REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

SUCCESSION CAUSE NO. 937 OF 2017

IN THE MATTER OF THE ESTATE OF BETHUEL MAREKA GECAGA (DECEASED)

RULING

First Application

This Ruling relates to two applications: the. By an order of this court (Onyiego, J) the two applications are to be considered and determined together. Both Margaret and Udi are co-administrators of the estate of Bethuel Mareka Gecaga, deceased, together with Gathoni Dietz.

In her Summons dated 25th February 2020, Margaret cited various provisions of the law in support of her application. She seeks the following orders:

1. That the Instant matter be certified urgent and heard exparte in the first instance. (spent)

2. That there be an injunctive order restraining the release of the sum of Kshs. 55,987,559.65/- plus all accrued interest thereon to date held at Kenya Commercial Bank Ltd (fixed deposit Ref/a/c No. MM 1517600078) in the names of J.M Njenga & Co. Advocates and Hamilton Harrison & Mathews Advocates pending determination of the exact assets comprising the Deceased's Estate herein, the beneficiaries thereof, share of each of the said beneficiaries and/or the hearing and final distribution of the subject Estate.

3. That pending the distribution of the estate herein, a reasonable monthly monetary provision to be made from the Estate for the maintenance and upkeep of the deceased's widow/ applicant Margaret Gacigi Gecaga.

4. That pending the inter-parties hearing of the instant application there be an exparte interim order in terms of prayer 2 above.

5. That the costs of this application be borne out of the estate.

6. That the honorable court be at liberty to make such other or further orders as it may deem just and expedient in the circumstances.

She has supported the application with grounds found on the face of the application and in an Affidavit she swore on 25th February, 2020. My understanding of the grounds in support of the application is that Margaret is the wife of the late Dr. Bethuel Mareka Gecaga, the deceased herein, and co-administrator of his estate by virtue of the Grant issued on 4th September, 2019. She claims that she used to be sustained by funds from the estate of the deceased during the deceased's lifetime but that this has changed after the deceased had died; that her co-administrator, Udi, has taken up the said funds unlawfully; that after the deceased died, the said co-administrator stopped remitting whatever subsistence funds he was remitting to her as a result of which she has encountered difficulties in meeting basic needs including food and medicine. She argues that she is now 81 years old with poor health; that she is

not in any gainful employment or in any income generating. She stated that the estate has sufficient funds to cater for her monthly needs pending the distribution of the estate. She seeks to be provided with monthly payments from the estate on or before the 5th of each month.

Margaret further states that she filed a different lists of the properties comprising deceased's estate, among the properties are some shares held by the deceased in Gateway Insurance Co. Ltd and which were, at the time of filing the petition, the subject of **Nairobi CA 327/18 Margaret Gecaga vs Gateway Insurance Co. Ltd, Udi Mareka Gecaga & Another.** She states that the said appeal arose from **Nairobi High Court Case No. 86 of 2018 Herself vs Udi Mareka Gecaga and 2 others (initially HCCC 387/14)** instituted by her when the deceased was ailing; that she went to court to stop payment of **Kshs. 57,658,165/-** to Udi Mareka Gecaga's board of directors controlled by Quivest Ltd as the deceased was ailing, incapacitated and unaware of the said transfer; that to safeguard the said funds, it was agreed by consent that pending the hearing and determination of the said matter, the funds be held in a joint interest earning account in favour of both advocates J.M Njenga & Co Advocates and Hamilton Harrison & Mathews Advocates.

She states that High Court Misc. 387 of 2014 was on 16th April, 2018 dismissed on a technicality; that she moved on Appeal vide CA 327/18 but the same was also dismissed; that the transfer of shares from the deceased to Quinvest Ltd meant that the deceased transferred shares from himself to Quinvest Ltd where he held majority shares at the time of the said transfer as shown in the attached CR 12; that the funds are hence due to the estate by virtue of the deceased shareholding and that the transfer of the shares held by the deceased in Quinvest Ltd to any other entity thereafter can only be fraudulent.

She claims that the issue of the fate of the shares held by the deceased initially in Gateway Insurance Co. Ltd and later in Quinvest Ltd will have to be litigated on prior to confirmation of the grant herein thus it's critical that the funds be secured by issuance of the injunctive orders sought. That the money in issue belong to the deceased and no party can claim to suffer any prejudice if the injunctive orders are issued.

Udi Mareka Gecaga, the Respondent in the first application, filed a Replying Affidavit sworn on 18th March, 2020 in opposition of the Application dated 25th February, 2020. He deposed that he is the son of the deceased and the co-administrator to his estate; that the Applicant has not been truthful in the presentation of facts in that she has through 3 arbitrators challenged the transfer of 8 parcels of land by the deceased to Quinvest Ltd; that through HCCC 86 of 2018 (formerly civil division HCCC 387 of 2014) she sought to stop the release of proceeds from the sale of shares in Gateway to Quinvest Ltd but the same failed in the High Court and Court of Appeal; that the Applicant has had absolute control of the deceased's account number 00521711 at the Bank of Scotland through her daughter Ann Wanjiku Kamau who resides in the United Kingdom; that the Applicant has been receiving dividends from Nation Media Group Ltd; that the deceased ceased being a shareholder of Quinvest Ltd years back; that the **Kshs 57,658,168/-** held in the joint interest earning account were the proceeds of the sale of shares of Gateway Insurance Co. owned by Quinvest Limited; that HCCC 86 of 2018 was struck out by the court as the Applicant did not have capacity to bring the suit on behalf of the deceased having failed to demonstrate the deceased's mental incapacity and that she filed the appeal being Civil Appeal No. 327 of 2018 which was also dismissed for lack of locus standi as she was not appointed as manager or guardian *ad litem* before filing the suit.

The Respondent further stated that the fraud allegations have never been established by any court and that the Deed of transfer of Gateway Insurance Co. shares was executed by the deceased on 9th March, 2007 transparently and legally; that the order of injunction does not serve the ends of justice as the continued preservation of the funds is prejudicial to Quinvest Lt; that the company has numerous financial obligations to meet and it is only just and fair that the funds held on deposit be released.

Udi swore Further Affidavit clarifying that the deceased married Margaret on 31st August 2007 and not 31st March 2007 and that the shares in Gateway Insurance Co. Limited had been sold on the March 2007 before Margaret married the deceased. He further deposed that the estate of the deceased has liabilities amounting to Kshs 14,430,884.43 which ought to be settled before the estate is distributed and that removal of any assets at this stage may prejudice the other beneficiaries and is not in the best interest of all the parties.

He also filed Grounds of Opposition dated 17th March, 2020 stating that the court has no jurisdiction to deal with the assets of Quinvest Ltd also that order made on 27/2/2020 affects Quinvest Ltd which is not a party to these proceedings which points will be taken care of by way of preliminary objection. The property of limited liability companies can only be dealt with by the Commercial and Tax Division. That the court has no jurisdiction to make an order for reasonable monetary provision before the estate has been determined. That the funds were only held pending hearing and determination of HCCC 86 of 2018 and the Civil Appeal 327 of

2018, the matter has been determined and judgment rendered. That the interim ex-parte orders were obtained through misrepresentation or concealment of facts and that the application is misconceived, frivolous and an abuse of court process.

The Applicant filed a further affidavit dated 13th July, 2020 where she has deposed that she has read and understood the Grounds of Opposition and Replying Affidavit filed by the Respondent; that contrary to the allegations that she had filed multiple suits she had only filed 2 suits one being an appeal which was struck out on a technicality; that the deceased before his ill health had tried to stop the transfer of the Muthaiga properties and other assets by the Respondent but his efforts were frustrated by the Respondent; that the shares of a deceased in a limited liability company are assets which the family has power to distribute in a succession cause; that the allegations that only the Commercial and Tax Division has jurisdiction are baseless; that the allegations that she holds shares in the UK and that she has been receiving dividends are baseless and that the marriage in 2007 was a formalization after a long period of cohabitation. She further deposed that she is a beneficiary of the deceased's estate and has locus as she is the deceased's bona fide wife; that on where the monthly support will come from the estate has the Kshs 55,987,559.65 in a joint interest account, that the Kshs 105,000,000/-, which the Arbitration Tribunal said should be addressed in the succession cause and dividends received from various blue chip companies.

Second Application

The second application is dated 15th July, 2020 and is brought by Udi Mareka seeking orders that:

1. That the matter be certified urgent and heard exparte in the first instance.

2. The order given on 27th February, 2020 extended on 26th May, 2020 and on 29th June, 2020 restraining the release of Kshs. 57,658,165/-(funds) placed in a joint interest earning account at Kenya Commercial Bank Limited in the names of J.M. Njenga and company advocates and Hamilton Harrison & Mathews advocates be reviewed and set aside.

3. The cost of the application be provided for.

The Application is supported by grounds found on the face of it and in the Affidavit sworn by Udi Mareka Gecaga on 16th July, 2020. His case is that he is the son of the deceased and a co- administrator of the estate as well as the director of Quinvest limited; that he was aware that this court on 27th February, 2020 made an order restraining the release of Kshs. 57,658,165/- deposited in an interest earning account at Kenya Commercial Bank Limited in the names of J.M. Njenga and company advocates and Hamilton Harrison & Mathews advocates; that this was done pursuant to a consent order made on 4th June, 2015 pending hearing and determination **of High Court Civil Case number 86 of 2018(formerly 387 of 2014) Margaret Gacigi Gecaga v Gateway Insurance Company Ltd, Udi Gecaga and Quinvest Ltd.**

He states that the above case was struck out and the appeal being **Civil Appeal 327 of 2018** was also dismissed; that therefore the purpose for which the funds were held in the joint interest account has been spent; that there was no response to the application made in HCCC 86 of 2018 for the release of the funds and therefore the court went on to deliver its ruling on 27th May, 2020; that the ruling has however not been availed to them even after numerous requests; that the funds on deposit belong to Quinvest Ltd who was not made a party to these proceedings and was not heard before the interim orders were given affecting its property; that the order restraining the release of the funds is prejudicial to the applicant and it infringes on its right to property; that the funds belong to the applicant and do not form part of the estate; that the applicant has numerous financial obligations to meet and it is only just that the funds held on deposit be released to enable the company meet these obligations and that he is prejudiced by the continued stay of the funds in the joint account.

The application is opposed by Margaret Gacigi Gecaga. She filed grounds of opposition dated 15th July, 2020 to the effect that the application is vexatious and an abuse of court process and meant to pre-empt and frustrate the interparte hearing of the application dated 25th February, 2020; that the injunctive orders in force are interim in nature and have been extended from time to time on good grounds in the presence of both parties and there is nothing to review on interim orders; that the application is a duplication of issues to be canvassed in the application dated 25/2/2020 and is only meant to circumvent the inter partes hearing and the said application.

She states that the money sought to be released relate to shares held by the deceased in a limited liability company and the issue of

whether or not the estate has a stake in them, is an issue to be determined by the court upon hearing of both parties; that releasing the amount held via an interlocutory application could therefore be premature, unprocedural, unfair and highly prejudicial to the estate's beneficiaries; that the application has no basis and should be stayed or await interparties hearing of the application dated 25/2/2020 and that there is no urgency in the application as indeed what is urgent is the application dated 25/2/2020 including the prayer for allocation of monetary provision for the ailing and elderly widow Margaret Gacigi Gecaga.

A further Affidavit dated 11th September, 2020 was filed by Udi Mareka Gecaga on the consolidated applications in which he deposed that the applicant concealed material information when she moved the court exparte by her application dated 25/2/2020, the deceased was not a shareholder of Quinvest Ltd at the time of his demise and that the shareholders as at the year 2012 were Yadini Holdings Ltd with 499 shares and himself holding 1 share evidenced by his annexed records from the companies registry; that there was no finding by any court that there was fraudulent transfer of the deceased properties as alleged by the Applicant; that the attempt by the Applicant to introduce matters and issues that were determined by the arbitrators through the further affidavit sworn on 12th July, 2020 is an abuse of court process; that the applicant received dividends from Nation Media Group Ltd in the sum of Kshs. 953,040/- which belong to the estate and should account for them; that it is not correct that the deceased relied on handouts from his assets and income which were under his control and that the Applicant continues to receive her monthly pension from the government of Kenya and several rental incomes and thus is not entitled to a monthly provision.

On 6th October, 2020 Margaret Gacigi Gecaga filed a supplementary affidavit in response to the one filed by the Respondent on 11/9/2020 in which she stated that she did not conceal any evidence to the court as all had been laid bear in her previous affidavits. She stated that as per annexure **"MG7"** of her affidavit sworn on 25/2/2020 the deceased as at 25/8/2011 held 499 shares out of a total 500 shares in Quinvest Ltd and the same position is replicated in Udi Mareka's page 2 of annexure **"UMG4**" of the affidavit sworn on 11/9/2020; that the same is the current official records from the Registrar of companies. She stated that if the document at page 15 of annexure **"UMG4"** which is a purported share transfer form purportedly executed by the deceased on 30/9/2011 is anything to go by the same can only be an attempted forgery in a bid to transfer the shares in Quinvest Ltd. That in regards to the contents of paragraph 9, the issue before the arbitral tribunal was not the shareholding of Quinvest Ltd but rather the transfer of the Muthaiga properties from the deceased to Quinvest Ltd and not transfer of the deceased shares to any third parties. That contents of paragraph 19 are irrelevant as the Nation Newspaper shares were jointly held between herself and the deceased but that later her name was mysteriously removed. That the net effect of the document at page 15 of annexure **"UMG4"** would mean that the shares held by the deceased in Quinvest Ltd would have been transferred to a company Yadini Holdings Ltd solely or substantively owned by Udi Mareka Gecaga.

Submissions by Margaret Gacigi Gecaga

As directed by this court, the two applications under consideration were canvassed by way of written submissions. Both parties have filed their respective submissions. Margaret Gacigi Gecaga's submissions are dated 12th October, 2020. She has identified two issues for determination:

(a) Whether there exists any basis to issue the injunctive orders sought in regard to the Kshs. 55,987,559.65 as per prayer 2.

(b) Is Margaret entitled to monthly monetary provision from the estate for her maintenance and upkeep pending the distribution of the Estate as per the prayer 3.

In addressing her first issue she relied on the case of ***Giella -vs- Cassman Brown (1973) E.A 358*** which lays down the principles of interlocutory injunctions to the effect that an applicant seeking interlocutory injunction must establish a prima facie case; that they stand to suffer irreparable loss that cannot be compensated by an award of damages and that when the court is in doubt on the two aspects then the court need to be convenience on a balance of convenience.

She argued that her case discloses a prima facie case with high chances of success and reiterates the facts in her affidavits therein and the history of the Kshs. 55,987,559.65/-. She relied on the court of appeal decision in **CA 126 of 2016 in the matter of the Estate of Charles Karuga Koinange [2017] eKLR** that shares held in a limited liability company by the deceased person are assets which the deceased's family has power to distribute in the succession cause relating to such deceased's estate and that the Kshs. 55,987,559.65 and indeed the 499 shares held by the deceased in Quinvest Ltd form part of the deceased estate. That allowing the release of the said money at this stage to Quinvest Ltd as sought in the application dated 15/7/2020 would be premature, unlawful and irregular and would amount to intermeddling with the estate.

The said application dated 15/7/2020 the alleged applicant is Quinvest Ltd in as much as deponed in the supporting affidavit and who also doubles as a co-administrator of the estate and contends that he is acting on behalf of Quinvest Ltd,

It is argued that there is no mandate exhibited to show that Udi Gecaga is authorized to plead on behalf of the Quinvest Ltd and that the money belongs to shareholders who include the deceased estate; that the company does not act by itself but through its Board of Directors as mandated by the shareholders; that Udi Mareka Gecaga therefore lacks any locus standi to plead on behalf of Quinvest Ltd.

On the issue of substantial loss she submitted that Quinvest Ltd including its bank account(s), functions, assets and operations are currently under the sole control of the Respondent and releasing the money at the moment will be as good as gifting the money to him as he will use it at his own discretion. She also submitted that Quinvest Ltd is not a party to this suit and therefore no order should have been made adverse to it. She relied on the case of **Estate of Charles Karuga Koinange[2017] eKLR**(Supra) and submitted that guided by the decision in this case this court should hold that it has jurisdiction to deal with the dispute regarding the shares held by the deceased in Quinvest Ltd and also that the said company is not a necessary party in the instant proceedings.

She argued that the argument by Udi that the provisions of Articles 40 and 159(2) of the constitution have been breached is baseless because through an act of fraud the same litigant wants to enrich himself by claiming that the deceased had transferred his shares from Quinvest Ltd to a company owned by him.

On balance of convenience she submitted that though the applicant has demonstrated that she has a prima facie case and that the estate of the deceased stands to lose substantial loss if funds in issue are released at this stage, the balance of convenience tilts in favour of the Applicant in the first application in granting the injunctive orders sought. She argued that the money is still held by both law firms on record in an interest earning account and there is pending an application for confirmation of the grant thus it won't be long before the matter is brought to a conclusion and that the amount in issue is quite colossal and recovering it back will be near impossible and an endless process.

On her second issue she argued that she is 82 years old and failing in health as shown by her medical records and that she is not in any gainful employment nor is she involved in any income generating activity. She argued that there is evidence that even before the deceased died, they were being maintained by funds from the deceased's assets. The Respondent opposed the prayer on the basis that the law does not provide for such but the court has unfettered powers donated to it by the provisions of Section 47 of the Act and Rule 73 of the probate and administration rules. The allegations that she has other sources of income have not been supported by any form of evidence and the law is crystal clear that he who alleges must prove. That she owns no income generating assets and as the deceased spouse, she is entitled to subsistence from the estate.

Udi Mareka Gecaga in his submissions dated 12th October, 2020 asked the court to consider and take into account the various affidavits filed in support of his application dated 15th July 2020. On that point he relied on the case of **Kitui County Council and Mwakini Ranching C. Ltd Civil Appeal (application) No. 221 of 1997**, where the court held that a party is entitled to rely on affidavits on record and that the court is also bound to look at all the affidavits and pleadings. He argued that Quinvest Ltd is not a party to these proceedings and that the order made on 27/2/2020 was made without giving the Applicant a chance to be heard and that the orders adversely affect the company. He submitted that Quinvest Ltd was condemned unheard which is against the rules of natural justice.

He relied on the court of Appeal decision in J***.M.K v M.W.M & Another (2015) eKLR*** where it was held that:

"The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by the decision before the decision is made. The court approved Onyango v. Attorney General (1986-1989) EA 456, where Nyarangi JA asserted:

'I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly, 'And further held that a decision would otherwise have been right if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.''

He also cited the case of ***Kiai Mbaki & Others v Macharia & Another (2005)*** eKLR where the Court of Appeal held that:

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.''

He submitted that the issue of ownership of the sum of kshs 57,658,165/- is *res judicata* the same having been settled by various courts as follows:

1. The Court of Appeal in Nairobi Civil Appeal 327 of 2018 Margaret Gacigi Gecaga v Gateway Insurance Company Ltd, Udi Gecaga and Quinvest Ltd. The court expressed itself and proclaimed that Mrs Gecaga had no claim in the shares.

2. In her ruling on 27/5/2020 Kasango J. in **HCCC 86 of 2018 Margaret Gacigi Gecaga v Gateway Insurance Company Ltd, Udi Gecaga and Quinvest Ltd** pronounced herself and directed that the funds held in a joint interest earning account be released to Quinvest Ltd.

He quoted Explanation 4 at Section 7 of the Civil Procedure Act which reads

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.''

He relied on the case of **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others(1996) eKLR** where the Court of Appeal held that***:***

"The plea of res judicata applies, except in special circumstances, not only on points upon which court was actually required by parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.''

He further submits that the re-litigation of the issue of ownership of the funds held in deposit already determined in another forum is an abuse of the court process. He further cited **Dedani v Manji & 3others (2004) eKLR** where the court held that:

"There is an inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the process, or put an end to it.''

It was his argument that the affidavit of the company secretary Elias Muthondu sworn on 12th October, 2020 makes the position clear and having regard to sections 93 and 105 of the companies Act settles who are the shareholders of Quinvest Ltd.

In respect to the Application dated 25th February, 2020, he submitted that the applicant is not entitled to the injunctive orders sought; that on a preliminary point Mrs. Gecaga is guilty of non-disclosure and misrepresentation of material facts including that the funds belong to the estate and that the court lacks jurisdiction to deal with the funds as they are assets of a limited liability company. In support of this he relied on **Bahadurali Ebrahim Shanji v Al Noor Jamal & 2 others (1998) eKLR** where the Court of Appeal stated, ***"that a person making exparte application is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if not cannot obtain any advantage from the proceedings, and will be deprived of any advantage he may have already obtained."***

He also relied on the case of **Eastland Hotel Limited v Wafula Simiyu & Co. Advocates [2015] eKLR** where the court ordered the release of the funds held in an account pending the hearing and determination of the appeal. He argued that it was unjust and unequitable for an order to issue restraining the release of the funds the condition for which they were deposited having been met.

He argued that the Applicant does not meet the test for injunction set out in **Geilla v Cassman Brown [1973] EA 358** (Supra) as she has not met the standards set out in this case and cited **Nguruman Limited v Bonde Nielsen & 2 others [2014] eKLR**, where it was stated that "***these are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above 3 conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."***

It was submitted that the Applicant has not demonstrated a prima facie case because the funds in issue do not form part of the estate of the deceased as demonstrated herein; that she will not suffer irreparable loss because of the same reasoning, that money does not belong to the estate and that the balance of convenience lies in not allowing the application dated 25th February 2020 because the order of injunction does not serve the ends of justice.

On the issue of reasonable monthly provision, it is argued that the Applicant has not met the test for grant of reasonable monthly provision pending determination and distribution of assets and that she has not placed any evidence before court to show what assets the monthly provision she seeks ought to be paid. He argued that the court has the discretion to order some disbursements pending distribution of assets but the same is to be exercised cautiously with regard to particular circumstances. On that point he relied on the case of **Re the Estate of Simon Ndungu Njoroge (Deceased) [2005] eKLR** where it was stated that:

"Where the court has to intervene to order some interim disbursement of an estate's funds pending distribution of the estate amongst the beneficiaries, it will only do so to meet some basic necessities of a beneficiary or to alleviate excessive suffering of such a person but not otherwise".

Analysis and Determination

All the material placed before me has been analyzed and considered. The issues that pop up in these two applications and which I have condensed into tfour are the following:

1. Whether Kshs 57,658,165 forms the estate or part of the estate of the deceased.

2. Whether the application dated 25th February 2020 raises the issue of res judicata.

3. Whether the Applicant in the above application deserves injunctive orders sought.

4. Whether the Applicant is entitled to monthly monetary provisions from the estate for her maintenance.

In **re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR**, the court stated that:

"The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation." (emphasis mine).

The above reasoning brings to mind the meaning of "**free property**" as defined under Section 3 of the Law of Succession Act. It is defined as follows:

"free property", in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death".

As of necessity, the issue at hand is whether Kshs. 57,658,165/- was property of which the deceased herein was legally competent freely to dispose during his lifetime and which interest has not terminated upon his death as to form property of his estate" This is the issue that is central to the applications before me. It is an issue that is yet to be resolved. Margaret argues that the deceased was the majority shareholder of Quinvest Ltd therefore the latter forms part of the estate of the deceased. The Respondent in his argument states that Quinvest Ltd is a third party and that the deceased transferred his shares to the said company and therefore ceased to be a shareholder of the company.

The history of this matter is that Margaret did sue Gateway Insurance Co. Ltd, Udi Mareka Gecaga and Quinvest Ltd in Civil Suit No. 387 of 2014, claiming among others fraud and forgery in transferring shares from the deceased to Quinvest Ltd and seeking, *inter alia*, a mandatory order compelling the reverse of the transfer of the shares. That suit was filed by Margaret on her own behalf

and as next friend to the deceased, then alive. That suit was struck out on the ground that Margaret had no legal capacity to bring the suit on behalf of her husband. She moved to the Court of Appeal which rendered itself as follows:

"We find no fault in the manner the learned Judge exercised his discretion, he came to the correct conclusion that the appellant lacked legal capacity to file suit on behalf of Dr. Gecaga and that she had failed to demonstrate any independent interest or right over the shares. In the event there was no need of sustaining the suit merely to subject the respondents to unnecessary expense and inconvenience of defending it.

Following the striking out of the suit, Udi Mareka Gecaga and Quinvest Ltd moved the court through a Notice of Motion dated 16th March 2020, to have the sum of Kshs 57,658,165/= held in joint account of J.M Njenga & Company Advocates and Hamilton Harrison & Mathews Advocates pursuant to a consent order dated 4th June 2015 released to the latter advocates. The court seized with handling that Notice of Motion granted orders, *inter alia*, as follows:

"The sum of Kshs 57,658,165.00 in the joint interest earning account at Kenya Commercial Bank Limited in the names of J.M Njenga & Company Advocates and Hamilton Harrison & Mathews Advocates pursuant to the order of 4th June 2015 be released to Hamilton Harrison & Mathews Advocates together with the interest accrued therein."

This court cannot make a different determination on this matter. My reading and understanding of the material presented before this court shows that the issue as to whether these funds form part of the property of the estate herein is yet to be determined if Margaret prefers an appeal. Currently, there is no indication that Margaret took this matter on appeal. The determination of the ownership of these funds falls in a different jurisdiction not this court sitting as probate court. These funds, as far as I can state, do not form free property of the estate of the deceased. To grant an order restraining the release of these funds would lead to a contradiction of the decision of another sister court of equal jurisdiction. I have noted that the order to release the funds was issued on 27th May 2020 while the one granting interim injunction is dated 27th February 2020.

On the issue of res judicata, the Respondent claims that the issue of ownership of the sum of Kshs. 57,658,165/- had been settled in HCCC 86 of 2018 and Nairobi Civil Appeal 327 of 2018. Section 7 of the Civil Procedure Act provides that:

"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."

The doctrine of *res judicata* as stated in the said Section has been explained in the recent case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR),** the Court of Appeal held that:

"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive 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."

The Court explained the role of the doctrine thus:

"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

In our instant case the Application dated 25th February, 2020 was brought seeking the orders therein. Prayer 2 seeks an order of injunction restraining the release of the funds held in an interest earning joint account in the names of the advocates named therein. This was the subject matter in the Notice of Motion dated 16th March 2020 which was decided in favour of Udi Mareka Gecaga and Quinvest Ltd. The court ordered the release of the funds in issue. This decision renders the matter before me, touching on the issue of the same funds, *res judicata*. There in nothing to injunct. There is an order already granted releasing the said funds. Parties therefore ought to litigate this matter in a different forum with the jurisdiction to try the matter. It is only after a court of competent jurisdiction has pronounced itself that the funds form part of the estate of the deceased can the matter be litigated in a Probate Court.

The determination above settles issues 1, 2, and 4. However, prayers 3, 5 and 6 of the Summons dated 25th February 2020 are still open for litigation before me.

On the issue of reasonable monthly monetary provision from the estate for the maintenance and upkeep of Margaret, I have considered the matter. That she is aged 82 years old and in failing health and that she is not in any gainful employment nor is she involved in any income generating activity has not been disputed. However, Udi has submitted that Margaret received dividends from Nation Media Group and that she has absolute control of deceased's account held at Account No. 00521711 at Bank of Scotland through her daughter. I am also aware that Margaret has attached her medical records showing her failing health. The respondent in turn challenged these allegations stating that she is a person of means and even listing a schedule showing the assets for her exclusive benefit. He also states that the estate of the deceased has not been determined and hence unclear where the funds proposed to be used will be drawn from. It is not in contention that the Applicant Margaret Gacigi Gecaga is the wife to the deceased. Under section 29 of the Law of Succession Act, the wife of the deceased is recognized as a dependent. Section 27 of the law of succession Act provides that: In making provision for a dependent the court shall have complete discretion to order a specific share of the estate to be given to the dependent, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

I have considered this matter. It is true that Margaret has not placed evidence in court to challenge the allegation that she has means to take care of herself pending determination of this cause. She has not disputed that she has absolute control over the account held at Bank of Scotland and also receives dividends from Nation Media Group Ltd. I am therefore not persuaded to make a ruling in favour of Margaret in respect to prayer No. 3.

The outcome of this ruling is that the Summons dated 25th February, 2020 brought by Margaret Gacigi Gecaga fails and is hereby dismissed. The Summons dated 15th July, 2020 brought by Udi Mareka Gecaga succeeds in that the order issued on 27th February, 2020, extended on 26th May, 2020 and on 29th June, 2020 restraining the release of Kshs. 57,658,165/-(funds) placed in a joint interest earning account at Kenya Commercial Bank Limited in the names of J.M. Njenga and company advocates and Hamilton Harrison & Mathews advocates is hereby set aside. Each party shall bear own costs in both applications. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DECEMBER 2021.

S. N. MUTUKU

JUDGE