



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

HIGH COURT CIVIL SUIT NO. 61 OF 2018

KOGI MWAURA WALLACE.....APPLICANT

VERSUS

MWAURA KOGI alias MWAURA WAMBUI.....1STDEFENDANT

KARANJA KOGI alias KARANJA WAMBUI.....2ND DEFENDANT

MWANGI KOGI alias MWANGI WAMBUI.....3RD DEFENDANT

RULING

1. The Defendant/Respondent filed the Notice of Preliminary objection dated 14.5.2019 to be plaintiff/Applicant's Originating summons dated 5.10.2018 for the following reasons:

(i) THAT the issues raised herein are Res judicata having been competently and conclusively adjudicated upon and addressed via the Judgment rendered by this Honourable Court in NAIROBI SUCCESSION CAUSE NO. 3002 'A' OF 2003.

(ii) THAT the application and the entire suit is fatally defective having been filed in violation of Mandatory Civil Procedure Rules intended to circumvent the cause of justice.

(iii) THAT the entire suit is therefore mischievous and an abuse of the Court Process aimed at defeating the Judgment rendered by this Honourable Court in Nairobi Succession Cause No. 3002 "A" of 2003.

(iv) THAT the entire Application and suit ought to be dismissed with costs to the Respondents.

2. The parties filed written submissive in the NOPO. The Defendant/Applicant submitted that Order 37 rule 1 is mandatory on who may take out originating summons and in respect to what matters.

3. The Defendant/Applicant further submitted that the Plaintiff has not in any way demonstrated locus standi and/or the capacity within which he has taken out the originating summons. Further that the originating summons seeks to have the defendant undergo a DNA test and for the Court to decide what to do with the said result and he urged the court to reject this invitation as it would amount to the court engaging on a frolic of its own.

4. The Defendant/Applicant also stated that the suit is Res-Judicata the issue of inheritance having been addressed vide a Judgment delivered by this court in Succession Cause No. 3002 "A" of 2003 in which the Court stated that the purpose of that litigation was the paternity issue.

5. It was further submitted by the defendant that the Plaintiff is seeking what can be addressed by a written Will and further that nothing prevents the Plaintiff's beneficiaries from pursuing DNA tests in case of his demise.

6. The defendant relied on the case of **MUKHISA BISCUIT MANUFACTURERS LTD VS WEST END DISTRIBUTORS LTD** where Law JA observed as follows:

"So far as I am aware 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 preliminary objection may dispose of the suit"

7. The defendant argued that the Plaintiff's Originating Summons is incompetent, frivolous and a waste of judicial time and has no legs to stand on and ought to be struck out with costs to the defendants.

8. The Plaintiff opposed the Preliminary Objection and submitted that the issue raised in Succession Cause No. 3002 'A' of 2003 is the paternity of the 1st, 2nd and 3rd defendants and that is what the Originating Summons seeks to demystify.

9. He further submitted that the said issue has not been raised, heard and finally determined by the Court. The Plaintiff submitted that the said issue of paternity has not been resolved but is moot. He said the Court only determined the issue of validity of the Will in Succession Cause No. 3002 'A' of 2003.

10. The Plaintiff submitted that a preliminary objection has to be on a pure point of law which must result in determination of the matter in finality but the matter before this Court requires viva voce evidence so that the matter can be resolved.

11. The Plaintiff relied on the case of **MWK VS. AMW [2017] eKLR** where Judge Ngugi said that RES JUDICATA only 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.

12. The Plaintiff further submitted that the issue of paternity was not raised in succession cause No. 3002 'A' of 2003 as the same was on the validity of the Will and urged the Court to dismiss the Preliminary Objection as it does not raise any pure points of law as the same delves into facts and will require adducing of evidence and documentary prove to determine the same.

13. I have perused the Judgment delivered in Succession Cause No. 3002 'A' of 2003 and I find that the issue for determination was not paternity but validity of the will. In determining the issue before Court, the Judge said at paragraph 18 of the Judgment as follows;

"I have noted that the applicants are not challenging the existence of the Will. They do not allege that no will was ever made by the deceased. To my mind they concede to the existence of the document that has been placed on record. Their case appears to me to be that the said document cannot possibly be valid as its maker lacked capacity to make it, or that even if she had capacity she was illiterate and therefore incapable of understanding what she was signing, or that the document did not properly dispose of the assets.

14. I therefore find that this suit is not resjudicata. I also find that the preliminary objection raised herein requires ventilation by way of adducing evidence.

15. In the case of **Transcend Media Group Limited vs Independent Electoral Boundaries and Electoral Commission (I.E.B.C.) [2015] eKLR** where the holding was that a court should never strike out a case if it has chances of success, if it can be injected with real life by an amendment, if it is plain, obvious, clear and beyond doubt and that the court ought not to engage in engaging in a minute and protracted examination of facts and documents before the matter proceeds for hearing.

16. I accordingly find that the preliminary objection herein cannot be determined on pure points of law and that the same requires to be canvassed by way of viva voce evidence.

17. I dismiss the Preliminary Objection dated 14th May 2019 and direct that the Originating Summons proceeds to full hearing.

18. Costs in the cause.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 1ST DAY OF NOVEMBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.