REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 213 OF 2015

IN THE MATTER OF THE ESTATE OF JULIUS SAMSON MEME ALIAS JULIUS MEME ALIAS J.S.MEME ALIAS JULIUS MEME RUKARIA ALIAS JULIUS .S. MEME (DECEASED)

MARYWENDY NKANTHA THURA.....OBJECTOR/APPLICANT

VERSUS

MARGARET NYIRENDA MEME.....1ST RESPONDENT

MURIUKI MEME.....2ND RESPONDENT

RULING

1. What is for determination before this court is an application filed via summons dated 15th October, 2019 under certificate of urgency and brought pursuant to **section 3(2)** of the **Law of Succession Act**, **rule 63** and **73** of the **Probate and Administration Rules**, **section 4(2)** of the **Children Act**, **Articles 50**, **53(2)**, and **159** of the **Constitution** and all other enabling provisions of the law.

2. The application seeks that: the court reviews and or sets aside its orders issued on 1st October, 2019 that the Administrators/Respondents refile their application dated 27th June, 2018 for reasons that it had been fully heard and duly dismissed by this court on 14th May, 2019 and is therefore *res judicata*; issue an order that the parties canvass the main application and give an earlier hearing date for the application of nullification of grant dated 6th May, 2016 in this regard for the expeditious disposal of this suit.

3. The grounds on the face of the application are that: there is a mistake or error apparent on the face of the record; the court lacked jurisdiction to make the orders of 1st October, 2019 as they relate to a matter that had been heard and determined by a ruling delivered on 14th May, 2019 which has not been appealed against and the issue of DNA testing is *res judicata*.

4. The application is supported by an affidavit sworn by the Objector/Applicant on 15th October, 2019 in which she deposes that the error on the face of the record relates to a substantive point of law in that the court cannot make a decisions to correct or change its own orders. That the court had on 1st October, 2019 directed the Administrator to file an application seeking to compel the Objector to present her child for extraction of DNA samples whereas a similar application had been dismissed on merit by a ruling dated 14th May, 2019 a copy of which is on record.

5. The Objector deposed that if the error is not reviewed, it will perpetuate an injustice as it will be tantamount to re-opening a matter for a fresh hearing when it has already been heard and determined by this court. She averred that reopening concluded applications at this stage will be to the detriment and prejudice of the Objector. That in any case, the Administrators will suffer no prejudice if the orders for review are granted as they can still canvass their issues at the hearing of the application for nullification of the grants.

6. The Objector asked the court to review and set aside its orders of 1st October, 2019 and direct the parties to file their witness statements in preparation for the hearing of the pending application for Nullification of the Grant herein. She stated that the main application raises grave issues of fraud and if not heard and determined on priority basis, the whole estate will be depleted as a result of which she and her family will suffer great loss and damage.

7. On 5th December, 2019 Muriuki Meme the 2nd Administrator/ Respondent filed an undated affidavit sworn by himself in opposition to the application in which he deposed that he is the surviving Administrator of the estate and a son of the deceased herein. He asked the court to dismiss the instant application with costs and uphold its orders of 1st October, 2019 in the interest of justice.

8. It was the 2nd Administrator's statement that he and his siblings had instructed their Advocates on record, M/S Nyawira Milimu and Omotto Advocates to file an application seeking orders for DNA testing to enable them ascertain the true beneficiaries of their late father's

estate. The application was filed on 27th June, 2018 and opposed by the Objector via numerous affidavits and canvassed by way of written submissions and a ruling date scheduled for 14th May, 2019. He averred that on the said date, the court did not deliver a ruling and instead directed the parties to avail their witnesses whose affidavits were on record for cross-examination on 25th July, 2017.

9. The Administrator contended that he is a stranger to the ruling referred to by the Objector as there was never a ruling delivered in open court on 14th May, 2019. That the existence of the ruling was only brought to his attention when the matter was mentioned before the Deputy Registrar Hon. Munyolo who directed the parties to proceed with cross-examination of witnesses in accordance with the order of this court of 14th May, 2019.

10. The Administrator averred that there were no final orders issued on merit in the ruling of 14th May, 2019. He drew attention to paragraph 25 of the ruling which states thus:

> "*It is the view of this court that much of the Affidavit evidence adduced by the Applicant, the Objector and their respective witnesses ought to be subjected to appropriate challenge and testing through cross-examination prior to any final orders being issued.*"

11. The Administrator deposed that directions as to hearing regarding cross-examination of witnesses or whether to call for *viva voce* evidence are not a determination on an issue and cannot be taken to be *res judicata*. That the principle under **section 7** of the **Civil Procedure Act CAP 21 Laws of Kenya** on *res judicata* applies to determination of the substance of disputes between the parties on merit. He urged that the court has jurisdiction to call witnesses for cross-examination on its own motion if it is of the opinion that the evidence will help it reach a decision especially where there is conflicting affidavit evidence.

12. On 6th February, 2020 learned Counsel Mr. Nyaencha filed written submissions on behalf of the Objector/Applicant in which he asked the court to allow the application with costs.

13. Mr. Nyaencha submitted that the court had on 14th May, 2019 delivered a reasoned and detailed ruling in which it dismissed the Administrators' application dated 27th June, 2018 with costs. The Administrators had sought that the Objector's child be presented for DNA testing to enable the child fully benefit from the deceased's estate.

14. It was Mr. Nyaencha's statement that later on 1st October, 2019 the court directed the Administrator to refile the application for DNA testing which orders are the subject matter of this review application. Counsel contended that the orders do not in any way refer to the orders issued on 14th May, 2019 and as such there is no way of determining whether or not the orders of 14th May, 2019 were reviewed or rectified. That in the absence of such clarification, the application dated 27th June, 2018 if refiled, would be *res judicata* having already been dismissed by the court. He urged that the only way around this hurdle would be an appeal or a written application to review the ruling of 14th May, 2019. To buttress his argument, Counsel referred to the decisions in **Uhuru Highway Development Ltd vs. Central Bank of Kenya Ltd & Others, CA. No. 36 of 1996**; **E.T. vs. Attorney General & another [2012] eKLR**; **Njangu vs. Wambugu & another Nairobi HCCC No. 2340 of 1991 (unreported)** and **Independent and Boundaries Commission vs. Maina Kiai & 5 others [2017] eKLR**.

15. According to Mr. Nyaencha, the ruling of this court of 14th May, 2019 is a precedent and therefore binding to all subordinate courts and persuasive to the High Court reasons for which this court cannot recall, overturn or even overturn it.

16. In Mr. Nyaencha's view, this court lacks the jurisdiction to entertain the Respondent on issues upon which it has made a determination. Counsel asserted that jurisdiction is fundamental and goes to the core of any proceedings. That without jurisdiction, the proceedings have no legal foundation and ought to be declared null and void. He contended that since the ruling of 14th May, 2019 has not been challenged, this court is *functus officio* as far as a similar application as that of 27th June, 2018 is brought before it.

17. Mr. Nyaencha drew attention to **Order 21, rule 3(3)** of the **Civil Procedure Rules, 2010** and stated that the provision is straightforward that once a judgment is signed, it shall not afterwards be altered or added to save as provided by section 99 of the Act or review.

18. Mr. Nyaencha submitted that since the application herein is made on behalf of a minor, it ought to be determined on the basis of the best interest of the child which is paramount as espoused under **Article 53(2)** of the **Constitution**. That in any case, the Respondent has not shown what prejudice he will suffer or stand to suffer if the D.N.A test orders are not granted at this stage, when there are pending proceedings in which the issue of parentage will arise when identifying the beneficiaries of the estate.

19. On 18th February, 2020 M/s Omotto filed written submissions dated 17th February, 2020 on behalf of the Administrator/Respondent in which she asked the court to dismiss the application as filed and uphold its orders of 1st October, 2019.

20. M/s Omotto submitted that the key issue for determination herein is whether the subject matter of the application dated 27th June, 2018 was fully and finally heard and determined within the meaning of **section 7** of the **Civil Procedure Act**. Counsel contended that the principle under **section 7** on *res judicata* applies to determination of the substance of disputes between the parties on merit. To this end, Counsel referred to the decision in **MWK vs. AMW [2016] eKLR** in which Ngugi, J relied on the Court of Appeal decision in **Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97**.

21. It was M/s Omotto's contention that to invoke *res judicata*, there must be present the element of finality. That directions regarding whether to call for *viva voce* evidence or to cross-examine witnesses are not a determination on an issue and cannot therefore be deemed to be *res judicata*. Counsel cited the decision in **Republic vs. Ministry of Roads & another *Ex-parte* Vipingo Ridge Limited & another [2015] eKLR** where Muriithi, J observed that a matter is substantially in issue if it is of importance and value for the decisions of the main proceeding and stated thus:

> **"I, accordingly, find that the judge's order that "*there is no need to cross-examine the Respondent witness*" does not operate *res judicata* to the present motion for the cross-examination of the deponent. This court only need determine if there exists a basis for the order cross-examination."**

22. M/s Omotto contended that in any event, the court had unequivocally stated under paragraph 25 of its ruling of 14th May, 2019 that the Affidavit evidence presented by the parties ought to be subjected to appropriate challenge and testing through cross-examination prior to final orders being issued.

23. It was M/s Omotto's submission that if the orders of 1st October, 2019 are upheld, no loss, hardship or prejudice will be occasioned to the Objector or her child. Counsel asserted that DNA testing is crucial to determine or ascertain the true beneficiaries of the deceased's estate and the same should therefore be carried out in the interest of justice. She urged that the Administrator and his siblings filed the application for DNA testing in the pursuit of truth and if anything, it will only reaffirm the Objector's claim that her child is the daughter of the deceased and therefore a beneficiary of his estate.

24. I have considered the application, the affidavits filed in support of and in opposition thereof, the written submissions filed hereto and the authorities cited in support thereof. I commend the parties for filing comprehensive written submissions, which I have examined and analysed above.

25. It is evident from the arguments made by each of the parties that the issue that is the subject of this application is as a result of the ruling delivered by this court on 14th May, 2019. I note that contrary to the averments by the Administrators, the ruling was delivered in open court on 14th May, 2019 in the presence of the Advocates on record for both the Objector and the Administrators, being M/s Omoto and Mr. Ngugi respectively as shown on the record. The court did not however read through the whole ruling verbatim.

26. The ruling was in relation to an application filed via summons dated 27th June, 2019 in which the 2nd Administrator sought an order compelling the Objector to present her child at the Government Chemist at Kenyatta National Hospital or any other government certified hospital for extraction of D.N.A samples for sibling testing within ten (10) days of issuance of such order.

27. Whereas the Objector argues that the issue is *res judicata*, the record and the ruling of 14th May, 2019 demonstrate that the matter was not dismissed on merit. As per paragraph 25 of the ruling, the court found that the affidavit evidence that had been adduced by the respective parties needed to be subjected to testing through cross-examination prior to any final orders being issued. Further at paragraph 26, the court clearly stated that the orders sought could not be issued at that stage. This was because of the need to test the affidavit evidence through cross-examination.

28. I agree with the decision of Ngugi, J in **MWK vs. AMW [2016] eKLR** where the learned Judge cited the Court of Appeal decision in **Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97** and rendered himself thus:

> **"Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*."**

29. From the determination of the court in the ruling that is the subject of this application, it is clear that the court did not make substantive findings on the issue of DNA because the material before it was not sufficient. The basis for the order of 1st October, 2019 directing the Administrator to refile the application for DNA testing was therefore necessitated by the last sentence of the ruling which has been interpreted to have dismissed the entire application. A reading of the ruling holistically indicates that the parties were required to subject the affidavit evidence to cross-examination to enable the court to determine the issues raised in the application.

30. From the foregoing jurisprudence, it is clear that the issue of DNA testing cannot be said to be *res judicata* because it is yet to be heard and determined on merit. As such, the application filed via summons dated 15th October, 2019 is found to be unfounded and is hereby dismissed. It is so ordered.

DATED SIGNED AND DELIVERED VIA EMAIL AT NAIROBI THIS 8TH DAY OF APRIL, 2020.

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L. A. ACHODE

HIGH COURT JUDGE