



REPUBLIC OF KENYA



**In re Estate of Cyrus Joseph Karanja (Deceased) (Succession Cause E029 of 2022) [2024] KEHC 8096 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8096 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE E029 OF 2022**

**A MSHILA, J  
JUNE 28, 2024**

**RULING**

1. Before court is the Notice of Preliminary Objection dated 2<sup>nd</sup> October, 2023 by Jacinta Nyakinyua Karanja the Respondent to the application dated 24<sup>th</sup> August 2023 by Elizabeth Njeri Kamau on the following grounds;-
  - a. That the issues raised are res judicata having been determined by the High Court in HCCC 1666 of 2007 Elizabeth Njeri Kamau (suing as the personal representative of the Estate of Wainaina Mbuthia Gachoka (deceased) v Cyrus Joseph Karanja & another (2017) eKLR and the Court of Appeal in Civil Appeal 21 of 2018 Elizabeth Njeri Kamau (suing as the personal representative of the estate of Wainaina Mbuthia Ranji alias Wainaina Mbuthia Gachoki (deceased) v Karanja & another (Civil Appeal No. 21 of 2018) [2022]KECA 51 (KLR)(4 February 2022) (Judgment)
  - b. That based on the above, this court does not have jurisdiction to vary, review or alter the decision of the Court of Appeal by any stretch of imagination. Therefore, the application is bad in law, incurably defective and should be dismissed with costs.
  - c. That the succession court does not have jurisdiction to handle matters of ownership, especially those already determined by the court.
2. The Objectors filed their grounds of objection dated 31<sup>st</sup> October, 2023, on the following grounds;-
  - a. That the Preliminary Objection is fatally defective and only meant to annoy the Objector.
  - b. That the administrator should not have set her points of law in her Replying Affidavit if she wished to rely on them in her Preliminary Objection.
  - c. That if the administrator wished to raise a defence that the suit is procedurally and jurisdictionally barred the same should have been pleaded in the Replying Affidavit to avoid the element of surprise.
  - d. That a Preliminary Objection consists of a point of law which has been pleaded.



- e. That a Preliminary Objection raises pure points of law and cannot be raised if any fact has to be ascertained through affidavit or oral evidence.
  - f. That where the property is in the names of joint owners, upon the death of one of them, the surviving owner automatically becomes the owner upon presenting the evidence of death of the joint tenant as such the property is excluded from succession proceedings.
  - g. That the administrator has raised substantive responses to the Objector's claim after filing the Preliminary Objection which is contrary to the Civil Procedure Rules and the goal of fair contest.
  - h. That the Preliminary Objection herein is not based on a commonly accepted set of facts as such cannot form the basis of a Preliminary Objection on a point of law.
  - i. That the administrator is seeking to raise points of law based on disputed facts while he should move the court by way of a formal application or affidavit evidence.
  - j. That no rule should fetter the court's discretion as the same should depend on the facts and circumstances of each case.
  - k. That the Court of Appeal was clear that the Objector had not taken out letters of administration ad litem and parties were improperly before court as such Civil Appeal 21 of 2018 (2022) should not be read in isolation but must be read as a whole and construed reasonably.
  - l. That the issues of procedure, illegalities of the grant and joint ownership fall under the Law of Succession even if the P.O has merit.
  - m. That pleadings in the instant case cannot form the basis of a P.O.
  - n. That the concept of jurisdiction should be raised at the earliest opportunity possible and not after filing a Replying Affidavit as such the P.O should be dismissed
3. The Preliminary Objection was canvassed by way of written submissions.

#### **Petitioner/respondent Submissions**

4. The Petitioner submits that a Preliminary Objection can be raised at any time when the action is still alive. The filing of both the Replying Affidavit and a Preliminary Objection is well grounded in law as provided under Order 51 rule 14 of the *Civil Procedure Rules, 2010*. Reliance was placed in the case of *Republic v Chief Registrar of the Judiciary & 2 others Ex parte Riley Services Limited* (2015) eKLR (Nairobi Judicial Review Miscellaneous Application No. 2 of 2015). It was submitted that the issue of ownership of the property that is the subject of the application was already litigated all the way to the Court of Appeal. The Petitioner submits that issues of ownership if any should be litigated at the ELC court. Further it was submitted that what existed between the deceased and the Petitioner was tenancy in common as opposed to joint tenancy. The Petitioner was said to have fulfilled to the court all the conditions required for early confirmation of grant. The Protestor's allegation that the grant was confirmed fraudulently were said to be baseless as they lacked any evidence to prove the same. In conclusion, the court was urged to uphold the confirmation of grant and dismiss the Protestor's application.



## Protestor's Submissions

5. The Protestor submits that confirmation of grant comes after the due process has been followed as such the court should preserve the confirmed grant to avoid further dealings. The Protestor contends that the administrator was not a party to the afore-mentioned suit and was unaware of it as such res judicata does not apply. It was submitted that the procedure for early confirmation of grant was not proper as the court was not moved by way of an application. Further, the Protestor submitted that the pleadings in the instant case cannot form the basis of a preliminary objection as the same cannot be disposed of without ascertaining facts. Lastly the court was said to have jurisdiction to deal with the Protestor's application.

## Issues for Determination

6. After reading the respective submissions this finds only one issue for consideration; which is whether the Preliminary Objection is merited

## Analysis

7. The preliminary objection was raised on a point of law on the grounds that the issues raised by the Protestor are res judicata.
8. The Protestor submitted that the Administrator ought to have raised it in the Replying Affidavit that the suit was procedurally and jurisdictionally barred and that the Protest was improperly before this court.
9. This Court opines that for the doctrine of res judicata to apply there should be demonstration that the same issues have been heard and determined by a court of competent jurisdiction, same parties litigated under the same title and issues have been raised once more in this Protest.
10. The applicable law falls within the ambit of Section 7 of the Civil Procedure Act which stipulates as follows:

‘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.’

11. This court makes reference to the case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR, where it was held that:

“for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms; 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.”



12. A Preliminary Objection is well described in the case of *Oraro v Mbaja* 2005 eKLR, Ojwang J (as he then was) as follows: -

“I think the principle is abundantly clear. A “Preliminary Objection” correctly understood, is now well identified as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

13. The issue on whether or not the matter is res judicata means that the parties, relief sought and subject matter in the former suits HCCC 1666 OF 2007 and Civil Appeal 21 Of 2018 are facts that have to be ascertained as being the same and that the previous suits have been determined by a competent court; the Preliminary Objection in this instance bears factual aspects calling for proof or ascertainment of disputed facts which this court cannot make presumptions on unless provided with the same for authentication. Therefore, the Court is satisfied that what has been raised by the Administrator does not amount to a Preliminary Objection.

### **Findings And Determinations**

14. For the reasons set out above this court makes the following findings and conclusions;

- i. Preliminary Objection on res-judicata is found to be devoid of merit and it is hereby overruled.
- ii. Each party to bear their own costs
- iii. Mention on 2/10/2024 for directions. Mention Notice to Issue  
Orders Accordingly.

**DATED SIGNED SEALED AND DELIVERED VIA TEAMS AT KIAMBU THIS 28th DAY OF JUNE, 2024**

**A. MSHILA**

**JUDGE**

**In the presence of;**

**Mourice – Court Assistant**

**Kosgei – h/b for Akout for the Administrator**

**N/A – by Protestor**

