



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC CASE NO. 768 OF 2008

IN THE MATTER OF THE ESTATE OF GEOFFREY MUCHIRI KAMAU

ANNE NJERI MUCHIRI..... OBJECTOR/RESPONDENT

-VERSUS

MARGARET NJOKI MUCHIRIPETITIONER/APPLICANT

RULING

1. The Objector/Respondent filed a Notice of Preliminary Objection to the Petitioner's Application dated 5.6.2018 on the following grounds;

(i) THAT this Court lacks jurisdiction to hear the application dated 5.6.2018.

(ii) THAT the Court having delivered its judgment on 27.5.2016 and having granted the objector leave to appeal on 2.6.2017 has become functus officio and has no jurisdiction to hear the Application dated 5.6.2018

(iii) THAT as held in the Court of Appeal in Telkom Kenya Ltd Vs. John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Ltd) [2014] eKLR where there is finality as to the proceedings, merits and decision in a matter, a court becomes functus officio so that any issues of grievance can only be dealt with by escalation to another Court on appeal.

2. The objector submitted in writing that the Notice of Preliminary objection is filed in opposition to the Petitioner's summons dated 5.6.2018 seeking the following orders.

(i) THAT the stay of execution to apply for confirmation of grant pending appeal granted to the Respondent on 22.6.2017 be vacated and/or set aside and the Applicant be at liberty to apply for confirmation of grant.

(ii) That costs of this Application be borne by the Respondent.

3. The objector submitted that she applied for proceedings to enable her lodge an appeal and to date she has not been informed that the proceedings are ready.

4. The Objector further submitted that the Petitioner is guilty of non disclosure of material facts that the DNA conducted on 11.7.2016 appeared to have familiarity on the part of the Applicants family and the Doctor who run the said test and that parties conceded to the fact that the DNA test was not proper and that another test be done in another hospital which has not been done.

5. The Petitioner/Applicant opposed the preliminary objection and in her submissions dated 22.11.2018, she stated that the functus officio principle was conclusively dealt with by the Court of Appeal in Telkom Kenya LTD Vs JOHN OCHANDA (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya [2014] eklr where Justices Githinji Karanja & Kiage JJA observed as follows:

“ Functus officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century”

“.....The doctrine is not to be understood to bar any engagement by a Court with a case that it has already decided or pronounced itself on. What it does bar is a merit –based decisional re-engagement with the case once a final judgment has been entered and a decree thereon issued”.

6. The Petitioner further submitted she petitioned for grant of letters of administration intestate in respect of her deceased husband on 3.4.2008. The Respondent subsequently filed two applications dated 31.7.2008 and 7.7.2011 seeking reasonable provision from the Estate and barring the Petitioner from withdrawing money from the deceased's bank account.

7. The two applications were dismissed on 27.7.2016 and the court allowed the Petitioner to proceed with Confirmation of the grant issued on 27.5.2016 on condition that a DNA test be conducted first to determine the paternity of the Respondent's daughter.

8. On 2.6.2017 the Court granted the Respondent a 30 days conditional stay of execution but the Petitioner submitted that over one and a half years later, the Respondent has not taken any steps to file the intended appeal.

9. I have considered submissions filed by both parties in the Notice of Preliminary Objection. I find that the Objector/Respondent was granted conditional stay and leave to appeal within 30 days.

10. I find that the matter was not concluded as the grant has not yet been confirmed or the estate distributed. It is therefore incorrect to say that the court is functus officio.

11. I also find that the 30 days stay of Execution and leave to appeal lapsed in July 2017 and there is no indication that an appeal has been filed in this case.

12. I find that the Preliminary Objection lacks in merit and I accordingly dismiss it with costs and I direct that the Petitioner applies for confirmation within 30 days of this date Orders to issue accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 18TH

DAY OF DECEMBER, 2018

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI