



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.351 OF 2009

IN THE MATTER OF THE ESTATE OF M'MWENGWA MUTUERANDU-DECEASED

VIRGINIA WANJA JOSEPH.....OBJECTOR/APPLICANT

-VERSUS-

FREDRICK KIOGORA.....PETITIONER/RESPONDENT

RULING

1. A Notice of Preliminary Objection dated 21/01/2021 was taken out by Fredrick Kiogora, the petitioner/respondent herein, on two pronged grounds that; the applicant's application dated 23/01/2019 is *res judicata* as the same had previously been determined through a consent dated 22/06/2015 and that the applicant lacks the *locus standi* to bring the application as she is not a beneficiary to the deceased.
2. The court on 14/06/2021 heard oral submissions from Mr. Ashaba for the respondent and Miss Muriithi for the applicant. Mr. Ashaba submitted that an application similar to the one dated 23/01/2019 was filed but the deceased family agreed to let the respondent proceed with distribution. On 23/7/2015, a consent dated 22/06/2015 was filed withdrawing the summons dated 28/03/2011 and the same was adopted by the court. According to him, the applicant herein lacks *locus standi* because she is not a beneficiary of the deceased estate and therefore her application should be dismissed.
3. Miss Muriithi on the other hand maintained that the applicant has locus standi by virtue of being a sister to the deceased. She went on to state that the earlier application had been filed by one Alexander Mutua in his own right and not on behalf of the applicant herein. She asserted that the applicant was not a party to the consent seeking to withdraw the earlier application. She urged the court to dismiss the Preliminary objection.

Determination

4. Before I go to the merits of the objection, parties must be reminded that a preliminary objection properly so called is argued on pure point of law based on fact asserted by one side in the pleadings or arising out of clear implication thereof, and given the assumption to be true and accurate^[1]. Where facts have to be ascertained by minute scrutiny, the point is disqualified as a preliminary objection and evidence must be led to prove it in the usual way. It is also important to reiterate the words of **Sir Charles Newbold, p**, in **Mukisha biscuits vs West End Distributors Ltd (1969) EA 696 at 701**, that *the improper raising of every point as a preliminary objection does nothing but to increase costs and obfuscate the issues and should stop as a bad practice*.
5. The doctrine of res judicata has been coded under Section 7 of the Civil Procedure Act 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.”

6. The basis for the doctrine being embedded in the Civil Procedure Act has the rationale of securing public confidence in the finality of decisions made by the courts. This doctrine affords litigants a breather from being vexed multiple times with a vicious circle of disputes which have been determined by a competent court. It is designed to protect litigants from time and resource consuming endless litigation. Without such control, litigants would abuse the judicial process by filing multiplicity of similar suits in different courts hoping to obtain favorable outcomes. For its rational and importance, I take the view that the doctrine is applicable in all disputes of civil nature including succession matters. This court despite being a probate court is still a civil court within the purview of the Civil Procedure Act. That position has remained the law as firmly innumerable established in **re Estate of M N J (Deceased) [2018] eKLR**, in **re Estate of Pauline Muthoni Nyaga (Deceased) [2019] eKLR** and in **Re Margaret Wahu Kimani (Deceased) [2008] eKLR**.

7. The three conditions which have to be satisfied for the court to apply this doctrine were enlisted in **Uhuru Highway Development Limited –v- Central Bank of Kenya & 2 Others(1996)eKLR** as:-

i) There is a former suit or proceeding in which the same parties in the subsequent suit had litigated.

ii) The issue in dispute was directly or substantially in issue in the former suit.

iii) That a court with competent jurisdiction had heard the matter and finally determined it

8. The record shows that the applicant herein was not involved in any way in the earlier application. It is also evident that consent dated 22/06/2015 upon which the P.O is premised was not executed by the applicant. The respondent's Preliminary objection has failed to meet any of the aforementioned conditions to warrant the grant of the orders sought. To that extent, I find that the first ground of the P.O based on section 7 of the Act should fail and I do dismiss it.

9. On the second ground, I have looked at the chief's letter dated 23/12/2010 where all the beneficiaries of the deceased estate are listed. According to that letter, the applicant is a sister to the deceased and therefore a beneficiary thereto. I have no doubt in my mind that she has the requisite locus standi to file the application. The allegation by the respondent that the applicant lacks locus standi, as she is not a beneficiary of the deceased, is therefore unfounded and baseless.

10. The upshot is that the preliminary objection is bereft of merit and it is hereby dismissed. I make no orders as to costs.

Dated, signed and delivered at Meru, Virtually, By MS Teams, this 18th day of June 2021

Patrick J O Otieno

Judge

In presence of -;

Mr. Ashaba for petitioner

Ms Muriithi for respondent

Patrick J O Otieno

Judge

[1] Mukisha biscuits vs West End Distributors Ltd (1969) EA 696 at 701,