



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 141 OF 1991

IN THE MATTER OF THE ESTATE OF KIGEN CHEBOI (DECEASED)

IN THE MATTER OF A PRELIMINARY OBJECTION

BETWEEN

CHRISTOPHER KIPYEGO A. KIGEN.....1ST PETITIONER

ALFRED KIMUTAI LAGAT *alias*

MICHAEL KIGEN.....2ND PETITIONER

AND

SANIEKO KIGEN.....APPLICANT

RULING

[1] Grant of Probate in respect of the Will of the deceased herein, **Kigen Cheboi**, was issued herein way back on **28 February 1992**, to the two executors named in the said Will, **Christopher Kipyego A. Kigen** and **Alfred Kimutai Lagat alias Michael Kigen**. The Grant was thereafter confirmed on **27 August 1998**. The cause was dormant until **18 November 2020** when **Sanieko Kigen**, one of the widows of the deceased, filed a Summons for Revocation or Annulment of Grant pursuant to **Section 76** of the **Law of Succession Act**, and **Rule 44** of the **Probate and Administration Rules**. The application was premised on the grounds, *inter alia*, that the proceedings to obtain the Grant were defective in substance; and that the purported Will on which basis the Grant of Probate was issued was never executed by the deceased person.

[2] Thereafter, the applicant filed an application dated **2 February 2021** seeking the preservation of the estate; particularly the pieces of land known as **IRONG/KITANY/721, 722, 723, 724, 725 and 726**, and **TEMBELEO/ELGEYO BORDER BLOCK 13 (KAPLOGOI)/31** pending the hearing and determination of the main Petition. The Objector also prayed for cancellation of the titles known as **IRONG/KITANY/721, 722, 723, 724, 725 and 726**, and for an order reverting the property to the estate of the deceased for redistribution. It was in response to that application that the petitioners filed the Notice of Preliminary Objection dated **8 February 2021** contending that:

[a] The application is fatally defective, incompetent and should be struck out.

[b] The application is an abuse of the court process.

[c] The application dated **2 February 2021** offends the provisions of **Article 162** of the **Constitution of Kenya** and **Section 13** of the **Environment and Land Court Act**.

[d] That this Court lacks jurisdiction to entertain the application dated **2 February 2021** as the said application cannot be handled by the Probate Court but by the Environment and Land Court.

[3] Granted that one of the Grounds of the Preliminary Objection included the question whether this Court has the jurisdiction to determine the issues raised in the application dated **2 February 2021**, especially cancellation of title, directions were issued herein on **10 February 2021**, that the Preliminary Objection be disposed of first by way of written submissions. Thus, **Mr. Tunoi**, learned counsel for the Objector, relied on his written submissions dated **23 February 2021** and reiterated the applicant's stance that the revised and consolidated land law

regime created the Environment and Land Court as the court with the exclusive jurisdiction to hear and determine environment and land disputes. He made reference to the provisions of **Sections 4 and 13** of the **Environment and Land Court Act, 2011**, **Section 150** of the **Land Act, 2012** and **Section 101** of the **Land Registration Act, 2012** to underscore his argument that the court with jurisdiction in all land disputes is the Environment and Land Court.

[4] **Mr. Tunoi** also placed reliance on **Article 162** of the Constitution; and to this end, he cited **Law Society of Kenya Nairobi Branch vs. Malindi Law Society & 6 Others** [2017] eKLR wherein it was held that:

“...Article 165(5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrates courts to hear and determine disputes stipulated under Article 162(2) of the Constitution, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases.”

[5] **Mr. Tunoi** also relied on **Samuel Kamau Macharia vs. Kenya Commercial Bank Limited & 2 Others** [2012] eKLR for the proposition that a court's jurisdiction flows from either the Constitution or legislation or both, and that:

“...a Court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...where the Constitution exhaustively provides for the jurisdiction of a Court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation...”

[6] Accordingly, **Mr. Tunoi** urged the Court to uphold the Preliminary Objection and dismiss the application dated **2 February 2021** with costs.

[7] On his part, **Mr. Kibii**, learned counsel for the Objector, was of the view that the High Court has the jurisdiction, under **Section 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules**, to hear and determine such applications when they concern the estate of a deceased person, such as the case at hand. He cited **Millicent Mbatha Mulavu & Another vs. Annah Ndunge Mulavu & Others** [2018] eKLR wherein it was held that:

“The law of Succession Act ... is basically concerned with the administration of estates of deceased persons and the High Court is vested with powers to determine any dispute under the Act. The argument by the Respondent that this is a land matter is therefore misplaced.

[8] I have given careful consideration to the Preliminary Objection and the written submissions filed in respect thereof. As to whether the grounds raised in the Notice of Preliminary Objection are proper subjects of a preliminary objection, the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors** [1969] EA 696 is instructive. It was held therein 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. 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.”

[9] Moreover, as was opined by **Sir Charles Newbold, P.** in the **Mukisa Biscuits Manufacturing Co. Ltd Case:**

“...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...”

[10] The same posturing was adopted by **Hon. Ojwang, J.** (as he then was) in **Oraro vs. Mbaja** [2005] 1 KLR 141, thus:

“...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed... Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

[11] In the light of the foregoing authorities, it is manifest that the 1st and 2nd grounds of the Notice of Preliminary Objection dated **8 February 2021** are untenable. The only valid ground for purposes of the preliminary objection, in my view, is the issue of jurisdiction. This is because, as was pointed out by the Court of Appeal in the **Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd** [1989] KLR 1:

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

[12] And in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others** [2012] eKLR, which counsel for the applicant relied on, the Supreme Court explained that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

[13] Thus, while **Article 165(3)(a)** of the **Constitution** gives the High Court unlimited original jurisdiction to handle civil and criminal matters, **Sub-Article (5)** thereof is explicit that that jurisdiction does not extend to matters reserved for the exclusive jurisdiction of the Supreme Court or matters falling within the jurisdiction of the Employment and Labour Relations Court and the Environment and Land Court. For purposes of ascertaining matters falling within the jurisdiction of the Environment and Land Court, **Section 13** of the **Environment and Land Court Act** provides that:

(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.**

[14] A consideration of the application dated **2 February 2021** does show that the dispute herein is not simply over land use or title to land. It is plainly an application for the preservation of the estate of a deceased person pending re-distribution to the rightful beneficiaries under the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**. At paragraphs 2 and 7 of the Supporting Affidavit, the applicant deposed that the subject parcels of land initially comprised land **Parcel No. IRONG/KITANY/173 and IRONG/KITANY/175**, which belonged to the deceased, **Kigen Cheboi Kipchorsoi**. And, at paragraph 4 of that affidavit, the applicant mentioned that **"...the dispute revolves around some beneficiaries who want to rely on a will whose authenticity is contested through these proceedings."**

[15] It is also manifest that the applicant has filed the said application, not in any other capacity, but as the widow and a beneficiary of the deceased **Kigen Cheboi Kipchorsoi**. Consequently, the Court does have the requisite jurisdiction to hear and determine the said application, for **Section 47** of the **Law of Succession Act** leaves no doubt that the Court with jurisdiction in such matters is the High Court. It stipulates that:

"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient..."

[16] In the same vein, **Rule 73** 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 an affidavit."

[17] Clearly therefore, the mere fact that one of the orders sought is cancellation of title is no reason to divest this Court of the jurisdiction given it under the **Law of Succession Act**; and authorities abound to underscore this posturing. For instance, in **Re Estate of Esau Matias Chamwada** (supra) wherein a preliminary objection was similarly raised on the jurisdiction of the High Court to cancel title, it was held that:

"the handling of the property after the deceased died in 2001 was in violation of the Law of Succession Act, yet the property in question was estate property. It falls within the jurisdiction of the High Court so long as the High Court is exercising the jurisdiction conferred upon it by the Law of Succession Act. The court has jurisdiction to protect and preserve it in keeping with section 45 of the Act. Consequently, there can be no merit in the preliminary objection raised by the respondents." (see also **Millicent Mbatha Mulavu & Another vs. Annah Ndunge & 3 Others**, supra)

[18] Consequently, it matters not that the estate property had been subdivided and allocated new titles. The applicant has sought that the different titles be cancelled and that the property be restored to the estate, on the ground that they were fraudulently transferred to the title-holders. Hence, in **Re Estate of Mutugi Mbutii** (supra) it was held that:

“The court has power to make orders as in this case where there was intermeddling with the estate, to preserve the estate and to restore the estate where it has been sold or transferred fraudulently where the court is seized of the matter.”

[19] It is in the light of the foregoing that I find no merit at all in the Preliminary Objection raised herein by the petitioners. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 19TH DAY OF APRIL 2021

OLGA SEWE

JUDGE