



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO. 255 OF 2012**

**IN THE MATTER OF THE ESTATE OF KIPKOECH KEIYO (DECEASED)**

**AND**

**IN THE MATTER OF AN A PRELIMINARY OBJECTION**

**BETWEEN**

WILLIAM KIMAIYO.....1<sup>ST</sup> PETITIONER

JOSEPH KOECH.....2<sup>ND</sup> PETITIONER

**AND**

KIMAGUT MELILEI ARAP LEL.....APPLICANT

**RULING**

[1] There is a pending application herein, dated **28 February 2017**. It was filed pursuant to **Section 76** of the **Law of Succession Act** and **Rules 44** and **75** of the **Probate and Administration Rules**. It seeks orders, *inter alia*, that the Grant of Letters of Administration issued on **6 August 2013** to the petitioners herein and confirmed on **5 March 2015** be revoked and/or annulled. The said application was premised on the grounds that the Grant was obtained fraudulently, by concealing from the Court significant information that was material to the case.

[2] The applicant further contended that he is a beneficiary by way of sale having bought pieces of the parcel of land forming part of the estate from the sons and administrators of the estate, namely: **John Arap Koech** and **William Kimaiyo Koech**. He added that the petitioners did not seek his consent to their petition for Grant; and that it is in the interest of justice that the orders sought be granted. In his Supporting Affidavit, the applicant averred that he has lived on the subject property for over 33 years and has proceeded to develop the same. He annexed documents to his affidavit in proof of his averments. The documents include the land sale agreement between him and **John Arap Koech** dated **15 February 1984**.

[3] In response to that application, the petitioners filed a Notice of Preliminary Objection dated **26 April 2019**. He relied the following grounds:

- [a] That the application is based on an alleged sale agreement between a son of the deceased and the applicant, which has no connection to the estate.
- [b] That the deceased died in **1979** while the said transaction took place in **1984**, and therefore the application has no basis in law.
- [c] That the application lies directly against the beneficiary who purported to sell the land to the applicant; and not the entire estate.
- [d] The application for revocation has no merit and should be struck out and/or dismissed with costs to the petitioners.

[4] From the grounds set out herein above, it is manifest that the preliminary objection is premised on the allegation that the applicant is a purchaser for value of part of the estate property. It is also manifest that the allegation is opposed by the petitioners. Thus, in paragraph 1 of the Notice of Preliminary Objection, the petitioners assert that:

**“...the deceased died in 1979 while the said transaction took place in 1984, and therefore the application has no basis in law.”**

[5] It is manifest therefore that, to make a determination in respect of the grounds put forth by the petitioners, the court would have to make an inquiry and ascertain the disputed facts; yet it is now trite that a preliminary objection ought to be based on a pure point of law. In **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors** [1969] EA 696 it was 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. 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."**

[6] 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..."**

[7] Thus, I am in full agreement with the expressions in **Oraro vs. Mbaja** [2005] 1 KLR 141, by **Hon. Ojwang, J.** (as he then was) that:

**"...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..."**

[8] It is in the light of the foregoing, it is plain that the petitioner's preliminary objection was improperly taken; for which reason I find apt the caution given by **Sir Charles Newbold, P.** in the **Mukisa Biscuits Manufacturing Co. Ltd Case** that:

**"The first matter relates to the 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 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 points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues..."**

[9] In the result, the petitioners' Preliminary Objection is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 19<sup>TH</sup> DAY OF APRIL 2021**

**OLGA SEWE**

**JUDGE**