



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 36 OF 2019

JANE WANJA GAKUYA.....APPELLANT

AND

SARAH WAMBETI KINYUA1ST RESPONDENT

SUSAN MUTHONI GICHOBI2ND RESPONDENT

SUSAN WAIRIMU NJAU 3RD RESPONDENT

RULING

1. The applicant Jane Wanja Gakunya filed a Notice of Motion dated 10/6/2019 which seeks a substantive prayer of stay of execution of the Order/Ruling of the trial court dated 10/5/2019 in succession cause No. 149/2017 pending the hearing and determination of the already filed appeal No. 36/2019.

2. The application is based on the grounds that the appeal has high chances of success and if stay is not ordered the appeal shall be rendered nugatory and the appellant stands to suffer irreparable damages and loss. That the respondent will only be subjected to only waiting for the appeal to be disposed as the subject matter is land. Finally, that he is ready to abide by conditions which the court may impose.

3. The 1st respondent Sarah Wambeti Kinyua filed a notice to the pre-liminary objection. It is based on the grounds that:-

a) The appeal is a none starter by virtue of Section 76 of the Law of Succession Act (Cap 160 Laws of Kenya) and the same lacks merits as the administration of the estate of the deceased Mugo Nguo has been concluded.

b) That the application is an abuse of court process intended to frustrate the 1st respondent and circumvent the property rights of the 1st respondent.

c) That the applicant ought to provide security for costs.

4. The 1st respondent also filed a replying affidavit. Her contention is that the applicant ought to have applied for revocation of grant ad not file a memorandum of appeal.

5. The applicant filed written submissions to the pre-liminary objection. He submits that ground (a) is the only ground on a point of law. He submits that **Section 76 of the Law of Succession Act** provides that:

“a grant may be revoked or annulled at any time if the court find that the grant was obtained fraudulently by making of a false statement or by concealing material facts.”

6. He submits that the appeal is against the orders issued by the lower court on 10/5/2019 and 15/5/2019 which has no bearing and nor it connected to **Section 76 of the Law of Succession Act**. To this end he submits that the objection is misconceived.

7. The counsel for the appellant further submits that the grant was confirmed on 12/3/2019 and there is no time limit to seek its revocation. That **Section 76 of the Law of Succession Act** does not prevent a party from appealing against other interlocutory orders. Finally, that the appeal is against a ruling dated 10/5/19 and the grant had been confirmed on 12/3/2019.

8. I have considered the preliminary objection. I agree with Mr. Wambugu that the only ground that meets the threshold of the Preliminary objection is ground (a). It is trite that a preliminary objection can only be raised on a point of law. Ground (b) & (c) may form grounds of

opposition. I will therefore deal with ground (a) of the preliminary objection.

9. The law on preliminary objection has been considered in various decisions of the High Court and the Court of Appeal. I will therefore first consider the law on Preliminary Objections. The definition of a Preliminary Objection was given in the celebrated case of **Mukisa Biscuit Company –v- Westend Distributors Limited (1969) E. A 690 at page 701 as follows:-**

“ 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 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. For a party to raise a preliminary objection, it must be on a pure point of law which when argued would have as a consequence the termination of the suit. It must be clear on the pleadings. It ceases to be a preliminary objection if the court has to ascertain facts. In the case of **Mukisa Biscuits** which I have cited above, the court further states:-

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded ----- which if argued as a preliminary point may dispose of the suit.”

11. What is emphasized here is that a preliminary objection should if successful dispose of the suit.

12. Preliminary objection is therefore a serious matter and a party raising it must be certain of the pleading as raising a point just for the sake without ascertaining the pleadings may amount to waste of judicial time. The pleading in this case is the memorandum of appeal filed by the appellants. The Memorandum of appeal states that the appeal is against the ruling dated 10/5/2019 in succession cause No. 149/2017 by the Senior Resident Magistrate Kerugoya Court. The ruling was on an application dated 18/4/19 which was seeking orders of the removal of the cautions and restrictions placed on land parcel No. Inoi/Thaita/869. The ruling also addressed another application dated 3/4/19 which was seeking review of the orders that the Executive Officer of the Court to sign documents to facilitate transfer of One Acre from land parcel No. Inoi/Thaita/869 to the caveator. It was also seeking orders that the caveator pays Kshs 100,000/- being the balance of the purchase price. The application dated 3/4/19 was dismissed with costs while the one dated 15/4/19 was allowed as prayed. These applications had nothing to do with matters under **Section 76 of the Law of Succession Act**. As held in the cases I have referred to above, the Preliminary Objection must be determined from the pleadings and the Preliminary Objection must be on matters which are not in dispute. There are matters in dispute as the 1st respondent is raising the issue of revocation of grant while the appeal is against a ruling. In the circumstances, the appeal ought to be heard and determined on merits.

13. I find that the preliminary objection is clearly misconceived and had no merits. I dismiss it with costs.

Dated at Kerugoya this 30th day of January 2020.

L. W. GITARI

JUDGE

30/1/2020

Order:-

The ruling has been read out in open court.

The application to proceed on 2/6/2020.

L. W. GITARI

JUDGE