



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**HIGH COURT SUCC. CAUSE NO. 531 OF 2010**

**IN THE MATTER OF THE ESTATE OF NGUBANE KARUGA alias NGUMBANE KARUGA (DECEASED)**

**GERALD MWANGI KIHARA.....APPLICANT**

**- V E R S U S -**

**CHRISTOPHER MWANGI NGARIA**

**MICHAEL KARIUKI WANJOHI.....RESPONDENTS**

**R U L I N G**

On 13<sup>th</sup> September 2016 the applicant herein Gerald Mwangi Kihara brought a summons for revocation of grant under the certificate of urgency of Joshua Kiboi Advocate stating that the matter was urgent for the reasons;

1. That L.R. No. Othaya/Ihuririo/62 was the only asset for which the succession proceedings were instituted and the Grant of Letters of Administration issued and confirmed without the knowledge of the applicant and other dependants of the deceased who were entitled to participate in the estate of the deceased.
2. That the Grant was obtained fraudulently by asking of false statements that the 2nd respondent is a beneficiary and a dependant, and that the deceased was not survived by other dependants.
3. That the 1st respondent intends to have the suit parcel subdivided among the respondents and has brought before this honourable court an application dated 19th Nov. 2015, seeking to sign all necessary forms for transfer on behalf of the 2nd respondent so as to give effect to the Grant that was issued on the 15th November, 2010 and subsequently confirmed on 14th October, 2011.
4. That unless this application is heard on a priority basis and the court intervenes with injunctive and/or inhibitory orders pending the hearing and determination of the summons for revocation of the Grant under which the suit parcel is sought to be subdivided, the respondents will proceed to have land parcel land reference No. Othaya/Ihuririo/62 shared amongst themselves to the detriment of the applicant and other dependants left out in the succession proceedings herby denying them the right to participate in the estate of the deceased.
5. That the balance of convenience tilts in favour of grant of orders sought and no prejudice will be suffered by the respondents by a grant of temporary orders of the injunction and the maintenance of the status quo pending the hearing and determination of the summons for revocation or annulment of Grant.
6. Thus pending the hearing and final determination of this application, the respondents Christopher Mwangi Ngaria and Michael Kariuki Wanjohi who are the current Administrators as per this cause of the estate of the Late Ngubane Karuga alias Ngumbane Karuga ought to be restrained by way of an injunction from alienating, wasting, disposing of, subdividing, transferring and/or otherwise dealing or interfering with the deceased's parcel of Land Reference No. Othaya/Ihuririo/62.

The applicant sought orders that;

1. This matter be certified as urgent and same be admitted for hearing on a priority basis.
2. That the temporary injunction be and is hereby issued restraining the respondents, Christopher Mwangi Ngaria and Michael Kariuki Wanjohi who are the current administrators as per this cause of the estate of the late Ngubane Karuga alias Ngumbane Karuga, their employees, servants and/or agents or anyone else acting on their instructions from surveying, subdividing, selling, transferring, distributing and/or otherwise dealing or interfering with the deceased's parcel of Land Reference No. Othaya/Ihuririo/62 for a period of 14 days.

3. That the planned partition by Nyeri District Government Surveyor be and is hereby stayed for a period of fourteen days.

4. That the applicant be and is hereby directed to serve the respondents with summons for revocation of Grant for inter-pares hearing on the 26<sup>th</sup> September, 2016.

The grounds for the application were set out on the face of the application as:

(a) That at the time of applying for the Grant, the Respondents herein failed, neglected and/or intentionally refused to reveal to the court the material fact of the existing dependants ranking equal in priority to him, being the siblings of the brother to deceased and all of whom have equal beneficiary interests to the estate of the deceased.

(b) That at the time of applying for the Grant, the Respondents herein failed, neglected and/or intentionally refused to disclose to the court granting the Grant that they had no consent from other dependants ranking equal in priority and/or misrepresented to the court that he had obtained such consent.

(c) That the non-disclosure of the other dependants and the misrepresentation by the respondents that they had the requisite consent enabled the respondents to obtain the Grant of the Letter of Administration fraudulently for their own individual interests to the exclusion and detriment of the interests of the other beneficiaries.

(d) That the said non- disclosure and/or misrepresentation has tainted the proceedings leading to the confirmation of the Grant by the respondents rendering the proceedings defective in substance and thus qualifying them to be set aside in the interest of justice.

(e) That if the 1st respondent's application dated 19th November, 2015, is heard and determined before the disposal of this summons for revocation of the Grant of Letters of Administration, the court may grant the orders sought rendering the orders emanating from the summons for revocation of the grant futile in the event the summons are allowed.

(f) That in the event the respondents are not restrained by this Honourable Court, they will proceed to have land parcel Land Reference No. OTHAYA/IHURIRIO/62 shared amongst themselves to the detriment of the applicant and other dependants thereby denying them the right to participate in the estate of the deceased.

(g) That the balance of convenience tilts in favour of grant of the orders sought and no prejudice will be suffered by the respondents by grant of temporary orders and maintenance of status quo pending the hearing and determination of the summons for revocation or annulment of grant.

(h) That no third party without notice stands to be prejudiced by the making of the orders sought herein

(i) That it is only just and meet that the orders sought herein be granted to the just and fair administration of the deceased's estate.

The application is supported by the affidavit of Gerald Mwangi Kihara, the applicant.

On 13/9/16 the Hon. Justice Mativo J, heard the matter under certificate of urgency and granted prayers as listed on the order;

***1. That temporary injunction be and is hereby issued restraining the respondents, Christopher Mwangi Ngaria and Michael Kariuki Wanjohi who are the current administrators as per this cause of the estate of the late Ngubane Karuga alias Ngumbane Karuga, their employees, servants and/or agents or anyone else acting on their instructions from surveying, subdividing, selling, transferring, distributing and/or otherwise dealing or interfering with the deceased's parcel of land reference No. Othaya/Ihuririo/62 for a period of fourteen days.***

***2. That the planned partition by the Nyeri District Government surveyor be and is hereby stayed for a period of fourteen days.***

***3. That the applicant be and is hereby directed to serve the respondents with the summons for revocation of Grant for inter-partes hearing on the 26<sup>th</sup> September, 2016.***

The application was set down for hearing for 26<sup>th</sup> September 2016. On 11<sup>th</sup> October 2016 the 1<sup>st</sup> respondent filed a Preliminary Objection to the summons for revocation of Grant on the ground that the grant had been confirmed and the claim was based on trust.

The respondents each filed a replying affidavit to the summons

Parties, through their respective counsel Magua and Associates for the applicant and Kiminda for 1<sup>st</sup> respondent, and the 2<sup>nd</sup> respondent in person, agreed to dispose of the P.O by way of written submissions and to rely on their affidavits. The second respondent pointed out to the court that he had the title deed for the entire parcel of land since 1976.

Counsel made oral submissions in highlights.

Mr . Kiminda submitted that the entire claim was entirely based on trust. The 1<sup>st</sup> respondent is of the view that paragraph 6 and 7 of the supporting affidavit clearly show that the whole claim is based on trust, and for that reason seek that this court finds it does not have the jurisdiction to hear the application and strike out the summons for confirmation of Grant.

Further that the parties must first settle the issue of trust under the provisions of Order 37 of the Civil Procedure Rules otherwise this court lacks jurisdiction.

The applicant submitted that the 1<sup>st</sup> respondent has made a selective reading of the summons as is brought under s.76 of the Laws of Succession Act, and that they have set out the grounds for seeking the revocation of the grant. That the proceedings in Succession Cause no. 46 of 1980 Othaya DM's court had extinguished the issues of trust, and the mere mention of trust in some of the paragraphs in the affidavit of support could not take the meaning taken by the 1<sup>st</sup> respondent.

A preliminary objection must be a point of law which if argued may dispose of the suit. It cannot be raised if there are facts in issue – it must be on the assumption that all facts pleaded by the other side are correct. See **Mukhisa Biscuit Manufacturing Co. Ltd. Vs. West End Distributors Ltd. (1969) E.A. 699.**

“A preliminary objection is in the nature of a what used to be a demurrer. It raises a pure point of law which is argued as the assumption that that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or of what is sought is the exercise of judicial discretion.”

Further in **Oraro vs. Mbaja [2005] KLR 141** the court held that

“A preliminary objection correctly understood is 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 process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects coming for proof, or seeks to adduce evidence of its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The court's discretion is never exercised just on the basis of proposition of law. There must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised.”

Does this PO have merit? It would if the entire summons is based on trust as envisaged by Order 37 of the CPR.

I have considered the above issues. The question is, in this summons is this court being asked to determine whether there exists a trust? The grounds upon which the summons for revocation of Grant is brought are set as out in the face of the application as are provided for under section 76 of the law of succession Act. I have deliberately set them out there. The offensive paragraphs in the supporting affidavit state that, *“during the process of consolidation and adjudication of land in Kenya LR no. OTHAYA/IHURIRO/62 was registered on 19<sup>th</sup> March 1958 in favour of Ngubane Karuga alias Ngumbane Karuga to hold in trust...that since we were born and raised on the said parcel of land and have been living there with our families...”*

According to the applicant that issue was settled by the Succession cause no 46 of 1980 and is not live. The mere mention of it does not mean that the application is based on the issue of trust. Apparently that is the moot point, according to the 1<sup>st</sup> respondent. However, to the applicant it is not and he is not relying on it. He is relying on issues that require to be determined as per the provisions of s.76 of the Laws of Succession Act. These include whether there was non-disclosure/ misrepresentation of material facts, non-disclosure of other dependants, rendering the proceedings so defective as to warrant being set aside. These are matters of fact that can only be determined upon the hearing of the summons.

Secondly, by raising the P.O the 2<sup>nd</sup> respondent is saying that the facts deponed by the applicant are correct. That cannot be the position, as the applicants have raised serious issues for determination, which require that the summons be heard, and will not be resolved by the PO.

From the reasons above the preliminary objection is premature. It is hereby dismissed. The summons for confirmation of Grant to be listed for hearing as earlier ordered by Mativo J. The respondents are at liberty to file any protests.

No orders as to costs.

**Dated delivered and signed this 26<sup>th</sup> Day of January 2018.**

**TERESIA M MATHEKA**

**JUDGE**

Court Assistant Hariet

Ms. Mwangi for Mr. Kiminda for 1<sup>st</sup> Respondent present.

**TERESIA M MATHEKA**

**JUDGE**