



**In re Estate of Julia Waithira Karatu (Deceased) (Succession Cause
1372 of 2013) [2023] KEHC 402 (KLR) (Family) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 402 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1372 OF 2013
MA ODERO, J
JANUARY 27, 2023
IN THE MATTER OF THE ESTATE OF JULIA WAITHIRAE KARATU (DECEASED
BETWEEN
MARGARET NJERI KAMAU 1ST APPLICANT
MARY WANGARI KIMEMIA 2ND APPLICANT
AND
JOSEPH NGANGA MURURI RESPONDENT**

RULING

1. Before this court for determination is the notice of preliminary objection dated July 21, 2022 by which the applicant respondent/administrator sought to have the notice of motion dated August 8, 2022 struck out on grounds that this court is functus officio.
2. The matter was canvassed by way of written submissions. The administrator filed the written submissions dated September 20, 2022 whilst the applicants relied upon their submissions dated August 25, 2022.

Background

3. This Succession Cause revolves around the estate of Julia Waithira Karatu (hereinafter ‘the Deceased’) who died intestate on May 12, 1999. At the time of her death, the deceased was unmarried and had no children.
4. Vide Succession Cause No 3098 of 2007, the applicants herein presented themselves as cousins to the deceased. They relied on a letter dated May 17, 2007 written by one Ephantus M. Gichimu, Ag. Chief of Kangari Location in which letter the applicants were described as the ‘rightful heirs’ to succeed the



- deceased. On the basis of this letter the applicants on July 30, 2012 petitioned the court for grant of letters of administration to the estate of the deceased. A grant was duly issued to the two on March 6, 2008 which grant was confirmed on July 30, 2012.
5. Upon being issued with the confirmed grant the applicants agreed that the sole asset of the deceaseds estate being the parcel of land known as L.R. Loc. 2/Kangari/2886 would be divided into two whereby Mary Wangari Kimemia (1st applicant) would get 0.4 hectares and Margaret Njeri Kamau (2nd applicant) would get 0.2 hectares. The said agreement on the mode of distribution of the estate was effected and the sub-divisions were carried out.
 6. On May 30, 2016 the respondent Joseph Ng'ang'a who was a nephew to the deceased filed a summons seeking the revocation of the grant which had been issued to the applicants. By her ruling dated June 11, 2020 Hon Lady Justice Ali-Aroni revoked the grant that had earlier been issued to the applicants and directed the land registrar Murang'a to cancel subdivisions Loc. 2/Kangari/4784 and Loc 2/Kangari/4785 and to restore the original Title being Loc. 2/Kangari 2886 to the name of the original owner Julia Waithira Karatu (the deceased).
 7. The respondent Joseph ng'ang'a mururi then petitioned for the grant of letters of administration to the estate of the deceased vide this cause being Succession Cause No 1372 of 2013. The respondent was appointed as administrator of the deceased's estate in Succession Cause No 1372 of 2013.
 8. The respondent then filed a summons dated July 21, 2020 seeking to have the grant which had been issued to himself on July 30, 2013 confirmed. The 1st applicant filed an undated affidavit of protest claiming to be creditors to the estate of the deceased. The applicants averred that the respondent had twice invaded the suit land with hired gangs and had uprooted their tea and destroyed property all in an attempt to evict them from the suit land. The applicants then filed an application dated December 10, 2020 seeking interim interlocutory orders to restrain the respondent from interfering with their possession, use and occupation of the suit land pending the hearing and determination of the suit.
 9. That application was heard and was dismissed vide a ruling delivered on June 11, 2021.
 10. The applicants then filed a notice of motion dated August 8, 2022 seeking the following orders:-
 - “ 1. That this application be certified urgent and be heard ex-parte in the first instance for reasons of urgency.
 2. That the honourable court be pleased to stay this all the proceedings in Succession Cause No 3098 of 2007 and Succession Cause No 1372 of 2013 pending the hearing and determination of ELC (OS)/E007/2022 Margaret Njeri Kamau & Mary Wangari Kimemia versus Joseph Nganga Muiruri in Muranga Environment and Land Court.
 3. That the status quo pertaining to Loc 2/Kangari/2886 be maintained.
 4. That costs of this application be provided for.”
 11. Before that application could be heard the respondent filed this notice of preliminary objection seeking to have the application dated August 8, 2022 struck out on grounds that this court was functus officio. It was submitted that the status of the applicants in respect of this Succession Cause had already been determined by Hon Justice Ali-Aroni her ruling delivered on June 11, 2020.



12. The applicants have filed in the Environment and Land Court Case No 7 of 2022 regarding their claim to the suit land which matter is still pending. They now seek a stay of this succession cause pending a decision from the ELC.

Analysis and Determination

13. I have carefully considered this notice of preliminary objection as well as the written submissions filed by both parties.
14. The definition of what constitutes a preliminary objection was provided in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd – v – West End Distributors Ltd 1969 E.A 696* where it was held 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 the pleadings and which objection point may dispose the suit”.

15. Similarly in the case of *Oraro – v – Mbaja* [2005] KLR Hon Justice Ojwang (as he then was) stated as follows:-

“A preliminary objection is in nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop. The principle is abundantly clear. The “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.” (own emphasis)

16. The issues which have been raised by the Preliminary Objection being issues of the court being ‘*functus officio*’ are in my view issues which upon determination may dispose of the application. I therefore find that the preliminary objection dated September 17, 2020 raises pure points of law and is a proper preliminary objection.
17. The applicants position is that this court having found that the applicants were not beneficiaries to the estate of the deceased has now been rendered ‘*functus officio*’. The principle of *functus officio* arises where a final decision has been made in a matter which decision can only be challenged through an appeal.



18. The Supreme Court of Kenya in the case of *Raila Odinga – v – Icbc & 3 others* Petition No 5 of 2013 cited “the Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law” by Daniel Malan Pretorious as follows: -

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

19. Similarly in *Telcom Kenya Ltd v John Ochanda* [2014] eKLR the court held that -

“Functus Officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

20. I have carefully perused the application dated August 8, 2022. The Applicants have filed that application claiming to be the rightful owners of the property known as Loc 2/Kangari/2886. The issue of the ownership of that parcel of land was not determined by the court in this succession cause. What the court did determine is that the Applicants were not beneficiaries of the estate of the deceased. These are two different issues.

21. No final decision on the applicants claim to ownership of the suit land has been rendered by the High Court thus, the principal of ‘functus officio’ is not applicable.

22. Finally, I find no merit in this preliminary objection. The same is dismissed. Each party to bear its own costs.

DATED IN NAIROBI THIS 27TH DAY OF JANUARY, 2023.

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MAUREEN A. ODERO

JUDGE

