



REPUBLIC OF KENYA



In re Estate of Paul Gathito Kibanya (Deceased) (Succession Cause E2177 of 2021) [2023] KEHC 19461 (KLR) (Family) (26 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E2177 OF 2021
EKO OGOLA, J
JUNE 26, 2023**

RULING

1. This matter relates to the estate of Paul Gathito Kibanya (the deceased) who died on 15th June, 2021 at the Nairobi West Hospital. Patricia Wambui Nderitu and Yvette Wambui Kibanya petitioned this court for Grant of Letters of Administration which was issued to them on 4th March, 2022.
2. On 22nd March, 2022 Paulyne Nyawira Gathito (hereinafter “the Objector”) filed an Objection to making of a Grant in the following grounds: -
 1. That at the time of his demise, the deceased was married to the Objector herein with whom they were blessed with one issue Stallone Kinyua (a minor) one of the surviving children to the deceased
 2. That the petitioners have maliciously omitted the Objector and the deceased’s above stated son from the Succession proceedings herein yet they are bonafide beneficiaries of the stated estate
 3. The surviving petitioners appear to have vested interests in the estate of the deceased since they have left out the objector who is the deceased’s wife and who takes care of the deceased’s stated child
3. The Objection is premised under Rule 17 (1) of the *Probate and Administration Rules*.
4. The Petitioners Patricia Wambui Nderitu and Yvette Wambui Kibanya filed a Preliminary Objection dated 25th October, 2022 opposing the Objection as follows: -

“That the Objection dated 22nd March, 2022 is time barred and offends the mandatory provisions of Section 67 (1) of the *Law of Succession* and Rule 17 (1) of the *Probate and Administration Rules*, 1980.”
5. The Objector filed submissions dated 3rd January, 2023 whilst the Petitioners’ submissions are dated 14th March, 2023.



Objector's Submissions

6. The Objector's counsel submitted that the Objector has locus to lodge an objection since she was married to the deceased and had a child together with him. Counsel submits that section 76 of the [Law of Succession Act](#) allows the Objector to be a party in this cause
7. Counsel submits that the Objection was filed in time but the grant was nevertheless issued even with the Objection being on Court records.

Petitioners' Submissions

8. The Petitioners' counsel submitted that the Objector has slept on her rights since the Petition was filed on 28th October, 2021, gazetted in the Kenya Gazette on 28th January, 2022 and no objection was filed within the prescribed time limit of 30 days under section 67(1) of the [Law of Succession Act](#) and Rule 17 (1) of the [Probate and Administration Rules](#), 1980. It is counsel's submission that the Objector filed the objection 18 days after the Grant was issued, without seeking leave to extend time within which such an Objection can be made, contrary to Section 68(1) of the [Law of Succession Act](#).
9. The Petitioners' counsel submitted that the Objection dated 22nd March, 2022 has been overtaken by events and offends the mandatory procedure provided for under section 66 to 68 of the Law of Succession. Counsel relied on the case of [Re estate of Agnes Ogolas Akoth \(Deceased\)](#) [2016] eKLR where the court held that:

“The upshot is that I find the preliminary Objection is meritorious and should be allowed. The Objection as taken out is misconceived, bad in law and incompetent having been overtaken by events as it was drawn and filed long after Grant of letters of Administration had been made to the Petitioner in this cause. The Objection is frivolous, vexatious or otherwise an abuse of process of the court. The same is struck out.”

10. It is counsel's prayer that the objection be struck out.

Determination

11. I have carefully considered the Objection to the issuance of Grant, the Preliminary Objection and the rival submissions by the parties. The issues arising for determination is whether the Preliminary Objection has merit and whether the Objection against issuance of Grant should be granted.
12. The purpose of a preliminary objection was broadly discussed in [Charles Onchari Ogoti v. Safaricom Ltd & anor](#) [2020] eKLR as follows:

“This court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd*. (1969) EA 696, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, J.A.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the



parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“ 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 the facts pleaded by the other side are correct. It cannot be raised if any fact has 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 increases costs and, on occasion, confuse the issues. This improper practice should stop.”

13. The Supreme Court of Kenya, now the highest court in the land has broadly confirmed, and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this court by virtue of Article 163 (7) of the [Constitution of Kenya](#) 2010.

“In case cited by the 1st Respondent, [David Nyekorach Matsanga & Another v. Philip Waki & 3 Others](#) [2017] eKLR, the three-judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ.) after considering various holdings of the Supreme Court of Kenya on question of Preliminary Objection held as follows:

“We quickly turn to the question whether we have before us a Preliminary Objection proper. Traditionally, the case of *Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in *Nitin Properties Ltd v. Singh Kalsi & another* [1995] eKLR also captured the legal principle when it stated as follows:

“A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

14. In [Hassan Ali Jobo & another -v- Suleiman Said Shabal & 2 Others](#) SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that:

“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 of the suit”

15. The Petitioners have argued that the Objector filed the Objection against issuance of Grant after the Grant had already been issued. The Petitioners contend that the [Law of Succession Act](#) cap 160 and Rule 17(1) of the Probate and Administration Rules require that an Objection be filed before a grant is issued.

16. Section 68 of the [Law of Succession Act](#) provides as follows:

- i. “Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow



- ii. Where notice of objection has been lodged under sub-section (1), the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period”
17. Rule 17 (1) of the [Probate and Administration Rules](#) provides: -
- “any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection”
18. What this provisions of law mean is that an objection to issuance of a grant has to be filed within a prescribed time after petition has been filed and not more than 30 days after the notice has been published in the Kenya Gazette. The provisions also are to the effect that if one wishes to file an Objection out of time, it has to be with the permission of the court meaning that one has to seek leave to file an objection out of time.
19. In this case, the Gazette notice was made on 11th February, 2022, the Grant was issued on 4th March, 2022 and the Objection was filed on 22nd March, 2022. From 11th February, 2022, 30 days were to expire on 13th of March, 2022. The Objection was therefore filed 9 days later after the Gazette notice.
20. Rule 17 (2) of the [Probate and Administration Rules](#) is clear that for seeking an extension of a longer period the objector is required to file an application to the registry at which the application for grant was made or by which notice was issued by summons supported by an affidavit, if necessary, and upon notice to the applicant for the grant. The filing of an objection after the period given in the published Kenya Gazette has lapsed and receipt of the objection by registry cannot suffice.
21. The objector is objecting to the making of the grant after it has already been made and I find that the objection has already been overtaken by events. The court cannot stop what has already passed. The law of Succession is made in such a manner that the obtaining of the grant is not an end to aggrieved party’s rights. One can challenge the grant by seeking its revocation or annulment or even file a protest to the mode of distribution.
22. In the instant cause, I find that the Petitioners have raised pure points of Law that can be confirmed by referring to the provisions of the [Law of Succession Act](#) and the [Probate and Administration Rules](#). The Petitioners have raised factual issues that require reference in evidence.
23. In re estate of [Agnes Ogolas Akoth \(Deceased\)](#) [2016] eKLR it was held that: -
- “The Law of Succession is a self-contained Act of Parliament which has clearly set out provisions on how matters of succession cause can be dealt with. An aggrieved party cannot ignore the express provisions of the law like in the case in raising any matter regarding specific provisions in the Act and claim that he is doing so, so as to get substantive justice in respect of his claim. In my view even when a party is seeking substantive justice, such justice must be attended to through some definite process. Article 159 (2) (d) of the Constitution in regard to administration of justice without undue regard to procedural technicality do not therefore mean we do away with all rules of procedure, as doing so would breed anarchy and would mean injustice to those who are vulnerable or weak or un cunning. Procedures and



rules are in my view good, and makes things move in an orderly and predictable manner and cannot be wished away.”

24. The upshot is that I find the Preliminary Objection meritorious and is hereby allowed. The Objection as taken out is misconceived, bad in law and incompetent having been overtaken by events as it was drawn and filed after Grant of letters of Administration had been made to the Petitioners in this cause. The Objection is frivolous, vexatious or otherwise an abuse of process of the court. The same is struck out.
25. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JUNE 2023.

E.K. OGOLA

JUDGE

