REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HIGH COURT CIVIL APPEAL NO. 12 OF 2015

(FORMERLY MERU HCCA NO. 151 OF 2011

JAMES GITONGA THIGUNKU……..1ST INTERESTED PARTY/APPLICANT

ISAAC MURITHI……..2ND INTERESTED PARTY/APPLICANT

MWATHANI MUTUA……3RD INTERESTED PARTY/APPLICANT

POLLY MURUGI PETER……4TH INTERESTED PARTY/APPLICANT

STANLEY KIRIMI ADVANE……5TH INTERESTED PARTY/APPLICANT

VERSUS

ELIZAPHAN NJUKI THIGUNKU.....1ST PETITIONER/RESPONDENT

SARAH KANINI THIGUNKU……2ND PETITIONER/RESPONDENT

RULING

1. The late Thigunku Mwarari had married two wives, the late Ciamurango Thigunku (“the first family”) and Sarah Kanini Thigunku (“the second family”). He settled his said wives together with their respective children on separate properties. During his lifetime, Thigunku Mwararia settled the first family on Magumoni/Mukuuni/134 (“plot No.134”) and the second family on Magumoni/Mukuuni/219 (“plot No.219”). On 21st February, 1966 the late Thigunku Mwarari caused plot No.134 to be registered in the name of Mbungu Thigunku, the last born son of the first wife. The first wife with her children continued to live plot No.134 which was now held in trust for them by their last born. As regards the second wife, she continued to live with her children and Thigunku Mwarari on plot No. 219 until he died in 2003 and was buried thereon. When Ciamurango Thigunku, the first wife died, it is said that she was buried on plot no.134.

2. On 15th June, 2007, Mbungu Thigunku passed on. Consequently, on 16th October, 2008, Sarah Kanini Thigunku, the second wife of the late Thigunku Mwararia obtained a letter of introduction from the Assistant Chief of Karamani Location and on 18th October, 2008 petitioned for Letters of Administration Intestate for the estate of the late Mbungu Thigunku (“the deceased”). In that Petition, she disclosed that she was petitioning in her capacity as the widow and set out the following as those surviving the deceased.

a) Sarah Kanini Thigunku

b) Isaack Murithi Thigunku

c) James Gitonga Thigunku

d) James Kamau Thigunku

e) Njuki Thigunku

f) Ephraim Nyaga

3. Pursuant thereto, a grant was issued to her on 20th March, 2009. Even before the expiry of the six (6) months period, on 29th May, 2009, she applied for confirmation which was duly made on 10th June, 2009 and the estate of the deceased (plot 134) was distributed as follows:-

a) Sarah Kanini Thigunku - 0.20 Acres

b) Isaack Murithi Thigunku - 0.30 Acres

c) James Gitonga Thigunku - 0.30 Acres

d) James Kamau Thigunku

Njuki Thigunku 1.05 Acres jointly

Ephraim Nyaga

e) Poly Murugi Peter 0.25 Acres jointly

Victor Murimi Isaack Murithi Thigunku and James Gitonga Thigunku are Sarah kanini's sons while James Kamau Thigunku, Njuki Thigunku and Ephraim Nyaga were sons of the late Ciamurango of the first family. It was not clear who Poly Murugi Peter and Victor Murimi were.

4. On learning of the Succession Cause, the 1st Respondent lodged in the High Court an application for revocation. The same was granted by consent and the 1st Respondent in these proceedings was appointed joint administrator with Sarah Kanini. However, when they failed to agree on distribution, the matter was litigated before the Chuka Principal Magistrate's Court whereby it was held that the deceased held plot No.134 in trust for the first family and his beneficiaries were his two (2) remaining brothers, to wit, Ephraim Nyaga and the 1st Respondent. In those proceedings, Sarah Kanini Thigunku testified and called James Gitonga Thigunku ("the 1st interested party") as her witness. Sarah Kanini was aggrieved by the said decision, appealed to this court and by a judgment of this court delivered on 11th February, 2016, the decision of the trial court was upheld and the appeal was dismissed. That then is the back ground to this matter.

5. By an originating summons dated 10th May, 2016, the interested parties sought the determination of various questions, including; whether as step-brothers of the deceased, the 1st and 2nd interested parties are dependants within the meaning of section 29 of the Law of Succession Act; whether they are entitled to share in Plot No.134 and whether Plot No.134 was trust property available to be distributed to the dependants of the deceased. Upon being served with the said originating summons, the 1st Respondent

lodged a preliminary objection on Notice to the effect that it offended the principle of RES JUDICATA and it sought to challenge the judgment of this court made on 11th February, 2016.

6. The court directed on 14th September, 2016 that the objection be argued by way of written submissions. Whilst the 1st Respondent filed his submissions on 21st September, 2016, there were none that were filed for the Interested Parties. It was submitted for the 1st Respondent that the originating summons was incompetent since under order 37 of the Civil Procedure Rules, it is a suit by itself and it should not have been filed in the appeal that had been determined. That since the issue of who the rightful beneficiaries of the estate of the deceased had been determined in the Appeal, the originating summons sought to re-open the said issue contrary to section 50 of the Act. The Interested Parties were parties in the Succession Cause and cannot seek to re-open the said issues again. Mr Ithiga for the 1st Respondent referred to the decision of the Court of Appeal in **Njue Ngai .v. Ephantus Njiru & Anor [2016] eKLR** in support of his submissions that the issues raised in the originating summons were Res Judicata. Finally, it was submitted that the originating summons was a conspiracy between the Applicants and their mother to re-open the cause and it was therefore an abuse of the court process. Counsel urged that the objection be upheld. There being no submissions on the part of the interested parties, the court was deprived the opportunity of knowing what their take would have been on the objection.

7. The first objection was that the originating summons was incompetent. The same was brought under order 37 Rules 1 (a) and 8 of the Civil Procedure Rules. Rule 15 of that order provides:-

"15. The originating summons when filed shall be filed and entered in the register of suits, but after the serial number the letters "0S" shall be placed to distinguish it from plaints filed in ordinary suits."

It's clear from the foregoing that an originating summons is in the nature of a suit in itself. It has to be registered separately and where the questions to be determined are those under order 37 Rule 1, they must be lodged by way of an originating summons as an independent and separate suit. In the present case, the filing of an originating summons in a concluded Appeal was not only irregular but makes the originating summons incompetent and incurably defective. There is no way a suit can be lodged within another or in an already concluded proceeding.

8. The second ground of objection is that the matters sought to be determined are Res Judicata. Section 7 of the Civil Procedure Act provides:-

"7. 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.

……

Explanation. (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or implied, by the other.

Explanation. (4) – Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

9. What is Res judicata" This has been defined in Black's Law Dictionary, 9th Edition as:-

"(i) An issue that has been definitively settled by judicial decision;

(ii) An affirmative defence barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction, or series of transactions and that could have been – but was to be raised in the first suit."

10. Although this court has already found that the originating summons was supposed to be a suit though brought as an application, it may be argued that it was not presented as a suit but an interlocutory proceeding. It does not matter whether the subsequent proceeding is an application or a suit. What matters is that there are similar parties litigating in similar capacities on similar issues which have been determined. In the case of ***Uhuru Highway Development Ltd .v. Central Bank of Keya & 2 others [1996]eKLR*** the Court of Appeal affirmed this position as follows:-

"…..there must be an end to applications of similar nature; that is to say further wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of our Civil Procedure Act caters for……

We have no hesitation whatsoever in saying that the general principles of Res judicata cannot be limited by section 7 of the Civil Procedure Act and that the section (section 7) is not exhaustive." (emphasis provided).

11. In this regard, this court holds that the current appeal, Chuka CA NO. 12 of 2015 is the previous suit (being a proceeding commenced as provided by law) and the originating summons is a subsequent proceeding. As to an Appeal being a suit, it has been held that an appeal being a proceeding commenced in a prescribed manner is a suit and is subject to the doctrine of re judicata. This was so held by the Court of Appeal in the case cited by Mr. Ithiga of Njue Ngai .v. Ephantus Njiru Ngai & Anor (supra.)

12. That being the position, is the originating summons res judicata" In order to answer this question, a look at the judgment of this court of 11th February, 2016 will suffice. Paragraphs 13, 14 and 16 of that judgment shows that the court considered that the 2nd Respondent who is the mother of the 1st and 2nd Interested Parties was a step mother of the deceased. The 1st and 2nd Interested Parties were both step brothers of the deceased and had benefited from the earlier distribution of the estate. The court considered that none of them had even occupied or lived on plot No. 134. The court made a finding that all were not dependents of the estate of the deceased under section 29 of the Act. A look at the questions framed for determination in the originating summons show that they relate to the dependency of the 1st and 2nd Interested Parties in the estate of the deceased; a claim for continued and un interrupted occupation thereof and the sharing of plot No. 134. The conclusion is that both the Appeal and the originating summons deal with the inheritance or succession of the estate of the deceased. That is an issue that was substantively and conclusively determined in the appeal. The interest and claims of the 3rd to 5th Interested Parties emanate from the claims of the 1st and 2nd Interested Parties and the 2nd Respondent from whom they purported to acquire an interest in the deceased's estate. Accordingly, the originating summons is Res Judicata the Appeal.

13. The next objection was that the originating summons was an attempt to challenge the judgment of 11th February, 2016. The subject judgment had determined the issue of inheritance of the estate of the

deceased. The originating summons seeks to disrupt that decision by attacking it on the grounds which were considered and determined. To my mind, the Interested Parties had the opportunity to present these issues in the court below, and they did so through the 1st Interested Party which were determined. The same was reviewed by this court and determined in the judgment of 11th February, 2016. Accordingly, the originating summons is but an attack on that judgment. That cannot be allowed.

14. Accordingly, the preliminary objection is meritorious. The same is hereby upheld and the originating summons is hereby struck out with costs.

It is so ordered.

Dated and delivered in Chuka this 20th day of December, 2016

A.MABEYA,

JUDGE.