



REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

MISC. SUCCESSION CAUSE NO.86 OF 2018

RICHARD KIPYEGON KOECHPETITIONER

VERSUS

BORNES CHEPKURUI KOE.....APPLICANT

PAUL KIPKIRUI TOWETT.....INTERESTED PARTY

RULING

1. Before me is a Notice of Preliminary Objection filed in these succession proceedings by the Interested Party Paul Kipkirui Towett dated 2nd December 2019 wrongly described by counsel as petitioners on the grounds that –

i. The issues raised by the applicant in the present suit are Res Judicata contrary to the provisions of section 7 of the Civil Procedure Rules (should be Act) as the same have been directly and substantially in issue in a former suit between the parties herein being Succession Cause No.29 of 2009 and such issues have been heard and finally determined by a court of competent jurisdiction.

ii. That the issues raised by the applicant in the instant suit will occasion multiple suits.

2. The Preliminary Objection proceeded by way of filing written submissions. The objector/Interested Party Paul Kipkirui Towett through M/s Rodgers Mugumya P. Sang & Co. advocates filed written submissions on 2nd January 2020, while the applicant Bornes Cheruiyot Koe filed written submissions on 7th February 2020 through M/s Ngeno and Company Advocates. The petitioner Richard Kipyegon Koech did not attend court, though I was told that he was served with notice.

3. I have perused and considered the pleadings herein and the written submissions filed by the interested party/objector and the applicant.

4. This is a preliminary objection. What constitutes a preliminary objection has been long settled. In the case of **Mukisa Biscuit Manufacturing Co. Ltd – vs – West End Distributors Ltd [1969] EA 696** Sir Charles Newbold President of the Court of Appeal stated 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 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 exercised of judicial discretion.”

5. It follows from the above reasoning in the case of Mukisa Biscuits (supra) that a preliminary objection has to be purely on a point of law, which can be raised only where the facts are not in contest.

6. The issues raised is the preliminary objection herein are whether this court has jurisdiction to entertain and determine the miscellaneous succession cause herein as the issues were finally determined in Sotik Succession Cause No.29 of 2007 and secondly that the issues in these proceedings will occasion a multiplicity of suits in this matter.

7. I have been availed the file in Sotik Succession Cause No.29 of 2007 in which I observe that the parties therein were Joel Kipkorir Koech as administrator and Richard Kipyegon as respondent. The beneficiaries in that estate were Joel Kipkorir Koech, Elijah Cheruiyot Koech, Peter Kipkurui Chepkwony, Richard Kipyegon Koech, Stephen Kiplangat Chirchir, Julius Ngetich and Kembur Pefa Church. None of the contentans in this preliminary objection herein Bornes Chepkurui Koe and Paul Kipkirui Towett was either a party or a beneficiary in those proceedings. The deceased was however the same Kipkoech Arap Koe.

8. The first issue is whether this court has jurisdiction to entertain this matter. I note that under section 50 of the Law of Succession Act (Cap.160) this court has jurisdiction to entertain, hear and determine an appeal from the magistrate’s court in succession matters. Though I

note that sometimes such contests are referred to this court as miscellaneous causes, in my view depending on the nature of the facts of the case, such a mistake in the wording of the pleadings may be curable under Article 159(2) of the Constitution of Kenya, 2010. I note however that the actual interested parties in the Sotik Succession Cause were not served. As the real parties in the succession cause, that is the petitioner and beneficiaries in the Sotik case have not been served and responded to the Miscellaneous Succession Application herein, I am hesitant to dismiss the present miscellaneous application on the ground that this court has no jurisdiction to hear this matter. In my view all the parties in the succession proceedings in Sotik should all be served and they may raise any objections thereafter if they wish.

9. With regard to the issue of multiplicity of court proceedings, it is clear to me that no parallel proceedings are pending at the moment, as the succession proceedings in Sotik Succession Cause No. 29 of 2007 were concluded in 2008, and certificate of confirmed grant of letters of administration was issued on 28th August 2008. There are thus no live parallel proceedings herein. Res-judicata under section 7 of the Civil Procedure Act (Cap. 21) does not arise, since an appeal from the decision of a magistrate's court in succession matters may under section 50 of the Law of Succession Act lie to this court, and I have not been addressed on any limitation in that regard in this preliminary objection. As such, I am not able to say that the principle of res-judicata applies here. I will thus not dismiss this miscellaneous application on that account also.

10. Having stated as above, I order that the miscellaneous succession cause filed herein be properly served on all the parties to the Sotik Magistrate's Court Succession Cause No.29 of 2007 together with all the beneficiaries therein. Each of them will have 21 days from service to file their responses for the court's consideration. It is so ordered.

Dated this 29th day of April 2020.

GEORGE DULU

JUDGE

Delivered through video conferencing in the presence of Mr. Langat court assistant, Mr. Musyoka ICT officer, Mr. Mugumya for interested party.