



In re Estate of Thomas Kiprop Ng'eno (Deceased) (Succession Cause 32 of 2023) [2023] KEHC 26703 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 32 OF 2023
JK SERGON, J
DECEMBER 20, 2023**

BETWEEN

GRACE CHEMUTAI NGENO, EMMANUEL KIPKOECH LELGO, KENNEDY KIBET ROP, CHRISTOPHER KIPRONO ROP (SUING IN THE CAPACITY AS ADMINISTRATORS IN THE ESTATE OF THOMAS KIPROP NGENO) ADMINISTRATOR

AND

CHEMARTIN TEA COMPANY LIMITED RESPONDENT

RULING

1. The applicants have filed a summons dated 28th September, 2023 seeking the following orders;
 - (i) Spent
 - (ii) That an injunction be hereby issued restraining the directors of Chemartin Tea Company Limited and/or all of its agents, employees, servants, subsidiaries or affiliates from in any way disposing of any asset belonging to the said company without the leave of the court.
 - (iii) That the Registrar of Lands be hereby ordered to place a caveat upon the parcel known as L.R No. 6085/8, I.R No. 31226 that is registered in the name of Chemartin Tea Company Limited until further directed by the court.
 - (iv) That the Honourable Court be pleased to issue any other orders it deems just and necessary to grant.
 - (v) That costs be provided for out of the Estate of the Deceased.
2. The Application is supported by the grounds on the face of it and the supporting affidavit by Emmanuel Kipkoech Lelgo, Kennedy Kibet Rop, Christopher Kiprono Rop and Grace Chemutai Ngeno the applicants herein.



3. The applicants aver that Thomas Kipro Ngeno died intestate on 15th December, 2018 and was survived by 5 widows and 29 children.
4. The applicants aver that on 19th January, 2021 this court issued a limited grant ad colligenda bona defuncti to Grace Chemutai Ngeno, Emmanuel Kipkoech Jelgo, Kennedy Kibet Rop and Patricia Chebet Ngeno specifically for purposes of collecting, getting in and receiving all outgoings from the estate and doing all such acts as are necessary for the preservation of the estate including execution of all documents that are necessary to be executed on behalf of the estate as director of Chemartin Tea Company Limited.
5. The applicants aver that prior to his death, the deceased was part owner of Chemartin Tea Company Limited alongside 3 other directors and/or shareholders and that a large part of the assets comprising the estate of the deceased is within Chemartin Tea Company Limited.
6. The applicants aver that on 19th August, 2021 the remaining directors of the company passed a board resolution to sell forty acres of land belonging to Chemartin Tea Company Limited without seeking leave of the court and that it had come to their attention that the directors were at an advanced stage in the sale of the company assets and property known as L.R NO. 6085/8, I.R NO. 31226 in the name of Chemartin Tea Company Limited.
7. The applicants are apprehensive that unless the application herein is heard and determined expeditiously the estate of the deceased will be exposed to unwarranted wastage and misappropriation.
8. The respondent filed a preliminary objection in response to the application dated 28th September, 2023 on the following two grounds that the applicants are not administrators of the estate of the deceased herein and that the applicants have no locus standi to bring the instant application and therefore the application was incompetent and ought to be struck out.
9. The matter came up for inter partes hearing on 14th December, 2023 and the counsel on record made oral submissions.
10. Ms. Kimeto Learned Counsel for the applicants maintained that she was relying on the grounds set out in the summons. She reiterated that the respondents had resolved to sell 40 acres of land which constituted part of the assets of the deceased herein, which facts were not controverted. She submitted that the applicants filed the instant succession cause and had obtained a limited grant which granted them capacity to file the instant action as provided for in rule 36 of the [*Probate and Administration Rules*](#).
11. The Learned Counsel cited rule 49 of the [*Probate and Administration Rules*](#) provides that;

" A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit."

and contended that striking out the summons as proposed in the preliminary objection as filed by the respondents was a draconian step. She also argued that order 2 rule 15 of the [*Civil Procedure Rules*](#), 2010 offers guidelines to be taken into account before striking out a suit. She relied on the following cases *DT. Dobie v Muchina* (1982) KLR, the Court of Appeal discussed striking out of pleadings at length and observed as follows;

" If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action.



A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.” In *Cooperative Merchant Ltd v George Wekesa* CA No. 94 of 1999 the Court of Appeal observed as follows; “Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”

12. Mr. Otieno Learned Counsel for the Respondent reiterated that the applicants did not have locus standi to bring the instant application, he presented a twofold argument, firstly, that the respondent was a corporate entity with no interest in the estate of the deceased and secondly, that the applicants are not personal representatives and/or administrators of the estate of the deceased and further submitted that it was a misconception to argue that rule 36 of the *Probate and Administration Rules* applies to the instant case. He relied on the case of *Francis Mwangi Mugo v David Kamau Gachago* [2017] eKLR the court struck out a suit whereby the plaintiff filed a suit over immovable property without first registering power of attorney; Sila J. struck out the suit with costs and observed as follows;

“ I do not think capacity is a technicality curable under Article 159 of *the Constitution*. It is either you have it or you do not. You do not gain capacity retrospectively.”

13. I have considered the application and the preliminary objection filed in response to the application, I find that the preliminary objection raises a pertinent issue as to locus standi as to whether the applicants have the capacity to file the instant application. In case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 a locus classicus case on what constitutes a preliminary objection where their Lordships observed thus:

“ ... 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.”

In the same case Sir Charles Newbold, P. stated:

“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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

14. I therefore find that the sole issue that arises for determination herein is whether the preliminary objection raised is sustainable. The answer is in the affirmative, the applicants are not administrators and/or personal representatives of the estate of the deceased they merely obtained a limited grant ad colligenda bona defuncti, the grant issued by this court on 19th January, 2021 is very specific and limited in scope and I therefore find that the applicants do not have capacity to file the instant application.



15. In *Morjarila v Abdallah* (1984) KLR 490 the Court of Appeal expressed itself in the fifth and sixth holdings as follows:-

“5. The purpose of a grant of letters of administration ad colligenda bona is to collect the property of the deceased person where it is of a perishable or precarious nature, and where regular probate and administration cannot be granted at once.

6. The appointment of a person as an administrator ad colligenda bona in respect of a deceased person cannot include the right to take the place of the deceased for the purpose of instituting an action or appeal, especially where there is specific provision for that purpose in paragraph 14 of the Fifth Schedule to the *Law of Succession Act*.”

16. The Preliminary Objection is hereby upheld. I find that the summons dated 28th September 2023, incompetent having been filed by person without authority and the same is hereby ordered struck out with costs to the Respondent.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 20TH DAY OF DECEMBER 2023.

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J.K. SERGON

JUDGE

In the presence of:-

Otieno David for the Respondent

Miss Kimetto for the Applicant

