



REPUBLIC OF KENYA



**In re Estate of Sheila Thompson (Deceased) (Succession Cause 2391 of 2011)
[2023] KEHC 24492 (KLR) (Family) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24492 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2391 OF 2011
MA ODERO, J
OCTOBER 27, 2023**

BETWEEN

JONATHAN MUNYWOKI MULI 1ST APPLICANT

SHADRACK MBAI MBIU 2ND APPLICANT

AND

SOLOMON NJOROG KIORE RESPONDENT

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated January 27, 2023 filed by the respondent/objector Solomon Njoroge Kiore. The same was opposed by the applicants Jonathan Munywoki Muli and Shadrack Mbai Mbiu.
2. The matter was canvassed by way of Written Submissions. The respondent filed the Written Submissions dated February 27, 2023 whilst the administrators relied upon their Written Submissions dated February 24, 2023.

Background

3. This Succession cause relates to the estate of the late Sheila Thompson who died on June 26, 2006. Following the demise of the Deceased Grant of letters of administration were issued to Jonathan Munywoki Muli and Shadrack Mbai Mbiu on May 25, 2012.
4. The respondent/objector Solomon Njoroge Kiore then filed a summons for revocation/annulment of Grant, dated February 16, 2018 and April 16, 2018.
5. On September 22, 2022 this court gave directions that the summons for revocation of Grant dated February 26, 2018 and April 16, 2018 would be heard together by way of vive voce evidence.



6. The respondent/objector then filed this Notice of Preliminary Objection seeking to have the entire Petition No 2391 of 2011 struck out on the following grounds:-

- “ 1. That the application/petition for letters of administration in succession cause No 2391 of 2011 is *res judicata* the same having been rejected by an order of this court dated July 3, 2008. Refer page 114 of my summons for revocation or annulment of a grant April 16, 2018 and filed in court on April 17, 2018.
2. That the two applicants having not obtained letters of Administration to the estate of Peter Mbiu Muli to whom they claim to be their father who died on May 9, 2007 then it's a fact they had no *locus* of action to obtain letters of administration in case No 2391 of 2011 and as such the said case is null and void and this honourable court has no jurisdiction to entertain them.
3. That it is a fact that the applicants miserably admitted forgery and perjury in paragraph 8 and 9 of their Affidavit to support summons for revocation or annulment of a grant filed and issued on February 27, 2018 and they averred that they did not instruct Paul Wamae to obtain the grant in issue.
4. That it is uncontroverted fact that the applicants on August 30, 2010 signed the petition for letters of Administration in succession cause No 2391 of 2011 and was filed in court on November 3, 2011 P&A 80, P&A 12, P&A 57 and R265(2) with signed Affidavit by the applicants in support for petition for letters of administration in the Estate of Sheila Thompson (Deceased) even after they were denied by the court to do so. Therefore, my lady this is serious perjury under oath and cannot go unpunished. The same facts are also in an affidavit sworn on January 12, 2015 by the same applicants and filed by Nzaku & Nzaku Advocates and as such offended section 109 and 117 of the [Penal Code](#) then it leaves the said Petition and all consequential orders made therein a nullity.
5. That the applicants are not within the degree of consanguinity as required by section 39 (e) of the [law of succession Act](#) cap 160 laws of Kenya and therefore the applicants are not qualified to take any action in relation to the estate of Sheila Thompson.
6. That the petition herein is hopelessly misconceived, frivolous, fictitious totally devoid of merit and malafides for the reason inter alia that the applicants filed the said petition in a view to defraud after they were denied entry in Succession Cause No 2276 of 2006 in the matter of estate of Sheila Thompson hence *res judicata inter alia* and should not be part of court record and ought to be dismissed in the first instance.”

Analysis and Determination

7. I have carefully considered the Notice of Preliminary Objection filed before this court, the Grounds of Opposition filed by the Petitioner, as well as the submissions filed by both parties.



8. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd v 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. Therefore, a genuine and proper Preliminary Objection can only raise points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.
12. I have carefully perused the Notice of Preliminary Objection filed by the respondent/objector as well as the grounds upon which said Preliminary Objection is premised.
13. The respondent/objector claims that the administrators obtained the Grant through forgery and perjury. This is not a pure point of law. Any allegations of forgery and/or perjury are matters of fact which can only be determined by way of evidence adduced at a hearing.
14. Likewise the claim that the administrators admitted to the alleged forgery/perjury is not a point of law but is a claim which can only be proved by way of adducing evidence.
15. The respondent/objector further alleges that the administrators obtained the Grant illegally as they did not fall within the degree of consanguinity required section 39 (e) of the *Law of Succession Act* cap 160, laws of Kenya and therefore have no locus standi in the suit. That the late Peter Mbui (the Administrators brother and Father) did not have the legal capacity to marry the Deceased.
16. Once again these are not pure points of law but rather are questions of fact which can only be determined upon hearing of the suit.



17. On the whole I find no merit in this Notice of Preliminary Objection. The same does not meet the threshold set in the Mukisa Biscuit Case. Accordingly, I dismiss the Preliminary Objection dated January 27, 2023 in its entirety. Costs to be met by the Objector.

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

MAUREEN A. ODERO

JUDGE

