



REPUBLIC OF KENYA



KENYA LAW
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**UFM v KFM (Family Appeal 5 of 2020)
[2022] KEHC 14589 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 14589 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 5 OF 2020
JN ONYIEGO, J
SEPTEMBER 23, 2022**

BETWEEN

UFM APPELLANT

AND

KFM RESPONDENT

*(Being an appeal from the ruling of Hon. Juma Ali Adbadall
Principal Kadhi Mombasa on the 14th February 2020 Mombasa
Kadhi Succ case No 21 of 2019 formally Lamu Succ case No 9 of 2019)*

JUDGMENT

1. Vide a petition dated December 3, 2018 and filed on December 3, 2018 as succession case No 9 of 2018, Lamu Kadhi's court, one KFU petitioned the court for orders in respect of the estate of FMS who died intestate on July 12, 2018 seeking orders that;
 - a. Judgment be entered against the respondents not to interfere with the estate until the matter is heard and determined;
 - b. The Honourable court to order all estates be brought together so as all rightful heirs to inherit;
 - c. Costs of the suit;
 - d. Any other orders this Honourable court may deem fit and just to grant
2. Listed as respondents were; FM (1st respondent), MFM (2nd respondent) and MFM (3rd respondent). At paragraph 5 of the petition, the petitioner indicated survivors to the deceased as;
 - a. MFM -son
 - b. UFM -daughter



- c. MFM-daughter
 - d. MFM -daughter
 - e. MFM -son
 - f. JFM -daughter
 - g. MFM- daughter
 - h. KF - son
3. Subsequently, the second respondent filed her statement of defence on December 24, 2018 urging the court to dismiss the suit; order transfer of the matter to a court of competent jurisdiction; payment of special and general damages for the respondents and; grant of any relief the court could deem fit; However, on February 8, 2019, Umi famau Madi filed a preliminary objection contesting paternity of the petitioner and that DNA test be conducted upon all rightful heirs to determine who were the correct heirs.
 4. Pursuant to a notice of motion dated March 28, 2019 filed before the high court Mombasa, it was on April 9, 2019 ordered that Lamu succession case No 9/2008 be transferred to Mombasa Kadhi's court for hearing and determination.
 5. In response to the preliminary objection, the petitioner filed a replying affidavit on January 15, 2016 stating that; the preliminary objection was bad in law and filed in bad faith with the intention of wasting court's precious time; he was a biological son to the deceased hence a beneficiary of the estate; the preliminary objection was premature, unsubstantiated and without basis; the preliminary objection was intended to deny him a chance to be heard by a court of law and access to justice; the preliminary objection cannot stand as it was based on factual issues and not points of law hence raised prematurely before parties could tender their evidence and; that the preliminary objection was intended to deny the court a chance to determine issues in controversy on merit.
 6. After canvassing the preliminary objection, the honorable Kadhi Abdalla Juma delivered his ruling on February 14, 2020 thus dismissing the same on grounds that it was prematurely raised thus challenging issues of fact before parties could tender their evidence for the court to determine paternity. Further, the court held that the conditions set out in the celebrated case of Mukisa biscuits regarding the question of what constitutes a preliminary objection had not been satisfied.
 7. Aggrieved by the said ruling, UFM (hereinafter the appellant) moved to this court vide a Memorandum of Appeal dated March 17, 2020 citing 10 grounds as follows;
 - a. The learned principal Kadhi erred in law and in fact in failing to distinguish between the Laws of intestacy under Islamic Law and *succession Law under the Succession Act* chapter 160 Laws of Kenya.
 - b. The learned principal Kadhi erred in law and in fact in failing to distinguish between the Laws of intestacy Law of points of laws under the succession Act ,Cap 160 Laws of Kenya in relying on the case of *Mukisa Biscuits co. Ltd versus West End Distributors limited* (1969) E.A 699 as the authority.
 - c. The learned principal kadhi erred in fact and in law in dismissing the preliminary objection dated February 5, 2019 on the basis that it was not founded on any provision of the law or any affidavit.



- d. The learned principal kadhi erred in law and in fact in failing to appreciate that the preliminary objection was not aimed at dismissing the petition but at establishing the true beneficiaries of the estate under Islamic law which in itself is a point of law.
 - e. The learned principal Kadhi erred in law and in fact in failing to appreciate that the issue of the true heirs of the deceased had already been raised by the petitioner himself in his petition which the learned principal kadhi himself raises in his ruling and which under Islamic law requires an initial determination as the petitioner has mysteriously acquired a birth certificate bearing the deceased's name as his father.
 - f. The learned chief kadhi erred in law and in fact in failing to appreciate that under Islamic law the issue of who is a rightful heir or beneficiary on an intestacy is a legal point which must be determined before any distribution of the estate can be done.
 - g. The learned principal Kadhi erred in fact and in law in holding that a DNA test can only be done between the petitioner and the deceased person to establish paternity whereas the deceased had other close relatives who are still living and can provide blood specimen for the purpose of the test.
 - h. The learned principal Kadhi erred in law and in fact by ignoring the basic test of Islamic law that doubtful issues must be abandoned in favour of the truth which was the sole purpose of the objection.
 - i. The learned principal Kadhi erred in law and in fact in failing to grant an order for a DNA test to be carried out on the parties in that should the petitioner and either of the parties be found not to have a legitimate blood relationship with the deceased, then such inheritance as would accrue to such a party from the distribution of the estate would amount to a fraud on the estate of the deceased (haram).
 - j. The learned principal Kadhi erred in law and in fact in failing to appreciate that disallowing the preliminary objection would amount to a gross injustice in the estate of the deceased in that a stranger would be seeking to unjustly benefit from it and for which he is not lawfully entitled.
8. When the matter came up for directions, parties agreed to file written submissions.

Appellant's submissions

9. Through the firm of Gichana Bw'omwando and Co. Advocates, the appellant filed his submissions on February 1, 2022. It was submitted that; though in substance the preliminary objection may not necessarily meet the strict criteria set out in the case of *Mukisa biscuits*, it raises a question of procedure adopted by the Kadhi's court under the law. It was counsel's contention that the issue of paternity ought to have been addressed first during pre-trial directions to ascertain the correct heirs to inherit the estate.
10. It was further contended that the petitioner /respondent having been born out of wedlock is an illegitimate child born of a mother not officially married to the deceased hence has no right to inherit the estate of the deceased Muslim father and that DNA test ought to have been conducted before commencing hearing the case.
11. The appellant opined that the appropriate action is for the court to refer the matter to the Kadhi' court where the appellant will have the liberty to make an application for the legitimacy test under the Islamic law. In support of this contention the court was referred to the holding in the case of *CKC and another (suing through their mother and next friend JWN) VS ANC*(2019) e KLR



Respondent's submissions.

12. Through the firm of Khalid Salim and company Advocates, the respondent/petitioner filed his submissions on 3rd December, 2021 thus urging the court to dismiss the appeal. The respondent narrowed the grounds of appeal into one i.e whether the Honourable kadhi erred in dismissing the appellant's preliminary objection.
13. The court was referred to the attendant principles laid out in the case of Mukisa Biscuits Manufacturing Company Ltd vs West End distributors Ltd (1969) E.A 696 where it was held that a preliminary objection must be based on a pure point of law which if proved will dispose of the matter in limine.
14. According to the respondents, the issues raised in support of the preliminary objection are issues of fact and not points of law. That the issue of determination of heirs is a matter of evidence and a verdict arrived at on merit.
15. Besides, it was submitted that the appellant had vehemently contested production of the petitioner's birth certificate a fact that requires adduction of evidence by calling various witnesses before a determination could be made.

Determination

16. I have considered the grounds of appeal herein and submissions by both counsel. Although the appellant cited several grounds of appeal, I am able to discern only one issue for determination i.e whether the honorable court properly dismissed the preliminary objection the subject for this appeal. The rest of the grounds are general and have no connection with the dismissed preliminary objection hence should not have been raised.
17. The principles guiding determination of what constitutes a preliminary objection have been settled through a series of case law including the celebrated case of Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (supra) where the court held that;

“ a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
18. In the case of *Agnes Mukami and 5 others vs Ngewabi and company* (2005) e KLR the court expressed itself as follows;

“...a clear and well taken preliminary objection may expedite disposal of matters before a court. On the other hand, a vague preliminary objection often causes delay in determination of matters”
19. The crux of the preliminary objection the subject of this appeal is the claim by the appellant that the petitioner's mother was not married in accordance with the Islamic law or practices and therefore the petitioner was a child born out of wedlock hence an illegitimate child not entitled to inherit the estate.



20. In his submission, the appellant submitted and I quote;
- “Though in substance the preliminary objection may not necessarily meet the strict criteria set in the case of Mukisa biscuits, it raises a question of procedure adopted by the kadhi’s court under the Constitution}} and the law”.
21. From the above quoted statement, the appellant is admitting that the preliminary objection did not actually raise a pure point of law capable of determination within the confines of what constitutes a preliminary objection as laid out in the famous case of Mukisa biscuits.
22. The claim that the petitioner was born out of wedlock and therefore an illegitimate child is a factual issue requiring parties to be heard and a determination made on merit. A preliminary objection is not a tool which should be used as a matter of course to prematurely bring to an end a suit which should be subjected to thorough interrogation through adduction of evidence. Where factual issues are involved as it is the case herein, the best approach is to let parties litigate their case up to the end and a determination made on merit. Those are the tenets of principles of natural justice on fair hearing and that parties should not unnecessarily be denied the right to be heard. See *Evans Odhiambo Kidero and 4 others vs Ferdinand Ndungu Waititu and 4 others* petition No. 18/2014 as consolidate with petition 20/2014 (2021 e KLR).
23. The issue of paternity is a factual one which can only be determined after laying a basis for the same to be conducted. DNA examination is not to be ordered casually. The person seeking the same must lay a basis which quite often is determined in the course of adducing evidence. DNA examination is not the only conclusive method of assessing paternity. If there is any other evidence establishing paternity, a court can still uphold paternity without necessarily ordering for DNA.
24. It then follows that any contestation over the petitioner’s paternity is a factual issue which can only be resolved through adducing evidence. I do agree with the honorable Kadhi that the objector did not meet the conditions attendant to dismissing a suit on a preliminary objection. I do not find any ground to interfere with the ruling of the Hon Kadhi.
25. The appeal herein is a non-starter and indeed unnecessary with the sole intension of delaying the suit further. Accordingly, the appeal is dismissed with costs to the respondent. Original file to be returned to the trial court to fast track hearing of the suit on merit.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER, 2022

J. N. ONYIEGO

JUDGE

