuria & Company Advocates** are on record for the appellant, while the firm of **Osoro Mogikoyo & Company Advocates** are on record for the respondent. Both parties filed written submissions and elected to rely on them.

It was submitted that the respondent's application was misconceived as the respondent failed to prove her case in accordance to the threshold of **Section 76** of the **Act**. Further that a purchaser's claim cannot be challenged through a revocation of grant. It was further submitted that the application by the respondent was *res judicata*, as the issues raised in the application were already determined by Kuloba, J. who had denied a similar application for revocation of grant filed by the respondent's brother. Moreover, the procedural flaw occasioned by the appellant being listed as an heir was curable by the application of **Article 159(d)** of the **Constitution**.

We were urged to set aside the ruling of the High Court with costs to the appellant.

In response, it was submitted on behalf of the respondent that since the appellant was not named as a purchaser nor appeared under the liabilities section in the initial petition documents, the appellant was a stranger to the succession proceedings at the confirmation stage. It was clarified that the respondent was not challenging the validity of the sale agreement, but was rather seeking the amendment or correction of an error apparent on the face of the court record. The respondent thus made a proper case for review and were urged to dismiss the appeal with costs.

Having carefully read and considered those rival submissions in light of the entire record we have distilled the following as the issues for determination; whether the appellant was a stranger to the succession proceedings; whether the application was *res judicata* and whether the application ought to have been dealt with as one for review. We shall consider these issues whilst keeping in mind that as appellate Court we should be slow to interfere with the first instance Judges exercise of discretion, to only when, in the words of Sir Charles Newbold in ***MBOGO vs. SHAH [1968] EA 93*** in which De Lestang VP (as he then was) observed at page 94;

> ***"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

Before delving into the other grounds of appeal, it is imperative that we deal with the issue of *res judicata* as raised by the appellant *in limine*, since the same went to the jurisdiction of the High Court. The claim by the appellant is that the issues raised by the respondent in the impugned ruling, had already been raised in an earlier application by her brother and denied by Kuloba, J. He claims that the High Court became *functus officio* having already decided on a similar issue before and hence had no jurisdiction to entertain the respondent's application.

The doctrine of *res judicata* as applied by courts is meant to promote efficiency and fairness and also avoids inconsistent adjudications over the same matter. In Kenya, the doctrine is provided for in **Section 7** of the **Civil Procedure Act**, which states;

> ***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 philosophy behind the principle of *res judicata* is that litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives way as we stated **WILLIAM KOROSS VS. HEZEKIAH KIPTOO KOMEN & 4 OTHERS [2015] eKLR**. The elements to be satisfied before a matter is termed *res judicata* were well adumbrated by this Court in **KENYA COMMERCIAL BANK LIMITED V BENJOH AMALGAMATED LIMITED [2017] eKLR** as follows;

> ***"The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;***

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

From the record it is not disputed that, the main subject of both applications was the revocation of the grant of letters of administration and the confirmation thereof due to the concealment of material facts from the court, namely that the appellant was not a beneficiary of the estate. Even though the respondent's brother's application sought for an annulment, revocation was directly and substantially in issue in both application. On these issues, Kuloba, J. (as he was then) determined in the judgment delivered on 12th March 1998, that the avenue of annulment or revocation of grant was not a proper one in an attempt to resist a purchaser's claim. He opined that the applicant ought to have instituted proceedings against Mary and the appellant and sought the decision of the court concerning the purchaser's entitlement. In the same judgement, Kuloba, J. also declared that the inclusion of the appellant as a purchaser was neither fraud nor a culpable concealment.

We note that on this issue of *res judicata* the learned Judge's brief answer was that;

"There is no evidence that the appellant was privy to the application. The applicant's application is not res judicata."

The Judge seemed to allude to the fact that since the parties were different and there was no evidence that the respondent was privy to the earlier application, then the doctrine of *res judicata* does not apply. This Court in **JOHN FLORENCE MARITIME SERVICES LIMITED & ANOTHER V CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & 3 OTHERS [2015] eKLR** brought to light the dimensions of the doctrine of *res judicata*;

"The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter."

The issue to satisfy ourselves with is whether the respondent was privy to the earlier proceedings. The answer can easily be found in an affidavit sworn by the respondent that was in support of her amended Chamber Summons, which reads in part;

"16. That this application would have been filed earlier than now on the following grounds namely that;

i. When the anomaly was discovered, my brother filed a wrong application to annul the letters of administration in November 1994 instead of revocation or annulment of the certificate of confirmation.

ii. Ruling to that application was made on 17/4/1997 and as we were pondering on what to do next, our mother was involved in a serious road traffic accident in 1999…."

From the foregoing, it is clear that the respondent was privy to the earlier proceedings and it is clear from her own words that she were filing essentially the same claim under the same title as her brother. We therefore find that the learned Judge erred in holding that there was no evidence to show that the respondent was privy to the earlier proceedings yet her own words indicated the contrary. We therefore hold that the application was **res judicata** and the learned Judge had no jurisdiction and was expressly debarred from entertaining it.

Having come to that conclusion, this appeal succeeds and we find it unnecessary to determine the other grounds of appeal. The ruling and order of G.B.M Kariuki, J. is set aside in its entirety.

We order that each party bear own costs of the appeal.

Dated and delivered at Nairobi this 20th day of November, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR