



**LWW & 5 others v LWW & 2 others (Succession Cause E1878 of 2021)
[2024] KEHC 14579 (KLR) (Family) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE E1878 OF 2021

PM NYAUNDI, J

NOVEMBER 14, 2024

IN THE MATTER OF THE ESTATE OF THE LATE PWK (DECEASED)

BETWEEN

**LWW 1ST OBJECTOR
EWW 2ND OBJECTOR
EWN 3RD OBJECTOR
GK 4TH OBJECTOR
PG 5TH OBJECTOR
AMK 6TH OBJECTOR**

AND

**LWW 1ST PETITIONER
JWW 2ND PETITIONER
SGW 3RD PETITIONER**

RULING

1. This ruling relates to preliminary objection dated 10th January 2024 presented against Objection dated 6th December 2023. The preliminary objection issued prior to notice issuing by the Registrar pursuant to rule 17 (5) of the probate and administration rules. The Preliminary Objection is expressed in 30 paragraphs which can be summed up as follows.



2. The Objection offends rule 17 as it does not comply with Section 29 of the *Law of Succession Act*. Further it is contended that the issue of paternity of the 4th and 5th Objectors by the deceased was resolved by DNA test in Eldama Ravine Children’s Case No. 49 of 2021 and the same is therefore res Judicata
3. He further contends that the 1st, 2nd, 3rd and 6th are strangers to the Estate. The 1st, 2nd and 6th are not spouses and the 3rd is not a child.
4. The Protestors have filed a terse response in grounds of opposition dated 1st February 2024 and contend that the preliminary objection as presented does not muster the legal requirements of a competent preliminary objection. It is further contended that the issues raised here were the subject of the ruling by this court on 17th March 2023.
5. The preliminary Objection was canvassed via written submissions. Both parties have filed their submissions.
6. In submissions dated 2nd April 2024, the Petitioners state that the objection is incurably defective as it is res judicata and the objectors have not met the evidential burden to bring them within the ambit of Section 29 of the *Law of Succession Act*. On the issue of Res Judicata, the Petitioners rely on the following decisions; Njangu vs Wambugu and Anor Nairobi HCCC No. 2340 of 1991 (unreported); Siri Ram Kaura vs MJE Morgan (1961) EA 462. It is further contended that the Objectors are in effect obstructing the Petitioners access to justice by denying them the fruits of their judgment and reference made to the decisions in Republic vs Attorney General and Anor Ex Parte James Alfred Koroso and Republic v Retirement Benefits Appeals Tribunal Ex parte Heritage A.I.I. Insurance Company Limited Benefits Scheme [2017] eKLR. Also the decision in Uhuru Highway Development Ltd vs Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhal Pattni for the dicta that the res judicata principle ensures that litigation must come to an end.
7. On discharge of evidential burden, the Petitioners rely on the decision in Sarah Kanini Thigunku v Elizabeth Njuki Thigunku [2016] eKLR. The Petitioners conclude their submissions by invoking Article 159 (2) (d) of the *Constitution* of Kenya 2010 and submits that the Court is inter alia bound to deliver substantive justice rather than technical and procedural justice.
8. The Objectors submissions are dated 25th September 2024. The Objection is competent as it raises the following issues; the Petition is defective as the sureties are beneficiaries and the Petition failed to disclose all the assets and beneficiaries of the estate.
9. The Objectors frame the following as the issues for determination with regard to the Estate of the deceased.
 - a. Whether the Objection offends Section 29 of the *Law of Succession Act* and if not whether the application is merited
 - b. Whether the preliminary objection dated 10th January 2024 raises pure points of law.
 - c. Whether the objection under Rule 17 probate and administration is res judicata.
10. The thrust of the response is that the preliminary objection is not based on a point of law but on factual points that are contested; Were the 1st, 2nd and 6th Objectors spouses and dependants of the deceased. Were the 3rd, 4th and 5th children or dependants of the deceased. It is submitted that the preliminary objection falls short of the principles set out in the celebrated decision of Mukisa Biscuit Manufacturing Co. Ltd vs Westend Distributors Ltd (1969) EA 696.



11. The Objectors contend that the issues for determination in the succession cause are distinct from those that were at play in Eldama Ravine Children’s Case No. E049 of 2021, as the issue for determination herein is dependency which is not hinged on either a formal marriage or biological parentage. In any event the challenge to the entitlement to provision by the 1st, 2nd, 3rd and 6th Objectors is raised on points of fact which can only be established by calling of evidence and rebuttal. The principle of res judicata does not apply to their claim.

Analysis and Determination

12. Having considered the pleadings and rival submissions I discern the following to be the issues for determination-
 - a. Whether the Objection as framed is res Judicata?
 - b. Whether the Objection is incurably defective?
13. As to whether or not the Objection is res judicata, the preliminary objection relies on the proceedings in Eldama Ravine Children’s Case No. 49 of 2021, which it is conceded was withdrawn upon production of DNA tests that showed the deceased was not the biological father of the 4th and 5th Objectors. After this the Court discharged the injunction stopping the burial. The record is clear that the 4th and 5th Objector opted not to proceed with the matter after these results were presented in Court. The withdrawal was triggered by these results. The issue of paternity has been resolved and not in their favour.
14. It would be an abuse of court process if the 4th and 5th Objectors were allowed to litigate on this particular issue. Their claim herein however is that the deceased provided for them and therefore they are dependants. It is also contended that the 1st Objector was dependent upon the deceased.
15. The 2nd, 3rd and 6th Objectors claim that they ‘were recognized as spouses’ and provided for as such by the deceased. Evidently the Preliminary Objection is grounded on a misapprehension of the claim by the objectors and for this reason it must fail.
16. As stated earlier the preliminary objection was presented before the Registrar could issue directions as required under rule 17(5) of the Probate and Administration Rules. It is not clear therefore if the Objectors intend to file Answer to Petition and Cross Petition.
17. The law governing objections is set out in Sections 67 and 68 of the [Law of Succession Act](#) and rule 17 of the Probate and Administration Rules. Essentially, the Objection is filed in response to notice being published in the Gazette giving notice of the Petition and inviting Objections.
18. In the instant case, the cause is yet to be gazetted. The Objection is therefore premature. That notwithstanding I have carefully read the Objection, the substratum of the Objection is that the objectors have not been recognized and for this reason they are apprehensive that they will not be provided for. They are concerned that the interests of their respective ‘houses’ will not be catered for.
19. It is not the case of the Objectors, they have not stated so, that the Petition as presented offends Section 66 of the [Law of Succession Act](#). Their interest will be catered for if they are provided for by the Estate, once they establish their interest.
20. Article 159 (b) and (d) of the [Constitution](#) of Kenya 2010, require that in exercising judicial authority courts ensure inter alia that (1) Justice is not delayed and (2) justice is administered without undue regard to procedural technicalities. Parties approach courts for a resolution of the legal issues that clarify



their entitlements. It is the duty of the Court to ensure that a party with a defensible right is heard expeditiously and a pronouncement made on their right.

21. The legal hurdles here is that the matter is yet to be gazetted and therefore the objection will be incurably defective even if I were to revert it to the Registrar to issue directions as provide for under rule 17 of the Probate and Administration rules. The fastest route to the resolution of this dispute is for the Petitioners to proceed to have the Petition gazetted, have a grant issue and then file a summons for confirmation of grant.
22. If the Objectors are not in agreement with the mode of distribution they will file affidavits of protest. For this reason, I make the following orders
 - a. The Preliminary Objection is dismissed and the Objection to Making of Grant is struck out
 - b. The Petitioners shall Petition for full grant within 60 days. Mention before the Deputy Registrar on 14th January 2025 to confirm the matter is ready for gazettelement and to take further directions.
 - c. There shall be no application allowed herein save for the summons for confirmation to be filed by the Petitioners at the opportune moment as provided for under Section 71 of the [Law of Succession Act](#). The Objectors will be served with the Summons for Confirmation of Grant so filed.
 - d. Each party will bear their own costs

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024.

P M NYAUNDI

JUDGE

In the Presence of

Fardosa Court Assistant

Ratemo for the Petitioners

Nyagaka for the Respondents

