



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE 1664 OF 2001

IN THE MATTER OF THE ESTATE OF DAVID KAMAU MBARIA

MARY WAIRIMU.....APPLICANT

VERSUS

PETER BORO MBARIA.....RESPONDENT

AND

HUMPHREY NJENGA KARUMBA.....INTERESTED PARTY

DAVID NJOROGE KARIUKI.....1STOBJECTOR

(Administrator of the Estate of Danson Mbaria)

NJOROGE KINORO.....2NDOBJECTOR

(Administrator of the Estate of Peter Kinoro Kinuthia)

RULING

PRELIMINARY OBJECTION

1) The Applicants 1st Petitioner Mary Wairimu and 2nd Petitioner Afrohios Njoroge Kamau filed Preliminary Objection on 29th September 2016 against the application filed by 1st Objector David Njoroge Kariuki and 2nd Objector Njoroge Kinoro filed on 22nd July 2016.

2) The Applicants sought to be joined to the proceedings with regard to the estate of David Kamau Mbaria by substituting Danson Mbaria and Peter Kinoro Kinuthia who are deceased. They sought preservation of the suit property Plot Kabete/Gikuni/T.17 until the hearing and determination of the suit ELC 600 of 2016 to determine ownership of the suit property Plot Kabete/Gikuni/T.17.

3) The Applicants sought the grant issued to Administrators of the deceased's estate or amended so as to remove Plot Kabete/Gikuni/T.17 from the grant of representation.

4) The Applicants who filed the Preliminary Objection raised the same on the following grounds;

a. The interested party and Objectors lack locus standi to be joined to these proceedings.

b. The interested party's claim was extinguished at the Rent Tribunal proceedings.

c. The 1st and 2nd Objectors have not obtained grants to administer the estates of the Objectors who are deceased.

d. The suit property Plot Kabete/Gikuni/T.17 is part of the deceased's estate.

e. The interested party and Objectors are forum shopping and frustrating the efforts of the Petitioners to preserve the estate.

5) On 16th January 2017, the Applicant of the Preliminary Objection objected to the Applicants joining these proceedings as a similar application for revocation of grant was withdrawn on 19th February 2007 before Hon. Justice Joyce Aluoch. The Applicants cannot bring an extinguished claim that was withdrawn.

6) The Applicants obtained Court orders over the suit property Plot Kabete/Gikuni/T.17 from the Rent Tribunal and yet they are not landlords.

7) The Applicants; 1st Objector David Njoroge Kariuki sought to represent the estate of Danson Mbaria (deceased) and 2nd Objector Njoroge Kinoro sought to represent the estate of Peter Kinoro Kinuthia and the Preliminary Objection is that the Applicants have not obtained grant of letters of administration intestate and cannot legally represent the estates.

8) The Respondents of the Preliminary Objection claimed that there is a dispute over the suit property which ought to be resolved. There is a Purchaser who wants to join these proceedings and claims proprietary rights. There are the Objectors who claim ownership over the same suit property.

DETERMINATION

A Preliminary Objection is defined in the **MUKISA BISCUIT MANUFACTURING CO. LTD VS WESTEND DISTRIBUTORS LTD [1969] E.A. 696** where the Court observed that:

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point 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.”

Sir Charles Newbold P. added as follows at page 701:

“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.”

In the instant case, the Preliminary Objection seeks to determine questions of law that at the root of the suit or proceedings and may dispose the same. Upon consideration of the submissions by respective Counsel on the Objection; this Court is of the following view based on the issues herein under;

a) The Application filed on 22nd July 2016 is not purely revocation of grant but the issue of revocation is just but one of the issues raised as stated in the above submissions.

b) According to the Court record, on 19th February 2007, the Objection to making of grant filed on 6th April 2000 by the deceased's partner Danson Kariuki was withdrawn and a similar application by Boro Mbaria filed on 26th November 2000 was also withdrawn by consent before Hon. Justice Joyce Aluoch. Thereafter, the grant of letters of administration

was issued to the Petitioners/Applicants to administer the deceased's estate. The present application to revoke the grant cannot be sustained as the Objectors withdrew their respective objections as confirmed by the Court record.

c) The Applicants in the Application filed on 22nd July 2016 have not obtained grants of letters of administration for the Objectors' (who are deceased) estates to legally represent their estates. They do not have *locus standi* and their application lacks merit due to lack of limited grant *ad litem* and or full grant under Section 67 of Law of Succession Act Cap 160.

d) The Applicants in the Application filed on 22nd July 2016 seek to be granted orders allowing them to be joined in the proceedings. The Applicants intend to thereafter halt these succession proceedings on the basis of the fact that there is pending in ELC Division of the High Court Case Number 600 of 2016 which is pending over the same suit property Plot Kabete/Gikuni/T.17 which has not been set down for hearing.

This Court finds that in the instant case these Succession proceedings are focused on administration of David Kamau Mbaria (deceased) estate amongst his family. The assets that comprise the estate of the deceased include among other properties the suit property. To halt these proceedings to await final determination of ownership of the suit property Plot Kabete/Gikuni/T.17 in ELC Case Number 600 of 2016 is to deny the deceased's family justice by unfairly and unduly delaying the deceased's family's inheritance and beneficial interest over the deceased's estate.

Secondly; it is an abuse of the Court process to seek to join proceedings only for the sole purpose of halting these proceedings and await the hearing and determination of ELC Case Number 600 of 2016 at your convenience. If the Applicants have a legitimate, legal and valid right over the suit property, they are at liberty to prove their proprietary right first in the ELC Case number 600 of 2016; then file in this Court the ELC Court determination of the Applicants proprietary right over the suit property. Only then can and will the Court sever the suit property from the list of assets that comprise of the deceased's estate available for distribution.

In the meantime Succession Cause 1664 of 2001 shall proceed and the Applicants should obtain grants for their respective Objectors estates and establish their claim over the suit property in the instant case first before they can interfere and halt these proceedings.

A grant of letters of administration does not facilitate distribution of the estate, distribution, the distribution of the estate commences after the grant is confirmed. If and when the Petitioners file summons for confirmation of grant and proceedings commence the Objectors are at liberty to file protest over the suit property Plot Kabete/Gikuni/T.17 and they shall be granted a hearing and opportunity to establish their claim.

Even if confirmation of grant proceedings commences and it includes the seemingly contested suit property Kabete/Gikuni/T.17 under Rule 41(3) of Probate & Administration Rules, the Court may hive off any contested asset or share of the estate of the deceased that is contested and await distribution if at all until determination of the dispute and only distribute the uncontested assets of the deceased's estate.

Meanwhile the Court may proceed to partially confirm the grant with regard to the agreed and consented to properties that comprise of the estate of the deceased and suspend the distribution of undetermined property until the contest or dispute is resolved. All these factors tilt towards these proceedings continuing to their logical conclusion and not halted. Once ownership of the contested suit property is conclusively settled, then the unconfirmed part of the grant shall be confirmed and/or the contested asset be left out or availed for distribution depending on the outcome of the dispute.

DISPOSITION

For the above mentioned reasons;

1) This Court upholds in its entirety the Preliminary Objection filed on 29th September 2016 against the application filed on 22nd July 2016.

2) The Applicants application filed on 22nd July 2016 is stayed and or suspended until Applicants obtain grants and or establish their claim to the suit property Kabete/Gikuni/T.17.

3) The Petitioners are at liberty to continue the present proceedings subject to Applicants filing Protests to confirmation of grant.

4) The Applicants in Application filed on 22nd July 2016 shall pay costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH FEBRUARY 2017.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

Ms. Nyanchoka holding brief Ms. Michuki for Petitioner.