



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 121 OF 2010

IN THE MATTER OF THE ESTATE OF GIDEON MANTHI NZYUKO (DECEASED)

MONICAH MWENGA MANTHI....1ST ADMINISTRATOR/RESPONDENT

AARON MUTHIANI.....2ND ADMINISTRATOR/RESPONDENT

VERSUS

JOHN MUKULYA MANTHI.....3RD ADMINISTRATOR/APPLICANT

AND

MARY MAINA NANDEKA.....INTERESTED PARTY

RULING

1. When the application dated 27.10.2020 and filed on 29.10.2020 came up for hearing, Mr. Amuga for the interested party indicated to court that he had filed a notice of preliminary objection.

2. The preliminary objection is dated 16.11.2020 and was filed on 18.11.2020. The same sought that the application dated 27.10.2020 be struck out because;

a. No order had been sought or obtained to join the interested party as a party to this cause.

b. The application is fatally defective for being directed against a person who is a stranger to this cause.

c. The orders sought in the application against the interested party could only be sought in a substantive suit filed against Mary Maina Nandeka and not in a concluded succession cause.

3. The court directed that the preliminary objection be canvassed vide oral submissions. Mr. Amuga submitted that the interested party was not a party to the case and was never a beneficiary, administrator, objector, heir of the deceased. It was pointed out that the succession cause was concluded and there was no dispute among the beneficiaries as to the distribution of the estate of the deceased and further that there was no prayer for joinder of the interested party. According to counsel, the application dated 27.10.2020 was fatally defective for the substantive prayers sought were those of vacant possession of the suit property and as such this court did not have jurisdiction to entertain the same. Reliance was placed on the case of **Ambrose Kimani Mwangi & 30 Others v Jemima Wangechi Thuita (2015) eKLR**. It was reiterated that this court was not the forum for the claim being made against the interested party. The court was urged to strike out the summons dated 27.10.2020.

4. In response, Mr. Nthiwa for the 3rd administrator submitted that the court ought to direct that the interested party be punished for being an intermeddler. It was pointed out that the interested party was brought into the picture because of the intermeddling and therefore the preliminary objection was not valid as the interested party had not renounced her rights. According to counsel, there was no requirement under the law of succession to enjoin a beneficiary as they had a right to participate in the proceedings. Counsel submitted that the interested party was a beneficiary by virtue of her late husband being the 1st administrator. It was the argument of counsel that if there was merit in the preliminary objection, then this court ought to declare that the interested party had no interest in the estate of the deceased. Counsel

submitted that the preliminary objection was misplaced and the same ought to be dismissed.

5. Mr. Muumbi for the 2nd administrator submitted that the preliminary objection had no merit. It was pointed out that the interested party was not a stranger since she was a wife to the 1st administrator. According to counsel, the administration had not been finalized as the Kimathi estate was yet to be sold and proceeds shared out. It was submitted that the interested party was a beneficiary and therefore part and parcel of the proceedings. Counsel urged the court to dismiss the preliminary objection. Learned counsel took issue with the cited case as the same is not relevant to the instant matter.

6. In rejoinder, Mr. Amuga submitted that the interested party was not shown as a survivor of the 1st administrator. The court was urged to look at the pleadings and establish the identity of the beneficiaries. According to counsel, this court had no jurisdiction to issue eviction orders; that the issue relates to locus standi of the interested party and that the preliminary objection relates to pure points of law. The court was urged to allow the preliminary objection.

7. I find it necessary to define what constitutes a preliminary objection on a point of law. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

8. It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence. Understanding the nature and scope of preliminary objections is very important for practicing lawyers. Knowing how to raise a properly formulated preliminary objection, and when to raise it, can save a lot of time and costs.

9. Discussing what constitutes a preliminary objection, Law JA in **Mukisa Biscuit Manufacturers Ltd v West end Distributors Ltd**(1969) E.A 696 at Page 700 said:-

"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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."

10. In the words of **Sir Charles Newbold P** at page 701, B:-

"...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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."(Emphasis added)

11. In **Omondi v National Bank of Kenya Ltd & Others (2001) KLR 579** it was held that:-

"...What is forbidden is for counsel to take, and the court to purport to determine, a point of preliminary objection on contested facts..."

12. My understanding of the preliminary objection is that the claim in the application dated 27.10.2020 is not justiciable before a succession court but in a separate claim. Having looked at the definition of a preliminary objection, I deemed it necessary to examine the issue of jurisdiction before addressing the substance of the objection.

13. The guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine the suit, then the suit would be deemed a nullity as per the decision of Nyarangi J A in the case of **Owners of Motor Vessel "Lilian S" v Caltex Oil (K) Ltd [1989] KLR 1** that:-

"Jurisdiction is everything without which a court of law has no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction."

14. According to the pleadings before the court in respect of the application dated 27.10.2020, the crux of this matter is that the interested party continued in occupation of the suit property that was to be purchased by her deceased husband, the 1st administrator but who however did not complete payment for the same. It seems that the application dated 27.10.2020 seeks to have the interested party vacate the suit property to pave way for beneficiaries who have a purchaser's interest in the same. I find that there is a confirmed grant that permits the sale of the suit property and to the applicants in the application dated 27.10.2020. The interested party is interfering with the performance of the terms of the confirmed grant and hence the need to have her out of the property so as to enable beneficiaries who are ready to purchase the same and thus enable the proceeds thereof to be shared out according to the confirmed grant. It had earlier been agreed that the interested party's husband do purchase the property but failed to do so before he passed on and hence the surviving administrators must be allowed to carry on with the task of administering the estate. I am satisfied that the court has jurisdiction to handle the application dated 27.10.2020 by dint of section 79 of the Law of Succession Act as well as sections 82 and 83 of the Act, which sets out the powers and duties of administrators.

15. Having satisfied myself on the issue of jurisdiction, the other issue for my determination is whether the grounds raised in this objection are pure points of law. The grounds as I understood it is "*claim against the interested party does not belong to this court, a separate claim ought to be brought against the interested party and she has not been properly included as a party to the suit.*" Put differently, is the interested party properly sued? Does she have locus standi?

16. The provisions of the Probate and Administration Rules 1980 are silent on the element of joinder of parties. The closest provision that touches on parties to a matter before the court is Rule 60 that states that;

“Every interested person (whether or not he has been served with notice thereof) who wishes to be heard upon or to oppose any application, and has not already appeared in the proceedings, shall enter an appearance in Form 26 in the registry in which the application is made giving his address for service, and may file such affidavits as he considers proper, to each of which the applicant may with leave of the court file an affidavit in reply.”

17. Because of the lacuna of the law and by dint of rule 63 that does not import the application of Order 1 of the Civil Procedure Rules, section 47 of the Law of Succession Act enjoins this court to make such orders as are necessary to meet the ends of justice. I will therefore draw analogy from Order 1 rule 3 of the Civil Procedure Rules states that: "*All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise*" This rule provides that parties can be joined as defendants to a suit. Rule 5 provides that it is not necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

18. Further, Order 1 r.9 CPR provides that;

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

19. This means that the application dated 27.10.2020 cannot be defeated for mis-joinder or non-joinder of parties as long as the court is in a position to deal with the matter in controversy as regards the rights of the parties before it. Therefore before the court can strike out the application it has to be satisfied that there is no common question of law or fact between the parties which the court has to determine. At this stage, it is not possible to determine whether or not there is a question of law or fact common to all the parties that this court has to resolve. To make such a determination would necessitate going to the merits of the very same application that the advocate for the interested party seeks to have it struck out and yet a preliminary objection is limited in scope. Allowing the objection would be inviting this court to make a decision by imagining its own facts and yet there are pleadings on record that the court has been called upon to consider.

20. In addition, Order 1 rule 10(2) of the C.P.R. gives the court wide discretion to add parties at any stage of the proceedings either upon or without the application of either party on such terms as may be just. The test to be applied before doing so is whether this will enable the court to effectually and completely adjudicate upon and settle all questions involved in the cause or matter. Parties to a dispute can broadly be divided into necessary or proper. Necessary parties are those who are interested in the subject matter of the proceedings and in whose absence, therefore the subject matter cannot be fairly dealt with. Proper parties on the other hand are those who though not interested in the proceedings are added as parties for good reason. Generally, a defendant against whom no relief is sought will not be added against the wishes of the plaintiff because a plaintiff cannot be compelled to proceed against a defendant if he has no cause of action against him/her/it.

21. As indicated earlier, whether or not the interested party is a proper party is a point of fact which does warrant evidence and that the preliminary objection cannot dispense with it. I am therefore satisfied that any concerns that the interested party's counsel has can be adequately addressed during the hearing of the application where there is ample opportunity to present evidence on whether or not the remedies sought against his client ought to be granted.

22. Applying the principles laid down in the law and the above authorities, the conclusion becomes irresistible that the preliminary objection raised in this case fails and is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 15th day of December, 2020.

D. K. Kemei

Judge