



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 375 OF 2009

IN THE ESTATE OF HIRAM MURURU CHEGE (DECEASED)

TABITHA WAKIYA KABUTHIA..... APPLICANT

VERSUS

LUCY WANJIKU CHEGE

KEVIN KARAGU CHEGE RESPONDENTS

R U L I N G

1. Having heard the matter before him by way of *viva voce* evidence Musyoka J delivered a lengthy ruling on the 25th of September, 2015 where he made a number of findings and distributed the assets of the deceased amongst the beneficiaries of the estate. The ruling remains in force.

2. By an application dated 13th September 2018 **Tabitha Wakiya Kabuthia** one of the widows (Applicant) moved this court against **Lucy Wanjiku Chege**, the other widow and her son **Kelvin Karagu Chege** (Respondents), seeking for injunctive orders so that the Respondents do not advertise for sale, offer for sale, take possession, lease, charge or in any other manner interfere with **L.R. NO. RUIRU/KIU BLOCK 3/1314(PLOT 1370)**.

3. On their part the Respondents filed a replying affidavit in objection on 20th September, 2018. They also filed an application of even date seeking that the Applicant be ordered to vacate the suit premises within 30 days, the applicant do pay rent arrears of Kshs. 45,000 a month from date of the ruling mentioned above, totalling to Kshs. 1,620,000, and be ordered to be paying Kshs. 45,000 until the property is sold, in the alternative the Respondents sought to be allowed to move into the premises.

4. On the 24th September 2018, by consent of the parties the court directed the property in contention **Ruiru/Kiu Block 3/1314 (Plot 1370)** be valued pending hearing and determination of the applications.

Parties on the 4th of October 2018 reported that a valuation had been done. The valuation report was dated the 3rd of October, 2018. At which point the pending applications were slated for hearing on the 23rd of October 2018.

5. On the 18th of October 2018 a Notice of change of Advocates was filed. The incoming counsel filed a Notice of Preliminary objection citing lack of jurisdiction by this Court and accompanying the said notice was a replying affidavit.

6. On the 23rd of October 2018 the court directed the Preliminary Objection be disposed of first. After all a court would have no business dealing with a matter where it has no jurisdiction.

7. Mr. Nahone for the applicant submitted that the Preliminary Objection was premised on **Article 162(1)(b)** of the **Constitution** as read with **Section 1B** of the **Environment and Land Act** and contended that the property subject matter has a Certificate of Lease in the name of the Applicant and any issues thereof can only be entertained in a Land and Environmental Court and that this Court therefore lacked Jurisdiction to deal.

8. Mr. Wanjohi for the Respondent on his part submitted that the Preliminary Objection was a mere waste of time in that the title is featuring in court for the first time in 9 years yet it was purportedly issued in August 2009. He further submitted that the said Title was obtained fraudulently by the Respondent who has indeed been intermeddling with the estate.

9. In arriving at a decision, the court considered the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributing Limited (1969) EA 696** wherein Sir Charles Newbold described what would be raised as a Preliminary Objection in the following terms;

“The first matter relates to the increased practice of raising points which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be demurer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact had 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. The improper practice would stop”

10. The applications pending before court arise from the ruling of the 25th of September, 2015 where the property subject matter was listed as one of the assets of the estate due for distribution and distributed as such.

11. And as submitted by the Respondents’ counsel the title being unleashed now did not featured in the 9 years that this matter has been in court. It is also noteworthy that in the valuation report presented to this court dated 3rd October 2018 and prepared by Capital Valuers Ltd, a reputable firm of valuers, pursuant to a consent order, on page 4 thereof there is indication that the title has not been registered.

12. The million-dollar question is how the Respondent sat quietly for 9 years yet she had title and subjected herself to this Court’s jurisdiction. There are explanations to be made I must say. And this therefore is not a matter that can be decided preliminarily.

13. In my considered view the words of Sir Newbold quoted above fit squarely within the circumstances of this case. The Preliminary objection is not only misplaced, the introduction of the title against a ruling of the court which is still in force is an afterthought, is suspect, meant to confuse issues and ought not to have been raised in a simplistic manner as was done.

14. The Applicant herself filed evidence in support of the Preliminary Objection which clearly means that the issue raised cannot be a Preliminary point, neither are the facts accepted as being correct by the opposite side.

15. The Preliminary Objection is therefore dismissed with costs and directions issued that the pending applications be argued together at the earliest.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd DAY OF November, 2018.

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ALI-ARONI

JUDGE