



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 238 OF 1986
IN THE MATTER OF THE ESTATE OF KASSIM HASSAN MALAMBU (DECEASED)

F.A BADIA & CO. ADVOCATES...ADVOCATES/APPLICANTS

VERSUS

LUCY KASSIM MALAMBU.....1ST RESPONDENT/CLIENT

FATUMA KASSIM MALAMBU.....2ND RESPONDENT/CLIENT

RULING

1. Before this Court for determination is the Preliminary Objection dated **17th September 2020** by which the 1st and 2nd Respondents **FATUMA KASSIM MALAMBU** and **LUCY KASSIM MALAMBU** object to the hearing of the chamber summons **dated 16th July 2020** on the following grounds-

- “i. The Application as filed relates to land ownership and as such should have been filed at the Environment and Land Court *ab intio*.**
- ii. This Honourable courts lacks jurisdiction to adjudicate upon this matter.**
- iii. The applicant herein has no locus for she is neither a party in, nor does she have leave to be joined as an interested party to the succession cause.**
- iv. Therefore the application herein ought to be stuck out in toto, with costs.”**

2. The Applicant herein **F.A. BADIA & COMPANY ADVOCATES** opposed the Preliminary Objection through their Grounds of Opposition dated **4th February 2021** which opposition was premised on the following grounds:-

- “i. That it is not a proper preliminary objection as envisaged by law as it is blurred by factual details liable to be contested and in any event to be proved through the process of evidence.**
- ii. That it does not disclose which relevant statute and relevant statutory provision and/or provisions of law that have been infringed by the Advocates/Applicants in the Advocates/Applicants chamber summons dated 16th July 2020.**
- iii. That is an abuse of the court process meant to delay and/or all together thwart the Advocates/Applicants chamber summons Application dated 16th July 2020.”**

3. The preliminary objection was canvassed by way of written submissions. The Respondent filed the written submissions dated **13th April 2021** whilst the Applicant relied upon their written submissions dated **4th February 2021**.

BACKGROUND

4. The Succession Cause relates to the estate of **KASSIM HASSAN MALAMBU** (hereinafter ‘**the Deceased**’) who died intestate on **9th October 1983**. A certificate of confirmed Grant was issued to **MIRIAM KASSIM** (the 3rd Respondent herein). On **25th September 1987**.

5. Thereafter the 1st and 2nd Respondents filed in court a summons for Revocation or Annulment of Grant dated **10th July 2014**. The 1st and 2nd Respondents were represented in that matter by the firm of **F.A. Badia and Company Advocates** (the Applicants herein).

6. Vide a Ruling delivered on **21st February 2019** **Hon Lady Justice ROSE OUGO** declined to revoke the Grant dated **25th September 1987**.

7. In an attempt to secure the legal fees due to them from the 1st and 2nd Respondents the firm of **F.A. Badia and Company Advocates** filed the Chamber Summons dated **16th July 2020** seeking *inter alia* the following orders:-

ii. **“That the Honourable court be and is hereby pleased to issue conservatory orders against the following parcels of land and the subject matter of 1st and 2nd Respondents/Clients summons for revocation of Grant dated 10th July 2014 and filed on 15th July 2014 and supported by further affidavits of Lucy Kassim Malambu and Fatuma Kassim Malambu both dated 18th July 2014 and filed in court on 21st July 2014 which gave rise to the court order issued by Honourable Justice A.O. Muchelule dated 21st July 2014; pending the filing, hearing, determination and execution of the Advocates/Applicants intended Advocate/Client Bill of costs against the 1st and 2nd Respondents/clients.**

a. Ngong/Ngong/31984

b. Ngong/Ngong/44288

c. Ngong/Ngong/62326

d. Ngong/Ngong/62327

iii. **That the Honourable Court be and is hereby pleased to order the Advocates/Applicants to file their intended Advocate/Client Bill of Costs against the 1st and 2nd Respondent/Clients Lucy Kassim Malambu and Fatuma Kassim Malambu within 14 days of the filing of this Application.**

iv. **That Honourable court be and is hereby pleased to issue any other and further orders as it deems appropriate in the wider interest of justice.**

v. **That costs of this application shall be borne by the 1st and 2nd Respondent/clients .**

8. Before that application could be heard the Respondent filed the Preliminary Objection dated **17th September 2020**.

ANALYSIS AND DETERMINATION

9. I have carefully considered the Preliminary Objection filed by the Respondents the Grounds of Opposition filed by the Applicant as well as the written submissions filed by both parties. The issues which arise are-

(i) Whether this court has jurisdiction over the matter.

(ii) Whether the Applicants have *locus standi* to file the Application dated **16th July 2020**.

10. The definition of what constitutes a Preliminary Objection was provided in the celebrated case of **MUKISA BISCUIT MANUFACTURING CO. LTD – VS – WEST END DISTRIBUTORS LTD 1969 E.A 696** where it was held as follows:-

“So 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 the pleadings and which objection point may dispose the suit”.

11. Similarly in the case of **ORARO – VS – MBAJA [2005] KLR Hon Justice Ojwang** (as he then was) stated as follow:-

“A preliminary objection is in 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 raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop. The principle is abundantly clear. The “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.” (own emphasis)

12. The issues which have been raised by the Preliminary Objection being issues of jurisdiction and *locus standi* are in my view issues which upon determination may dispose of the application. I therefore find that the Preliminary Objection dated **17th September 2020** raise pure points of law and is a proper Preliminary Objection.

JURISDICTION

13. The Respondents contend that the issues which have been raised by the Applicant in the summons dated **16th July 2020** are matters which touch on the question ownership and occupation of land and as such ought to be litigated in the **Environment and Land Court**.

14. A clear reading of the prayers on the summons dated **16th July 2020** reveals that the Applicant are infact seeking conservatory orders in respect of the various pieces of land cited in the summons pending the hearing and determination of the Applicants/Advocate intended Advocate/Client Bill of Costs against the 1st and 2nd Respondents.

15. This is a family court and this matter was filed as a Succession Cause. The duty of a Probate Court is to oversee the transmission of the estate of the Deceased to the genuine and recognized beneficiaries. The purpose of a succession cause is to ascertain the assets and liabilities of the estate, the identity of the beneficiaries and the mode of distribution of the estate.

16. In **Alexander Mbaka – vs Royford Muriuki Rauni & 7 others [2016] eKLR**, it was held thus:-

“It is only where one has established claim against the estate that has already crystalised that he can litigate it before a Family Court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystalised. The right must be shown to have crystalised before the Family Court can entertain it.” (own emphasis)

17. The claim of the Applicants has not yet crystalized. The Bill of Costs is yet to be taxed. Moreover, the Applicants claim is not against the estate of the Deceased rather their claim would be against the 1st and 2nd Respondents **only** who were their clients. Furthermore, even if the claim was as against the estate then that claim ought to be litigated through the ‘**Administrators**’ of said estate and not by seeking conservatory orders as against the assets comprising the estate.

18. The fact that the Applicants believe they have a claim against some of the beneficiaries is **not** valid grounds to grant conservatory orders as against the entire estate. The Applicants claim which relates to the use and/or occupation of land cannot be litigated under this succession cause. They ought to file their claim under separate proceedings.

19. At best the Applicants could be described as creditors **not** to the entire estate but only to the 1st and 2nd Respondents. In **RE ESTATE OF DORCAS WANJIKU Hon Justice Musyoka** observed that:-

“Creditors as mentioned earlier are neither heirs nor survivors nor beneficiaries nor defendants.”

20. The Applicants cannot in seeking to secure their right to payment of their legal fees interfere with the rights of the beneficiaries of the estate. In my view, application dated **16th July 2020** cannot be filed in this succession cause. The Applicants ought to institute separate proceedings as against their clients (the 1st and 2nd Respondents) to articulate their claims. In the premises I find that this court does not have the jurisdiction to entertain the Applicants claim under this Succession Cause.

LOCUS STANDI

21. ‘**Locus Standi**’ is a legal term which means place of standing. It refers to the rights of a party to be heard by the court. Where a party has no ‘**Locus standi**’ then notwithstanding the merits of their case they cannot be heard by the court.

22. In **ALFRED NJAU & OTHERS – VS – CITY COUNCIL OF NAIROBI [1982] KAR 229** it was stated that:-

“The term *locus standi* means right to appear in court and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings.”

23. In **DAYKO PLANTATIONS LIMITED – VS - NATIONAL BANK OF KENYA LIMITED & 2 OTHERS [2019] eKLR** it was held-

“...it is therefore evident that *locus standi* is the right to appear and be heard in court or other proceedings and literally, it means ‘a place of standing’. Therefore if a party is found to have no *locus standi*, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this court was to find that the Applicant has no *locus standi*, then the Applicant cannot be heard and that point alone may dispose of the suit.” (own emphasis)

24. As stated earlier this is a succession cause and this court is sitting as a probate court.

25. The parties to this succession cause include the survivors/beneficiaries of the estate of the Deceased. A look at the pleadings in this file reveals that the original parties to this succession cause were the following:-

Lucy Kassim Malambu - 1st Objector/Applicant

Fatuma Kassim Malambu - 2nd Objector/Applicant

Mariam Kassim Malambu - Petitioner/1st Respondent

Hassan Kineiya Malambu - Petitioner/2nd Respondent

R.K. Kalama - 3rd Respondent

Elizabeth Wanjiru Njunge - 4th Respondent/Interested Party

Geoffrey Njunge Nganga - 5th Respondent/Interested Party

26. The Applicants were never at any time parties to this cause. They were merely advocates who represented some of the parties to the suit. It is not clear how and/or when the Applicants insinuated themselves into the matter as parties to the suit. There is no indication that the Applicants applied to be enjoined in the suit as Interested parties.

27. The fact that the Applicants have a claim against some of the parties in this cause does not entitle them to file an application to secure their fees in this succession cause. The matter of taxation is totally distinct and separate from the matter of succession. In the case of ***Amina Mohamed Mohamud v Jurjen German Draaijer [2017] eKLR Hon Justice Onyiego*** observed that-

“.....the two provisions do not require that an advocate file her or her Bill of Costs in a clients main file. *An Advocate cannot be party in a clients file for purposes of taxation.*” (own emphasis)

28. To the extent that the Applicants are neither beneficiaries, dependants of the Deceased nor are they Objectors or Interested parties in this succession cause, I find that have no *locus standi* in this matter.

29. Finally I find merit in the Preliminary Objection dated **17th September 2020**. The same is allowed and the Chamber Summons dated **16th July 2020** is hereby struck out. Costs to be met by the Applicants.

Dated in **Nairobi** this **26th** day of **November 2021**.

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MAUREEN A. ODERO

JUDGE