



In re Estate of Kiragu Kamau Stanley John (Deceased) (Succession Cause E1566 of 2021) [2023] KEHC 2200 (KLR) (Family) (17 February 2023) (Ruling)

Neutral citation: [2023] KEHC 2200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E1566 OF 2021
MA ODERO, J
FEBRUARY 17, 2023
IN THE MATTER OF THE ESTATE OF KIRAGU KAMAU STANLEY JOHN (DECEASED)**

BETWEEN

DAPHNE KAGWIRA GITONGA PETITIONER

AND

ERIC BOBBY MAINA OBJECTOR

AND

JEAN EMMANUEL MARLON INTERESTED PARTY

RULING

1. Before this Court for determination is the Notice of Preliminary objection dated 2nd November 2022 filed by the objector Eric Bobby Maina.
2. The Applicant/Interested party Jean Emmanuel Marion opposed the Preliminary Objection through the Response dated 16th November 2022.
3. The matter was canvassed by way of written submissions. The Objector filed the written submissions dated 16th November 2022 whilst the Applicant relied upon his written submissions dated 16th November 2022.

Background

4. This succession cause relates to the estate of the late Kiragu Kamau Stanley John (hereinafter the ‘the Deceased’) who died intestate at the Nairobi Hospital on 30th July 2021. A copy of the Death



Certificate Serial No. 1222149 is annexed to the Affidavit dated 9th September 2021 in support of the Petition for Grant of letter of Administration Intestate.

5. Following the demise of the Deceased his son Eric Bobby Maina (the Objector Herein) sought and obtained Grant of letters of Administration Intestate which were issued on 4th February 2022. The said Grant was duly confirmed on 11th May 2022, rectified on 1st August 2022 and further rectified on 17th August 2022.
6. One of the properties owned by the Deceased was Sanjo Karen Suites. The Interested Party claimed that he had entered into a lease agreement with the Deceased in respect of Sanjo Karen Suites for a period of three (3) years for a consideration of Kshs.400,000 per month. The interested Party further claimed that he had made an advance payment of Kshs.14,320,000 to cover the entire duration of the lease.
7. The Interested Party states that following the death of the Deceased the Objector in October 2021 approached him with a demand for payment of rent. That the Objector further proceeded to obtain an Order in Civil Suit No. Misc E1465 of 2023 to levy distress for rent accrued.
8. The Interested party asserts that having paid rent in advance upto 1st May 2024 he is lawfully residing in the said Sanjo Karen Suites. He further asserts that the Objector has no legitimate claim on the said property until the current succession proceedings are concluded.
9. The Interested party complains that he Objector has occasioned chaos by harassing the staff working in the said property. That unless restrained the Objector will continue to interfere with the Interested Party's quiet possession of the property. The Interested party then filed in these proceedings a Notice of Motion dated 27th October 2020 seeking the following orders:-

“ a) Spent

- b) That pending the hearing and determination of this application inter-parties, a temporary order of injunction do issue restraining the Objector whether by themselves or their representatives, servants agents and/or assignees from harassing and/or interfering with the applicant's peaceful possession and occupation pertaining to Sanjo Karen Suites or otherwise intermeddling with the property of the deceased referenced.
- c) That pending interpartes hearing of this application, the Honourable Court be pleased to grant in interim orders for stay of the execution of the orders dated 21/10/2022 granted in Civil Suit No. MCC MISC/21465 OF 2022.
- d) That pending intepartes the court be pleased to grant an order compelling the Objector herein to return the interested party all goods removed by him or his representatives, servants, agents, and/or assignees from the Interested party's rented premises namely Sanjo Karen Suites
- e) That pending the hearing and determination of the petition, the court be pleased to grant a temporary order of injunction restraining the Objector herein whether by himself, his agents, employees and anyone acting on his authority from harassing and/or interfering with the applicant's peaceful possession and occupation pertaining to Sanjo Karen Suites or otherwise intermeddling with the property of the deceased reference.
- f) That this Honourable Court does grant such orders as it may deem fit.



- g) That costs of this application be provided for.”
10. Before the application could be heard the Objector filed the Notice of Preliminary Objection seeking to have the application dated 27th October 2022 struck out on the following grounds:-
- “ 1) That this court has no jurisdiction pursuant to Section 12 (1) of the Landlord and Tenants (Shops, Hotel and Catering Establishment Act) Cap 301 Laws of Kenya to entertain the dispute as the dispute alleged falls exclusively with the jurisdiction of the Business Premises Rent tribunal as established under Section II.
 - 2) That the alleged lease is a controlled tenancy under Section 2 of the Landlord and Tenants (Shops, Hotel and Catering Establishment Act) Cap 301 and the appropriate forum for the determination of the issues raised is the Business Premises Rent Tribunal.
 - 3) That the court has no original nor appellate jurisdiction to determine the issues raised by the applicant.
 - 4) That the applicant should file the application before the Business Premises Rent Tribunal and join issue with the Petitioner and the Objector and in which the Honourable Tribunal can give direction on issues relating to payment of rent.
 - 5) That the application as filed is fatally defective and as such cannot stand or be ventilated before this Honourable Court.”

Analysis and Determination

11. I have carefully considered the Preliminary Objection, the Response filed by the Interested Parties as well as the written submissions filed by both parties.
12. The only issue for determination is whether the Preliminary Objection has merit and should be allowed.
13. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd – Vs West End Distributors Ltd* [1969] EA where the court stated as follows:-

“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 a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.“.....A preliminary objection is in the 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.”



14. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court of Kenya stated as follows:-

“a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

15. Therefore in order for a preliminary objection to succeed the following tests must be satisfied.

- (i) The Preliminary Objection should raise a pure point of law.
- (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
- (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
- (iv) A valid Preliminary Objection ought if successful dispose of the entire suit.

16. The Objector has claimed that this court has no jurisdiction to hear and determine the application filed by the Interested Parties. It is trite that jurisdiction is central to any matter before a court. In *Owners of The Motor Vessel Lillian's' – Vs – Caltex Oil (kenya) Ltd* [1987] eKLR the court stated that:-

“Jurisdiction is everything without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction” [own emphasis].

17. I am satisfied that this is a genuine preliminary objection which warrants consideration by the court.

18. The dispute here revolves around a lease entered into by the Deceased and the Interested Party. The term “lease” is defined in Black Law Dictionary Tenth Edition as

“the granting of the possession and use of land buildings rooms to another in return for rent or other consideration”

Section 2 of the *Land act* 2012 defines a ‘lease’ as follows:-

“‘lease’ means the grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of his or her land, and includes the right so granted and the instrument of granting it, and also includes a sub lease but does not include an agreement for lease.....”

19. This court is sitting as a Probate Court. The primary duty of a Probate Court is to oversee and supervise the distribution of an estate of a deceased person to the genuine beneficiaries. In *the Estate of GKK (Deceased)* [2017] eKLR the court held that “The primary function of a Probate Court is distribution of the estate of a dead person.” It is not the business of this court to delve into lease agreements entered into by the parties nor is it the business of the Probate Court to resolve disputes pertaining to such lease agreements.

20. The law makes adequate provisions for the manner in which rent disputes or disputes over lease agreements are to be resolved. The forum for resolution is not the Probate Court.



21. The Interested party is not a party to this Succession Cause. He is not a beneficiary to the estate of the Deceased. The Interested Party was a tenant of the Deceased and is now a tenant of the estate following the demise of the Deceased. In Kenya where the rent payable falls below Kshs.2,500 then the [Rent Restriction Act](#) Cap 296 Laws of Kenya would be applicable. Where the lease covers a commercial property (which appears to be the case here) then the Landlord and Tenants (Shops, Hotel and Catering Establishments) Act Cap 301 Laws of Kenya would be applicable.
22. There exists a Business Premises Tribunal set up for the purpose of dealing with such disputes. The claims of the interested party cannot be canvassed in this Succession Cause. Moreover there is already in existence a Civil Case Misc No. 1465 of 2023 dealing with the same subject. By prayer (c) of his application interested party seeks to stay the orders issued in that case. The Interested Party cannot seek to stay orders given in a Civil Suit through an application filed in a Succession Cause. He must file an application for stay in the same Civil Suit. The dispute between the Objector and the Interested Party is Civil in nature. It does not belong in the Probate Court. The Interested Party must file his claim in the appropriate forum.
23. Based on the foregoing I find that this preliminary objection has merit. The same is allowed. The Notice of Motion dated 27th October 2023 is hereby struck out. Each parties to meet their own costs.

DATED IN NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

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MAUREEN A. ODERO

JUDGE

