



In re Estate of Allan Lawrence Awuoché Otway (Deceased) (Succession Cause 1913 of 2008) [2023] KEHC 24382 (KLR) (Family) (19 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1913 OF 2008
MA ODERO, J
OCTOBER 19, 2023**

BETWEEN

AGNES AYOO ODINDO AWUOCHE ADMINISTRATRIX

AND

VICTORIA AGUNDA AWUOCHE APPLICANT

AND

BARAKA OBAMA AWOCHE 1ST RESPONDENT

JECINTA ANYANGO 2ND RESPONDENT

EDNA AWINO AWUOCHE 3RD RESPONDENT

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated 15th December 2022 filed by the Administratrix Agnes Ayoo Odindo Awouche. The Preliminary Objection was opposed.
2. The matter was to be canvassed by way of written submissions. The Administratrix filed the written submissions dated 19th December 2022 whilst the 2nd Respondent Jecinta Anyango relied upon her written submissions dated 19TH January 2023. The Applicant Barack Obama Awuoché filed written submissions dated 18th January 2023.

Background

3. This Succession Cause relates to the estate of the late Allan Lawrence Awuoché Otway who died intestate on 10th August 2007 at the Kenyatta National Hospital. Hearing of the dispute had proceeded before Hon. Lady Justice Mugai when two applications were filed as follows:-



(1) Notice of Motion dated 18th May 2022 by which the Applicant sought the following orders:-

- “ 1. That this Honourable Court be pleased to grant interim stay of execution and/ or bar any reliance on the DNA test results from KEMRI dated 9th December 2021, pending the hearing and determination of this application inter partes.
2. That the 3rd Respondent be barred and/ or restrained from relying on the DNA Test results from KEMRI to interfere and/or intermeddle with the Estate by purporting to caution the Estate that the Applicant has been determined not to be a child of the deceased; thereby, not an administrator pending the hearing and determination of this Application.
3. That the 3rd Respondent be barred and/ or restrained from relying on the DNA Test results from KEMRI to interfere and/or intermeddle with the Estate by compelling and/ or cautioning tenants of the Estate to deposit rental dues into Standard Chartered Bank Account Number 0151240598900 Harambee Avenue Branch which is primarily operated and/ or capable of access by herself and the 2nd Respondent.
4. All previous beneficiaries and/ or parties that undertook DNA Test at KEMRI to submit [for] a Supplementary DNA Test at the Government Chemist for verification and comparative DNA analysis pursuant to the order of this Honourable Court issued on the 10th February 2020.
5. That the author of the DNA Test report from KEMRI dated 9th December 2021, attend the Honourable Court when the matter is fixed for hearing to be cross-examined by counsel for the Applicant and any other counsel, who wishes to do so, as to the contents and findings of the report.
6. That the Applicant be at liberty to call his Expert witness to analyze and address the court on the contents of the impugned KEMRI DNA Test report as well as his own independent report that demonstrates various anomalies and irregularities in the initial report.
7. That cost of the application be provided for. “

(ii) Notice of Motion dated 3rd June 2021 by which the same Applicant sought the following orders:-

- “ 1. Spent.
2. That the Honourable Court do be pleased to issue an interim order restraining the 1st Respondent from conducting and/ or causing further transfer of all that property knowns as Plot No. 370 at Jamhuri Phase II measuring approximately nought point nought two (0.02)



hectares to the detriment and peril of the estate pending the hearing and determination of this present application.

3. That the Honourable Court, upon hearing and determining this present application, do be pleased to issue an order directing and restraining the 1st Respondent from interfering, intermeddling and/or disturbing the estate, in terms; transfer, sale and/or claiming superior interest in the estate pending the determination and conclusion of the current succession cause.
4. That costs of this application be provided for. “

4. The court on 20th December 2022 directed that the two applications be heard. The Administratrix then filed this Notice of Preliminary Objection seeking to have the two applications struck out on the following grounds:-

- “ 1. The claims made in the two summonses are res judicata by the reason of the order of this Honourable Court (Hon. Justice Muchelule [as he then was]) dated 10th February 2020, which order was fully implemented and the DNA results processed by a Government Institution (KEMRI), which report forms part of the record in this cause.
2. Section 7 of the *Civil Procedure Act* operates to bar the further adjudication of the DNA issue raised by the two summonses.

Analysis and Determination

5. I have considered the Notice of Preliminary Objection as well as the submissions filed by all parties. The main issue in contention is the DNA test which was ordered by the court.
6. On 22nd October 2019 Hon. Justice Muchelule (as he then was) made the following orders in this matter:-

- “ (1) All beneficiaries to undergo DNA to confirm whether they are children of the Deceased and whether Jecinta Anyango is a child of the Deceased.
- (2) D.N.A to be done by Government chemist.
- (3) Parties to share the costs.
- (4) Mention on 3rd December 2019.”

7. It is from this consent order that the two applications dated 18th June 2022 and 3rd June 2022 arise. In the Preliminary Objection the Administratrix objected to the two applications on grounds that they were ‘Res Judicata’
8. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA where the court stated as follows:-

“ 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 the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. “.....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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”

9. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court of Kenya stated as follows:-

“a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

10. Therefore in order for a preliminary objection to succeed the following tests must be satisfied.

- (i) The Preliminary Objection should raise a pure point of law.
- (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
- (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
- (iv) A valid Preliminary Objection ought if successful dispose of the entire suit.

11. Therefore a genuine and proper Preliminary Objection can only raise points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.

12. By this Preliminary Objection the Administratrix asserts that the issues raised in the two applications are ‘*Res Judicata*’ as the DNA test was fully implemented following the orders made by Hon. Justice Muchelule (as he then was) on 22nd October 2019.

13. The principle of Res Judicata is provided for by section 7 of the *Civil Procedure Act*, cap Laws of Kenya as follows:-

“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.”

14. *Black Law Dictionary* 10th Edition defines *Res Judicata* in the following terms:-

“An issue that has been definitely settled by judicial decision.... the three essentials are:-

- i. an earlier decision on the issue;
- ii. a final judgement on the merits; and
- iii. the involvement of the same parties, or parties in privity with the original parties;”

15. The Court of Appeal in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR stated as follows:-

“That rule or doctrine of res judicata serves the salutary aim of bring 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 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 and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice”. [own emphasis]

16. Therefore party seeking to rely on the doctrine of res judicata to bar a suit from being heard must prove each of the following elements:-
 - a. The suit or issue raised was directly and substantially in issue in the former suit;
 - b. The former suit was between the same parties or between the same parties under whom they or any of them claim;
 - c. The parties were litigating under the same title in the former; and
 - d. The court that formerly heard and determined the issue was competent to try and the subsequent suit or the suit in which the issue is raised.
17. The purpose of the doctrine of *Res Judicata* is to avoid a scenario where the courts are engaged in endless rounds of litigation over the same issue. A litigant may not commence more than one action in respect of the same or a substantially similar cause of action so as to avoid a multiplicity of suits.
18. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merit by a court of competent jurisdiction.
19. By the Preliminary Objection the Administratrix submits that the DNA test having already been conducted following the consent order and the report having already been filed in court, the issue of DNA testing cannot be raised by any party again.
20. I have carefully perused the two applications. The application dated 18th May 2022 raises a question concerning the venue where the DNA test was conducted and further challenges the veracity or authenticity of the results obtained. A challenge is raised regarding the entity that conducted the DNA test.
21. The application of 3rd June 2022 seeks orders in respect of a property known as Plot No. 370 Jamhuri Estate II. The consent order made no mention of this property thus the application of 3rd June 2022 cannot be said to be re judicata.
22. On the whole I find the issues raised in the two applications are not *Res Judicata*. The Notice of Preliminary Objection dated 15th December 2022 is hereby dismissed. Cost will be met by the Administratrix.

DATED IN NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

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MAUREEN A. ODERO

JUDGE

