



**In re Estate of John Gitau Muchunu (Deceased) (Succession Cause
1518 of 2000) [2023] KEHC 17444 (KLR) (Family) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 1518 OF 2000

MA ODERO, J

APRIL 28, 2023

IN THE MATTER OF THE ESTATE OF JOHN GITAU MUCHUNU (DECEASED)

BETWEEN

JANE MUTHONI GITHURU APPLICANT

AND

NOAH KIMANI GITAU 1ST RESPONDENT

HANNAH NJERI GITAU 2ND RESPONDENT

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated January 25, 2022 filed by the 1st Respondent Noah Kimani Gitau. The matter was canvassed by way of written submissions. The Protestors filed the written submissions dated July 28, 2022 whilst the 1st Respondent relied upon his written submissions dated March 25, 2022. The 2nd Respondent Hannah Njeri Gitau filed written submissions dated April 6, 2022.

Background

2. This succession Cause relates to the estate the late John Gitau Muchunu who died intestate on April 23, 2000. A copy of the Death Certificate serial No 5447XX is annexed to the Petition for Grant of letters of Administration dated July 12, 2000.
3. Following the demise of the Deceased the Respondents herein being the Widow and son of the Deceased sought and obtained Grant of letters of Administration which were issued to them on November 7, 2000. The Grant was duly confirmed on June 3, 2002.



4. The Protestor herein Jane Muthoni Gichuru then filed a summons for Revocation of Grant dated August 23, 2021 alleging that she and her late husband had purchased ¼ acre of Dagoretti/Ruthimiti/93 (herein the ‘suit land’) from the Deceased during his lifetime. The Protestor laments that the Administrators have refused and/or declined to transfer to her Title in the ¼ acre purchased from the Deceased. She therefore seeks that the Grant be revoked.
5. The 1st Respondent responded to the summons for revocation of Grant by filing this Notice of Preliminary Objection which is premised upon the following grounds:-
 - “a) That this Honourable Court has no jurisdiction to entertain the objector/applicant’s application dated August 23, 2021.
 - b) That the objector/applicant do not have locus to put in such application as it offends the provisions of Section 68 and 69 of the Law of Succession Act Cap 160, Laws of Kenya.
 - c) That the application and prayers are untenable in all respects.”
6. The 2nd Respondent however opposed the Preliminary Objection and asserted that this court had the requisite jurisdiction to determine the summons for revocation of Grant.

Analysis and Determination

7. I have carefully considered this Notice of Preliminary Objection as well as the replies filed by both parties. The only issue for determination is whether this court has the jurisdiction to hear and determine the summons for revocation of Grant filed by the Protestor.
8. 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.”
9. 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.”
10. 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.
11. 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].
12. Therefore I am satisfied that this is a genuine preliminary objection which warrants consideration by the court.
13. This court is sitting as a Probate Court. The primary duty of Probate Court is to oversee and supervise the distribution of the estate of a deceased person to the genuine beneficiaries. *In Estate of GKK (Decease)* [2017] eKLR the court held that:
- “The primary function of a Probate Court is distribution of the estate of a deceased person.”
14. The Protestor herein is not a beneficiary of the estate of the Deceased. The Protestors claims is based upon the alleged sale to herself and her late husband of a portion of the estate by the Deceased during his lifetime. The Protestor therefore claimed ‘ownership’ of the ‘suit property’ which forms part of the estate.
15. Matters relating to the ownership, use and occupation of land have now under Article 162 of the *Constitution* of Kenya 2010 been mandated to be determined exclusively by a specialised court being the Environment and Land Court (ELC).
16. Section 13 of the *Environment and Land Court Act* provides for the jurisdiction of that court as follows:-
17. Jurisdiction of the Court
- 1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) b of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - 2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes-
 - a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
 - b) relating to compulsory acquisition of land;
 - c) relating to land administration and management;
 - d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and



e) any other dispute relating to environment and land. [own emphasis]

18. Therefore the correct and proper forum before which the Protester ought to ventilate her claims to the 'suit land' is the ELC.

19. *In Re Estate of Stone Kathubi Muinde (Deceased)* [2016] eKLR, Hon Justice William Musyoka stated that:-

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the Probate Court in the succession cause so that that court can give effect to it.” [own emphasis]

20. Therefore though the Protestor may well have a legitimate claim to the 'suit land' she is pursuing her claim in the wrong court.

21. In *Alexander Mbaka vs Royford Muriuki Rauni 67 Others* [2016] eKLR it was held that:-

“It is only where one has established claim against the estate that has already crystallized that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This court, in my view cannot be called upon to ascertain whether or not one has the right to an estate of the deceased where such right has not yet crystallized. The right must be shown to have crystallized before the Family Court can entertain it.” [own emphasis]

22. Therefore this court has no jurisdiction to determine the question of ownership of the 'suit land'. The Protestor remedy lies in the ELC Court. If and when the Protestor obtains a decree in the ELC Court then she is at liberty to present that decree to this Probate Court for implementation.

23. Based on the foregoing I find merit in the Notice of Preliminary Objection. The summons for revocation of Grant dated August 23, 2021 filed by the Protestor is misplaced. The same is hereby struck out. Each party to meet its own costs.

DATED IN NAIROBI THIS 28TH DAY OF APRIL, 2023.

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MAUREEN A. ODERO

JUDGE

