



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 40 OF 2013**

**(PRINCIPAL MAGISTRATE' COURT – LIMURU SUCCESSION CAUSE NO. 121 OF 2011)**

**IN THE MATTER OF THE ESTATE OF NM alias NM (DECEASED)**

CWN.....APPELLANT

- VS -

TMT.....1<sup>ST</sup> RESPONDENT

EWK.....2<sup>ND</sup> RESPONDENT

SW.....3<sup>RD</sup> RESPONDENT

ENK.....4<sup>TH</sup> RESPONDENT

**RULING**

1. The Petitioner/Respondent filed a Notice of Preliminary Objection (NOPO) dated 20<sup>th</sup> September, 2019 to the Objector/Applicant's Application dated 13<sup>th</sup> September, 2019 on the ground that this Court lacks jurisdiction to hear and/or determine that Application or any other or further claim by any of the Applicants herein or any person claiming under them as the same is res judicata.
2. The Application dated 13.9.2019 is seeking for orders that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Applicants on the one hand and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on the other hand do submit to a DNA test at LANCET Kenya to determine paternity and further that the costs of the DNA be borne by the estate of the deceased.
3. The parties were directed to file submissions in the NOPO and the Petitioners filed written submissions dated 7.10.2019 while the objector's submissions are dated 27.9.2019.
4. The Petitioners submitted that the issue of paternity of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> applicants was raised in the trial court namely Limuru Succession Cause No. 121 of 2011 before the Senior Principal Magistrate's Court which was determined on 15.2.2013.
5. The Petitioner was not satisfied with the decision of the Senior Principal Magistrate and she appealed to this court in Appeal No. 40 of 2013 and the Appeal was finally determined on 20.6.2016.
6. The Petitioner submitted that the Application dated 13.9.2019 is res judicata and it is barred under section 7 of the Civil Procedure Act which provides that;

***“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.”***

7. The Applicants who opposed the NOPO submitted that the section 7 of the Civil Procedure Act is not applicable in Succession matters and further that the issue of DNA was not raised both before the trial court and in the Appeal No. 40 of 2016.

8. I have considered the authorities relied on by the parties and I find that it is not in dispute that the issue of paternity of the Applicants was raised both before the Principal Magistrate and in the appeal No. 40 of 2016.

9. It is true that the issue of DNA was not mentioned but the Applicants were at liberty to demand for DNA but they failed to do so.

10. The doctrine of res judicata is applicable in Succession Causes and the Application dated 13.9.2019 is res-judicata as the Applicants ought to have raised the issue of DNA before the trial court.

11. The Applicants were also at liberty to apply to call evidence during the Appeal but they failed to do so.

12. **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**, the Court of Appeal held that:

*“Thus, 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.”*

13. The Court explained the role of the doctrine thus:

*“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra 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 commonsensical 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 or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”*

14. The appeal was determined on 20.6.2016 and the Applicant’s claim to have the Applicants subjected to Sibling DNA testing as an attempt to have a second bite in a matter that has been determined with finality.

15. I find that the NOPO is meritorious and accordingly allow it and I strike out the Application dated 13.9.2019.

16. However, each party to bear its own costs of the Application.

**DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA,NAIROBI.**