



REPUBLIC OF KENYA



**In re Estate of Jane Wambui Mbugua (Deceased) (Succession Cause E618 of 2021) [2022] KEHC 370 (KLR) (Family) (1 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 370 (KLR)

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

**FAMILY**

**SUCCESSION CAUSE E618 OF 2021**

**MA ODERO, J**

**APRIL 1, 2022**

**IN THE MATTER OF THE ESTATE OF JANE WAMBUI MBUGUA (DECEASED)**

**BETWEEN**

**PAUL KIANIA MBUGUA ..... OBJECTOR**

**AND**

**SAMUEL MUGO MBUGUA ..... RESPONDENT**

**RULING**

1. Before this Court for determination is the Notice of Preliminary Objection dated 2<sup>nd</sup> September 2021 by which the Petitioner Samuel Mugo Mbugua sought to have the objection dated 17<sup>th</sup> August 2021 struck out.
2. The Preliminary Objection was opposed by the objector Paul Kiania Mbugua. Following directions issued by the court the matter was canvassed by way of written submissions. The Petitioner filed the written submissions dated 20<sup>th</sup> January 2022 whilst the Objector relied upon his written submissions dated 2<sup>nd</sup> February 2022.

**Background**

3. This Succession Cause relates to the estate of the late Jane Wambui Mbugua (hereinafter ‘the Deceased’) who died intestate on 7<sup>th</sup> February 2021. The Deceased was survived by the following: -
  - (a) Nancy Lillian Nyambura Mbugua – Daughter
  - (b) Benedict Njeri Mbugua – daughter
  - (c) John Mwaura Mbugua – son



- (d) Ray Peter Nganga Mbugua – son
  - (e) Samuel Mugo Mbugua – son
4. The estate of the Deceased was said to comprise of numerous parcels of land, shares, bank accounts and motor vehicles. One of the parcels of land included in the list of Assets in the Petition for Grant of letters of Administration Intestate dated 31<sup>st</sup> March 2021, was a half share of LR No. 1/543 – Ngong Road, Nairobi (hereinafter the ‘suit land’). Following the demise of the Deceased the Petitioner Samuel Mugo Mbugua in his capacity as son of the Deceased filed a Petition dated 31<sup>st</sup> March 2021 seeking Grant of letters of Administration Intestate in respect of the estate of the Deceased. The record indicates that the petition was Gazetted on 30<sup>th</sup> July 2021. A Limited Grant Ad Litem in respect of the estate of the Deceased was issued to the Petitioner on 15<sup>th</sup> June 2021.
  5. The Objector Paul Kiania Mbugua who claims to be a Director/shareholder of J M Mugo Investments Company Limited (hereinafter ‘the Company’) filed an objection dated 17<sup>th</sup> August 2021 to the making of letters of Administration Intestate. The Objector claimed that the Petitioner was attempting to mislead the court by including in his petition assets, which do not form part of the estate of the Deceased. That the inclusion of the LR No. 1/543 Ngong Road as an asset belonging to the Deceased was false as the said asset infact belongs to J M Mugo Investments Company Limited and was fraudulently transferred into the name of the Deceased and her co-tenant one Monica Wanjiru Mbugua (hereinafter referred to simply as ‘Monica’).
  6. Before the Objection could be heard and determined the Petitioner filed this Preliminary objection seeking to have the objection dated 17<sup>th</sup> August 2021 struck out ‘in limine’ on the following grounds: -
    1. That the Objector is not a beneficiary of the Deceased’s estate; hence the Objection herein is contrary to section 66 of the Law of Succession Act- Cap 160, Laws of Kenya and illegal.
    2. That the Objector lacks locus standi to file and/or prosecute the objection herein. The objection is thus void ab initio.
    3. That the objector lacks locus standi to litigate ownership of LR No. 1/543, Ngong Road – Nairobi in the name of J.M. Mugo Investments Company Limited and the objection is void ab initio.
    4. That this Honourable Court lacks jurisdiction to hear/determine the issue of ownership of and/or interests over L.R. No. 1/543 Ngong Road – Nairobi which is a reserve of the Environment and Land Court.
    5. That the High Court has heard/determined the issue of ownership of and/or transfer of L.R. No. 1/543, Ngong Road – Nairobi to the Deceased and her co-tenants in HC Comm No. 008 of 2000 and the Honourable Court cannot sit on appeal against its aforesaid decision.
    6. That the High Court is functus officio having adjudicated questions involving transfer of ownership of L.R. No. 1/543 with finality as aforesaid.
    7. That the objection is a nonstarter, misplaced, misconceived and an abuse of court process.”
  7. As stated earlier the Preliminary Objection was opposed. The Petitioner adamantly asserts that the suit land belongs to his late mother and her co-tenant (now deceased) having been lawfully transferred to them by the Company vide the Transfer dated 14<sup>th</sup> August 2015.



## Analysis and Determination

8. I have carefully considered the Preliminary Objection as well as the written submissions filed by both parties. The definition of what constitutes a preliminary Objection was set out in the celebrated case of *Mukisa Biscuit Manufacturing Company Limited Vs West End Distributors Co. Ltd* [1969] EA which the court observed as follows:-

“As far as I am aware, 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. Examples are an objection to 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. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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. The improper practice of raising points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop.” (own emphasis).

9. Closer home, the Supreme Court of Kenya in the case of *Independent Electoral & Boundaries Commission – v – Jane Cheprenger & 2 others* [2015] eKLR stated thus:-

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

10. Therefore it is clear that a Preliminary Objection can only be raised on a pure point of law, one which upon determination may dispose of the suit entirely. The petitioner has raised the question of ‘locus standi’. The petitioner has also submitted that the High Court is functus officio in this matter. These are in my view pure points of law which render the Preliminary Objection one which is merited and ought to be argued.

## Locus Standi

11. The Petitioner has submitted that the Objector lacks locus standi in this Succession Cause. That the Objector has no standing to litigate and/or prosecute the question of ownership of the suit land as he was neither a Director nor a shareholder in the company known as J M Mugo Investments Company Ltd and had no written authority to act on behalf of said Company.
12. ‘Locus Standi’ is a Latin term, which literally means “place of standing”. The term refers to the right of a person to bring a suit or action. In the case of *Ibrhaim – Vs Hassan & Charles Kimenyi Macharia* [2019] Hon Justice Nyakundi stated as follows: -

“Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party



cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.” (own emphasis).

13. The matter before this court is a Succession Cause and has been filed before the Probate Court. The main duty of the Probate Court is to ensure that the estate of the Deceased is identified and thereafter distributed to the genuine beneficiaries. The Objector herein is neither a beneficiary nor a dependant of the Deceased (nor does he claim to be). He therefore strictly speaking lacks locus standi in this matter.
  14. The Objector has come into this matter claiming to represent the interests of a company which he alleges owns the suit land. The Objector claims to be a Director/shareholder of this Company known as J M Mugo Investment Company Ltd. Annexed to the objection dated 17<sup>th</sup> August 2021 (Annexure ‘PKM-1’) is a copy of the Form CR-12 for a company known as Mary Farm Holdings Ltd in which the Objector Paul Kiania Mbugua is named a Director/Shareholder holding 1000 ordinary shares. That CR-12 is not for the company known as J M Mugo Investments Ltd, which the Objector claims to represent. There is no document proving that the Objector is a Director or shareholder of J M Mugo Investments Ltd which he claims owns the disputed parcel of land. Infact in another Form CR-12 dated 16<sup>th</sup> June 2015 in respect of J M Mugo Investment Ltd annexed to the Replying Affidavit dated 1<sup>st</sup> September 2021 sworn by Samuel Mugo Mbugua does not include the name of the Objector as one of the Directors and/or shareholders of said company neither has the Objector exhibited an authority from J M Mugo Investment Company Ltd authorizing him to file suit on behalf of the company. It is apparent therefore that the Objector has no locus standi in the question of ownership of the suit land.
  15. The Objector filed his objection claiming that the suit land did not belong to the Deceased and her co-tenant. The question of who owns the suit land is not one which this court has jurisdiction to determine. The fact of the matter is that this court is sitting as a Probate Court with the jurisdiction to oversee the distribution of the estate of the Deceased to the genuine heirs and beneficiaries. *In Re Estate of G.K.K. (Deceased)* 2017 eKLR it was held that -
- “ The primary function of a probate court is distribution of the estate of the dead person.”
16. The Objector contends that the suit land does not belong to the estate of the Deceased. Rather he insists that the land belongs to J M Mugo Investment Company Ltd. 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 by a specialized court being the Environment and Land Court (‘ELC’).
  17. Section 13 of the *Environment and Land Court Act* provides for the jurisdiction of that court as follows:-

#### 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 interests in land; and
  - (e) any other dispute relating to environment and land. [Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1]
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act No. 12 of 2012, Sch.
- (6) Deleted by Act No. 12 of 2012, Sch.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
- (a) interim or permanent preservation orders including injunctions;
  - (b) prerogative orders;
  - (c) award of damages;
  - (d) compensation;
  - (e) specific performance;
  - (g) restitution;
  - (h) declaration; or
  - (i) costs.
- Own emphasis)

18. Therefore, the correct and proper forum before which the objector and/or the Company ought to ventilate their claim to the suit land is the ELC. It would be counterproductive and a waste of judicial time to proceed with the hearing of this objection without evidence of any order/Decree from the ELC legitimizing the claim of the objector and/or Company to the suit land.



19. *In Re Estate of Stone Kathubi Muinde (Deceased)* [2016] eKLR Hon Justice William Musyoka held 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. I therefore find merit in this Preliminary Objection. The dispute between the parties is a dispute relating to ownership of land in question. This court sitting as a Probate Court does not have jurisdiction to determine disputes relating to ownership of land. The Parties are at liberty to file suit in the ELC where they will have the opportunity to ventilate any claim they allege to have to the suit land.

21. Moreover it is manifest that the question of ownership of LR. No 1/543 Ngong Road was at the centre of the dispute in Civil Case No. 008 of 2020 which case was heard by Hon Justice David Majanja sitting in the Commercial and Tax Division of the High Court. The learned Judge delivered his judgment in the matter on 3<sup>rd</sup> August 2020. The said judgment appears at pages 8-19 of the Petitioners Replying Affidavit dated 1<sup>st</sup> September 2021. In that judgment the learned judge upheld the transfer of Title in the suit land to the Deceased and her co-tenant. The objector herein has appealed that judgment vide Nairobi Civil Appeal No E 288 of 2020, which appeal is yet to be determined.

22. Therefore as matters stand the High Court is now ‘functus officio’ on the matter of proprietorship of the suit land. It is mischievous of the objector to approach this court seeking to relitigate matters, which had already been determined by a judge of concurrent jurisdiction, and which are the subject of a pending appeal. This court cannot sit in appeal over a decision of a fellow Judge of the High Court. This objection amount to an abuse of court process.

23. For the above reasons I find merit in this Preliminary Objection. The same is allowed. The Objection dated 17<sup>th</sup> August 2021 is hereby struck out. This being a family matter, I make no orders on costs.

**DATED IN NAIROBI THIS 1<sup>ST</sup> DAY OF APRIL 2022.**

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**MAUREEN A. ODERO**

**JUDGE**

