



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1379 OF 2006**

**IN THE MATTER OF THE ESTATE OF SOLOMON CHUCHU WATAKU ALIAS CHUCHU  
WATAKA GATHIMBA (DECEASED)**

**RULING**

1. The petitioners have filed a preliminary objection dated the 27/10/2015. The petitioners' objection is that the summons dated the 20<sup>th</sup> of July 2015 is **resjudicata**, that it is otherwise spent and is an abuse of the court process. That it is intended to embarrass or delay the expeditious hearing and determination of the summons for confirmation of grant dated the 12<sup>th</sup> of February 2007.
2. Parties made oral submissions. Mr. Nduati for the petitioner's submitted that a similar application to the one dated the 20/7/2015 had been withdrawn. That if the court were to allow parties to withdraw and file proceedings the court will allow an abuse of the court process. That the subsequent proceedings was not filed in good faith and is intended to delay the proceedings. That the petitioners objection is pegged on a Court of Appeal decision No. 258 of 2008. That the application for DNA had been abandoned before Justice Gacheche. That if you look at the judgment the larger part of it dealt with the issues of DNA. That the orders made by the High Court were on DNA and the order was set aside owing to its impracticability, that the Judges of the Court of Appeal stated that the orders were not enforceable. That this court is tied by the said decision and that the issues being raised on paternity can be pursued by cross examination, thus the matter is resjudicata and the court should allow the objection.
3. Mr. Mwanki for the objector in response submitted that, the case of **Mukisa Biscuit** case sets out what is a preliminary objection that it is one raised on a point of law that goes to the root cause of the argument. That it is raised in circumstances where the court is not being asked to go examine the record in the lower court and the court of appeal and that on that ground alone the objection fails. That the application was not heard by the Trial Judge and based on the evidence adduced she said that the only way to determine the matter was by DNA as she invoked sections 22 and 23 of the Civil Procedure Act. The matter went to the court of appeal because the persons named had not been heard and based on that ground the court of appeal held they had to be given a chance to be heard. The court of appeal did not determine the application. That the issue of revocation had not been dealt with and they are back in the lower court and have narrowed down to the person and they have affidavits stating they are the deceased's children. That the matter is not resjudicata. That the court of appeal stated that the Judge made a mistake to order a DNA as it was not the issue before the court. That they have not had a chance to prosecute their application or DNA and they are not abusing any court process. That it is the right of the objector to know his parentage which right is enshrined in the new Constitution and that their application will not embarrass or delay the matter and that as long as there is a dispute the grant cannot be confirmed.
4. Mr. Nduati in reply submitted that this court make take judicial notice of decisions of the previous court and the court of appeal. That Counsel admits that a DNA test was ordered and that in effect

- determined the application for DNA that was before the court which led to the court of appeal decision.
5. In trying to determine the preliminary objection raised I have had to go through the court file both of pleadings filed and the court and this is what I have found. The objector file objections proceedings and the application was heard by Justice Gacheche. In her ruling dated the 8/4/08 Justice Gacheche held that a DNA was to be done and that the petitioners were to nominate five sons to undergo the said test. In the judgment read by the court of appeal on the 10/10/2014 the 3 judge bench set aside the high court order on DNA. The court observed that the judge had dealt with a matter that had not been raised in the application that had been filed. The court also observed that the applicant had an application for revocation dated the 27/11/2006 and another application dated the 7/3/2008 where he sought an order to compel three children of the deceased whom he named to provide DNA samples.
  6. On the 21/7/2015 the applicant withdrew the application dated the 7/3/2008. I note that the said application was not heard and determined. The objector on the 13/8/2015 filed an application dated the 20/7/2015 seeking to have the children of the deceased who are named to appear before KEMRI for extraction of Deoxyribonuclei Acid samples for testing and in the alternative the deceased's body to be exhumed for the said testing.
  7. The definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** the court held that " **a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.**"
  8. The petitioner argument is that the application is resjudicata. The Civil Procedure Act at Section 7 provides as follows on Resjudicata

**" 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.**

9. The said Section 7 gives 6 explanations thereafter on what to consider when determining that a matter is resjudicata. The application dated 7/3/2008 was withdrawn before hearing on the 21/7/2015. Indeed the court of appeal dealt with the issue of DNA in a larger context, but how? Did the said court make a finding on the said issue? My understanding of the said judgment is that the court of appeal took issue with the fact that the judge gave orders which was not sought in the application under consideration then. The court further observed that the order as was given were not enforceable , as it was not clear who the five sons were "**named**" for no names were given in the ruling. The court went further to state that,

**" clearly the persons that the learned judge had in mind cannot possibly be the persons in respect of whom the applicant had sought DNA samples because not all of the persons specified by the respondent were sons of the deceased. There was a daughter and two brothers of the deceased among the five persons named by the respondent. Even assuming that the learned judge had in mind the pending application for DNA testing, which in the circumstances of the case before her she ought not, she ended up making an order against persons other than the particular persons against whom the respondent had specifically sought the order"**

10. In my view the court of appeal never dealt with issue of DNA in a manner to hold that the application before this court is resjudicata. The court did not make any findings on the issue of DNA which is the subject of the application dated the 20/7/2015. The petitioners counsel only sought costs when the application dated 7/3/2008 was withdrawn. The said application or the issues surrounding DNA whether it should be done and in which manner was not dealt with either by the High Court nor the Court of Appeal, no finding were made that were conclusive in either courts. I find no merit in the preliminary objection raised and I dismiss it with costs to the objector. The parties in this matter are yet to confirm the grant, there is also the application filed by the objector. This is a matter that has

been in court since 2006 parties should endeavor to finalize it so that the deceased's estate is determined. It is so ordered.

Dated, signed and delivered this **16<sup>th</sup>** Day of December **2015**.

**R.E.OUGO**

**JUDGE**

**In the presence of:**

.....**For the Petitioners**

.....**For the Objector**

.....**Court Clerk**