



In re Estate of IMM alias Ignatius LMM alias Dr IMM (Deceased) (Probate & Administration E012 of 2021) [2024] KEHC 14195 (KLR) (15 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PROBATE & ADMINISTRATION E012 OF 2021
MA ODERO, J
NOVEMBER 15, 2024
IN THE MATTER OF THE ESTATE OF IMM ALIAS
IGNATIUS LMM ALIAS DR. IMM (DECEASED)**

RULING

1. Before this Court is the Notice of Preliminary Objection dated 30th July 2024 filed by the Respondents MWM and AMM.
2. The Applicant FWK opposed the Preliminary Objection. The matter was canvassed by way of written submissions. The Respondents filed the written submissions dated 30th September 2024 whilst the Applicant relied on the submissions also dated 30th September 2024.
3. The Applicant FWK had filed in the High Court the Summons dated 16th July 2024 seeking inter alia an order that:-

“The Honourable court be pleased to order that a sibling Deoxyribonucleic Acid (DNA) test be undertaken with a view of ascertaining the paternity of the children of the protestor/ applicant herein using samples from the 1st petitioner/Respondent’s children within 21 days or any known children of the deceased”

4. In response to this application for DNA testing the Respondents filed the Notice of Preliminary Objection dated 30th July 2024 which is premised on the following grounds;-
 1. The High Court is Functus Officio, as the jurisdiction of this court is concurrent with the High Courts Earlier Decision Made on 20TH July 2022 and the matter cannot be revisited when the preferred appeal was struck out on 21st June 2024. It is not open for this court to reverse or contradict the finding of the High Court.
 2. The Applicant was found to have no legal Capacity to be enjoined as a beneficiary in this cause having failed to establish grounds on the application dated 24/3/2022 as to paternity and dependency as ruled by Justice F. Muchemi on 20/12/2022 in Application 24/3/2022.



3. The Applicants filing similar pleadings in terms of evidence back to the High Court seeking to re establish paternity through D.N.A and dependency is tantamount to filing an appeal before the same Court as the issue of whether they are dependants or beneficiaries having been directly and substantially determined with finality. The Applicant by resuscitating the said issue will not only be in abuse of the process of court but the court will also be acting unlawfully by sitting on an appeal over a decision of a court of concurrent jurisdiction.
4. That there is nothing left for the court to determine the applicant having failed to prove that the children were biological children of the deceased or dependants and cannot be dependants under Section 29 of the [Law of Succession Act](#).

Analysis and Determination

5. The only issue for determination is whether this Preliminary Objection has merit.
6. The definition of a Preliminary Objection was given in the case of Mukisa Biscuits Manufacturing Company Ltd -vs- 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.”
7. 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.”
8. 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.
9. Therefore, a genuine and proper Preliminary Objection can only be raised on points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.
10. The Respondents submit that the Summons filed by the Applicant raises issues which are ‘res judicata’ as the High Court conclusively dealt with the question of paternity in its judgment dated 20th July



2022. That said judgment was appealed which appeal was struck out vide the judgment dated 21st June 2024.
11. The Respondents therefore argue that the High Court is now ‘functus officio’ and pray that the Summons dated 16th July 2024 be struck out.
 12. This matter relates to the estate of the late IMM (hereinafter ‘the Deceased’) who died on 25th March, 2021. A copy of the Death Certificate Serial No. 116XXX2 was filed in court on 13th July 2021.
 13. The 1st Respondent MWM and the 2nd Respondent AMM are both children of the Deceased. The Respondents were on 25th October 2021 issued with Grant of letters of Administration intestate in respect of the estate of the Deceased.
 14. The Applicant claims to be the mother of two minor children TK and SN allegedly sired by the Deceased. The Applicant filed a Summons dated 24th March 2022 seeking to be included as a beneficiary of the estate as guardian of the two minors.
 15. Vide a Ruling delivered on 20th December 2022, Hon. Lady Justice Muchemi found that the Applicant had failed to establish the grounds of paternity and dependency and dismissed the application.
 16. The Applicant filed an appeal which appeal was dismissed by the court of Appeal vide the judgment dated 21st June 2024.
 17. The Applicant has now filed this present application seeking that DNA testing be conducted to determine whether the minors are in fact the children of the Deceased.
 18. The Respondents counter that the present application is ‘Res Judicata’ as the questions of paternity and dependance had been previously determined by court of competent jurisdiction.
 19. The substantive law on res judicata is found in Section 7 of the [Civil Procedure Act](#) Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue is 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.”

Black’s law Dictionary 10th Edition defines “res judicata” as

““An issue that has been definitely settled by judicial decision....The three essentials are (1) an earlier decision on the issue, (2) a final judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties....”

20. The Court of Appeal expounded on this principle in the case of IEBC -vs- Maina Kiai & 5 Others Civil Appeal No. 105 of 2017, where it was stated:-

““Thus for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive, 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.”
21. I have carefully perused the ruling delivered on 20th December 2022. That ruling related to an application dated 24th March 2022 by which the Applicant sought to be enjoined in this succession cause. In that application the Applicant sought inter alia the following orders:-
- “ 1. That the applicant be enjoined as a beneficiary of the estate of the Deceased in the instant succession cause as guardian ad litem for the minors who are the children of the late IMM.”
22. No prayer was made for DNA testing to be done.
23. Therefore Hon. Lady Justice Muchemi did not in her ruling address the question of DNA testing at all.
24. I have also carefully perused the judgment of the Court of Appeal dated 21st June 2024. The learned judges of the court of Appeal dismissed the Applicants appeal on a technicality.
25. In their judgment the Honourable judges of Appeal stated as follows:-
- “With this line of authorities by this court, we accept the respondents’ position that since there was no leave sought or granted the appellants’ appeal before us is not competent. We lack the jurisdiction to hear and determine the appeal. [own emphasis]
26. The Judges of Appeal did not consider and make a determination on the merits of the appeal.
27. It is therefore quite apparent that the issue or prayer for DNA testing has not been heard and determined by a court of competent jurisdiction. As such I find that the application made by the Applicant cannot be said to be Res Judicata.
28. This court is alive to the fact that the orders being sought relate to minors.
29. Section 8(1) (a) of the [Children Act](#) 2022 provides as follows:-
- “8(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies -
 - a. the best interests of the child shall be the Primary Consideration” [own emphasis]
30. Therefore in determining this application the court must give priority to the best interests of the minors. The minors are entitled to have the question of their paternity conclusively settled one way or another. If the DNA tests which is a scientific test excludes paternity then the matter will end there.
31. However if the DNA test reveals a link between the Deceased and the minors then said minors ought to be allowed to benefit from a share of the estate.



32. In these modern times court ought not to be left to rely on guess work to establish paternity. There exists a scientific test with over 99% accuracy which the courts can rely on to determine this question one way or another.

33. For the above reasons I find no merit in this Notice of Preliminary Objection. The same is dismissed in its entirety. Costs will be met by the Respondents.

DATED IN NYERI THIS 15TH DAY OF NOVEMBER, 2024

MAUREEN A. ODERO

JUDGE

