



In re Estate of Caroline Ziri (Deceased) (Judicial Review Miscellaneous Application E021 of 2024) [2024] KEHC 16147 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16147 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E021 OF 2024
G MUTAI, J
DECEMBER 19, 2024
IN THE MATTER OF THE ESTATE OF CAROLINE ZIRI (DECEASED)**

BETWEEN

FLORA MANGACHI ZIRI APPLICANT

AND

SALIM HUSSEIN KIBUDU RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 22nd May 2024. Vide the said application, the Applicant seeks the following orders:-
 1. Spent;
 2. Spent;
 3. That this honourable Court be pleased to declare that the Kadhi's Court has no jurisdiction to preside over the petition for letters of administration filed in Kadhi's Court Succession Cause No 239 of 2023 and further proceed to expunge the Petition filed by the Respondent from the Court's record;
 4. That the honourable Court be pleased to issue a temporary injunction restraining the Respondent from interfering with the assets of the deceased listed in the Petition and or any other properties of the deceased in any manner whatsoever pending hearing and determination of the annexed Petition;
 5. That the honourable Court be pleased to grant the Applicant leave to file the draft Petition annexed hereto and deem the same duly filed upon payment of the requisite fees; and
 6. That the costs be provided for.



2. The Applicant, who was the mother of Caroline Ziri, who I shall hereafter refer to as the deceased, died a Christian and never professed Muslim faith during her lifetime. She denied that the deceased was married to the Respondent. She accused him of misrepresenting himself as the deceased's husband and filing a succession cause before the Kadhi's Court, which Court, the Applicant averred, had no jurisdiction to hear and determine the matter. The Respondent was accused of filing the cause before the Kadhi as a way of robbing the deceased's estate.
3. The application was opposed. The Respondent filed a Replying Affidavit he swore on 7th August 2024. He admitted to filing the Mombasa Kadhi Court Succession Cause No E239 of 2023 as the deceased's spouse. He deposed that he was married to the deceased on 2nd April 2001 after the deceased converted to Islam, that she later changed her name to Salma Mshai Ziri, and that they lived together as husband and wife from 2nd April 2001 until 18th June 2023 when she died. In support of this contention, he attached to his affidavit a copy of what he said was a marriage certificate, a letter from the Kadhi who officiated the celebration of the marriage, as well as the chief's letter dated 13th July 2023, which shows that she lived in Aldina Royal Village.
4. The Respondent stated that upon her demise, the deceased was buried in his ancestral home under Islamic law and that, being a Muslim, her property had to devolve in accordance with the said law. He deposed that the Applicant filed a preliminary objection in the Court below, which was overruled by the Hon Kadhi upon hearing the parties. The said ruling was never appealed against nor otherwise reviewed. For that reason, it was urged that the application is res judicata. He thus urged that the application be dismissed.
5. The Applicant filed a Supplementary Affidavit sworn on 24th October 2024 in which she denied the contents of the Replying Affidavit, insisted that the deceased name was Caroline Ziri and not Caroline Mshai Ziri and that since she was the deceased's mother, her estate should devolve to her.
6. The application was canvassed by way of written submissions. The submissions of the Applicant are dated 25th October 2024.
7. The Applicant identified the two issues coming for determination as being:-
 1. Whether the Kadhi's Court has jurisdiction to hear Succession proceedings with regard to the deceased's estate; and
 2. Whether a temporary injunction should be issued stopping the Respondent from interfering with the deceased's estate.
8. On the first question, it was urged that the Kadhi's Court lacked jurisdiction as under Article 170(5) of *the Constitution* of Kenya, 2010, its jurisdiction was limited to cases where all the parties profess the Muslim religion. Counsel for the Applicant urged that the deceased was not a Muslim, nor had any evidence been produced to show that she was.
9. On the second issue it was urged, relying on the celebrated case of *Giella vs Cassman Brown & Co Ltd [1973]EA 358* and *ACE Engineering & Building Contractors Limited vs National Bank of Kenya Ltd [2019]eKLR* that an injunction should issue as:-
 1. There was a prima facie on the part of the Applicant that the Respondent was a stranger intermeddling with the estate of the deceased;
 2. There was a possibility that the Applicant would suffer irreparable injury which could not be compensated by an award of damages; and



3. Balance of convenience tilted in favour of grant of injunction relief.
10. It was thus urged that the order sought be issued.
11. The submissions of the Respondent are dated 6th November 2024. The Respondent submitted that the matter before the Kadhi proceeded and was heard after Hon Kadhi dismissed the preliminary objection filed by the Applicant, on 29th February 2024.
12. Counsel for the Respondent submitted that the decision of the Hon Kadhi, dismissing the preliminary objection, had never been reviewed, appealed against or set aside.
13. Ms Kinuva submitted that the application was res judicata as the question of jurisdiction was heard and determined by a Court with jurisdiction. Counsel relied on section 7 of the Civil Procedure Act and the decision of the Court in Kennedy Mokua Ongiri vs John Nyasende Mosioma & Florence Nyamoita Nyasende [2022]eKLR.
14. She urged that since the deceased was a Muslim, then under Article 170(5) of the Constitution and Section 5 of the Kadhi's Courts Act, the Hon Kadhi had jurisdiction. Therefore, the matter in the Court below was before the proper Court.
15. Counsel thus urged me to dismiss the application with costs.
16. I have considered the application, the supporting affidavit and annexures, the replying affidavit and its annexures, the supplementary affidavit, and the parties' written submissions. I must now determine whether the application has merit and if I should grant any orders.
17. To do this, I must first set out some provisions of the Constitution and the law.
18. Article (170(5) of the Constitution states that:-

“The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhis' courts.”
19. Section 5 of the Kadhi's Courts Act states that:-

“A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”
20. What I deduce from the provisions of the foregoing provisions of the Constitution and the law is that the jurisdiction of the Kadhi's Court is limited to:-
 1. Issues of Muslim law;
 2. Between Muslims; and
 3. Where all the parties submit to the jurisdiction of the said Court.
21. At the heart of this matter is the question of whether the deceased was a Muslim or not. The secondary issue related to that is whether the Respondent, a Muslim was married to her. The Applicant and the Respondent are unable to agree on this point. Since the Applicant brought this matter before this



Court, she bore the burden of proof under Sections 107 to 109 of the Evidence Act to prove her case. The said sections of the Evidence Act state that:-

107. Burden of proof.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

22. In these proceedings, the Applicant seeks to convince this Court that the Court below was wrong as the deceased was, according to her, a Christian and not a Muslim, as reckoned by the said Court. It follows logically that the Applicant's case would fail if it weren't shown that she was a Christian.
23. Did she do so? I am not persuaded. The Respondent produced documentary evidence that appears to show that he married the deceased. Save for raising technical matters regarding whether Caroline Ziri was the same person as Caroline Mshai Ziri or the importance of indicating ID Numbers in the chief's letters, nothing tangible was brought forth to show that the deceased wasn't a Muslim.
24. I note that in paragraph 8 of the Replying Affidavit, the Respondent averred that he buried the deceased at his ancestral home under Muslim customs and practices. The Applicant did not rebut the contention despite filing a Supplementary Affidavit. The conclusion I draw is that this particular assertion was truthful. Why would the Applicant, the mother of the deceased, have permitted the Respondent to bury the deceased if, indeed, he had no marital ties to Caroline Ziri?
25. The question as to whether the deceased converted to Islam and if she married the Respondent are questions of fact which the trial court was best placed to address after hearing the parties.
26. In the proceedings before the Hon Kadhi, the Respondent produced a note issued by Hon S. O. Ally Jadeed, a retired Kadhi, and a letter the said person wrote to the trial Kadhi stating that the deceased did convert to Islam and affirming that she got married to the Respondent. Whether this was indeed the case is a question of fact.
27. Having carefully considered this matter, it does not appear to me that Hon Kadhi was unreasonable in finding that the preliminary objection had no merit. There were grounds to think that the deceased died a Muslim and that she married the Respondent.
28. Section 2(3) of the Law of Succession Act states that:-

“Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions, the devolution of the estate of any such person shall be governed by Muslim law.”



29. Since, in all likelihood, the deceased was a Muslim, the applicable law for the devolution of her estate was the Muslim law, and as her husband was a Muslim, it follows logically that the succession to her estate would be governed by Islamic sharia law.
30. Part VII of the *Law of Succession Act* governs the administration of estates.
31. Section 66 of the said Act (which is in Part VII) lists down the order of priority when applying for a grant. It is clear from a reading of the said section that the surviving spouse has priority over any other person. Further, a spouse is not obligated to seek any other person's consent when filing for a grant of representation. Courts have also held that where a deceased person is survived by a nuclear family, all other relatives have no claim whatsoever.
32. I am guided by the decision of the Court in Nairobi Succession cause No 2015/2012 In the matter of the estate of Joshua Orwa Ojode (deceased) (2014) e KLR where it was stated that:-
- “ Going by the above provisions, where a deceased person is survived by a spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and children are entitled to the estate to the exclusion of all the other relatives. The excluded relatives include parents of the deceased. Parents are only entitled where there is no surviving spouse or child.”
33. Since the deceased person herein most likely had a husband, on the basis of the available evidence, the claim cannot stand.
34. Further to the foregoing, the Respondent, as the spouse of the deceased, had no obligation under Rule 26 of the Probate and Administration Rules to seek the consent of the deceased's mother since he ranks above her in the order of priority. The submissions that consent ought to have been sought is therefore misplaced.
35. I am guided by the decision of Onyiego, J, In re Estate of DKB (Deceased) [2020] eKLR where he held that:-
- “ 27. Since the applicant is not entitled to a share in the estate, there was no need to seek his consent. See also Ali-Amin Abdulrehman Halimany V Abdulrehman Mohamed and another (2013) e KRL where the court held that by virtue of rule 26 any petition for issue of a grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate.”
36. The foregoing notwithstanding the Applicant participated in the proceedings of the Court below. In my view the option open to the Applicant once a decision was made dismissing the preliminary objection was to appeal against the impugned decision to this Court.
37. Since the decision of the Court below was made by a Court with jurisdiction it could only be set aside upon appeal or review.
38. Section 7 of the *Civil Procedure Act* provides that:-
- “7. Res judicata 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.”

39. In the case of Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR THE Court of Appeal held as follows:-

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

40. For the doctrine of res judicata to apply, the following must be present:-

- (i). a previous suit in which the matter was in issue;
- (ii). the parties were the same or litigating under the same title;
- (iii). a competent court heard the matter in issue;
- (iv). the issue had been raised once again in a fresh suit.

41. It is, therefore, my view that since the decision was made by a Court with jurisdiction in a dispute between the same parties over the same subject matter, this application is res judicata. The only way I could hear it is if there was an appeal to this Court arising from the decision of the Hon Kadhi.

42. It is now settled law that the doctrine of res judicata applies to applications. The Court of Appeal in Uhuru Highway Development Ltd – Vs – Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni held that:-

“That is to say, there must be an end to Applications of similar nature, that is to further, under 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 mandated 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 or *Civil Procedure Act* caters for.”

43. In the circumstances, I find and hold that the application herein is res judicata and is one for dismissal.

44. Having held that this application is res judicata, I do not need to consider whether or not an injunction may be issued.

45. The application is dismissed with no orders as to costs.

46. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF DECEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI



JUDGE

In the presence of: -

Ms Mumbo, holding brief for Ms Ayieko, for the Applicant

Ms Kinuva, for the Respondent; and

Esther - Court Assistant.

