



In re Estate of Kiguoya s/o Mukuru (Deceased) (Succession Cause 338 of 2000) [2022] KEHC 16620 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 338 OF 2000
FN MUCHEMI, J
DECEMBER 20, 2022**

BETWEEN

KIGUOYA KAMUNGE PETITIONER

AND

LOISE WANGUI KARIMI RESPONDENT

RULING

1. This is a ruling on a preliminary objection raised by the respondent against the applicant's application dated March 29, 2022 for revocation of grant.
2. The application seeks for orders of revocation of grant issued and confirmed on August 1, 2003 and is based on several grounds.
3. The preliminary objection challenges the locus standi of the applicant in this cause and lack of the jurisdiction of this court to entertain the said application.
4. The background facts are that this case was heard and determined between the parties by Okwengu J, as she then was in the year 2003. The court found that the respondent was the rightful heir of the estate of the deceased. She was appointed the administrator of the estate and bequeathed the only asset of the estate L.R. No. Aguthi/Gatitu/155.
5. The respondent submits that the cause was heard on merit and a final judgement rendered. Furthermore, the applicant was a party to the proceedings and participated throughout the cause. As such, the respondent contends that the applicant can only appeal against the said judgement but not to seek orders for revocation of grant. The respondent states that the issue of revocation of grant cannot arise in a matter where the applicant earlier lodged a protest that was heard and determined. The respondent further submitted that this court is functus officio since the matter was heard on merit and judgement delivered.



6. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court 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 and may dispose of the suit.

7. 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.

8. Similarly the Supreme Court in the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR held 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.

9. Further in the case of *Hassan Nyanje Charo v Khatib Mwasbetani & 3 others*, [2014] eKLR the court held that:-

Thus 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. Evidently, a preliminary objection must be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. The respondent has raised the issue of jurisdiction and the lack of locus standi by the applicant as points of law. Indeed the question of jurisdiction was explained in the case of *Owners of the Motor Vessel "Lilian S" v Caltex Kenya Limited* [1989] KLR 1 where the court held:-

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 a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

11. The respondent contends that this court lacks jurisdiction to entertain the instant application because the court is functus officio and the applicant lacks locus standi.

12. This application seeks for revocation of the grant issued and confirmed by Okwengu, J on grounds that the court applied Kikuyu customary law in determining the matter which put him at a disadvantage because he could not inherit the deceased's property. He now invites the court to revoke the grant and apply the Kenya Constitution 2010 instead so that he is considered as a beneficiary in the estate.

13. It is imperative to note that the judgement of Okwengu, J was delivered on August 1, 2003 seven (7) years before the *Constitution* of 2010 was promulgated. The deceased died in 1928 in this case and the court applied the existing and applicable law which was Kikuyu customary law. The *Constitution*



cannot be applied retrospectively to aid any party who approaches the court. It is trite law that law shall not apply retrospectively.

14. Even if the *law of Succession Act* was applied in this cause the applicant would not have been declared a beneficiary or the administrator of the estate. Under section 66 of the Act, the respondent ranked higher in degree of consanguinity against the applicant who was a grandchild of a married daughter of the deceased. The respondent was a son to the deceased's brother. Inheritance under Kikuyu customary law which is patrilineal in nature was applied in this cause. Both parties were given their rights of fair hearing before the court.
15. The applicant did not file an appeal against the decision of the High court which would have been the right thing to do at that time. This court is bereft of the jurisdiction to review the judgement of a court of equal jurisdiction. The court having made a determination, cannot review except under Order 45 Rule 1 of the *Civil Procedure Rules* whose provisions are not applicable herein. It then follows that the only remedy open for the applicant was to file an appeal in the Court of Appeal.
16. Having found that this court has no jurisdiction to review or set aside the judgement of another High Court judge, I find the preliminary objection merited and uphold it accordingly.
17. Consequently, it is my considered view that the application dated 29/03/2022 is incompetent and misconceived. It is hereby struck out.
18. Being a succession cause, each party will meet their own costs of this application.
19. It is hereby so ordered.

DATED AND SIGNED AT NYERI THIS 20TH DAY OF DECEMBER, 2022.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 20th day of December, 2022.

