



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1753 OF 2011

IN THE MATTER OF THE ESTATE OF WAMBUI KIIGI (DECEASED)

LUCY WANJIKU KIBUNGA (suing as a legal representative of the late)

NAHASHON KIBUNGA KIGII.....1ST APPLICANT WAIRIMU NJOGU

(legal representative of the estate of NJOGU).....2ND APPLICANT

JAMES NDICHU WAWERU

(legal representative of WAWERU KIIGI.....3RD APPLICANT

VERSUS

GEORGE WAITHAKA MWAURA.....1ST RESPONDENT

MOSES KIIGI NGANGA ALIAS KIIGI NGANGA.....2ND RESPONDENT

RULING

1. The respondents filed a notice of preliminary objection dated 28th September 2016 in which they sought to have the applicant's application dated 2nd February 2015 dismissed on the following grounds;

i. The family Division of the High Court lacks jurisdiction to handle the 1st, 2nd and 3rd applicant's application dated 2nd February 2015 as the matter ought to have been filed as a civil suit as it is a dispute over ownership and title to land which is better handled in the court established pursuant to Article 162(2)(b) as read with Article 165(3)(a) and 165(b) of the Constitution of Kenya 2010 and section 13(2) of the Environment and Land Court Act, Cap 12A.

ii. The 1st, 2nd and 3rd Applicants lack the necessary Locus Standi to file the instant application as they are neither defendants or beneficiaries of the estate of the deceased, the late Wambui Kiigi by virtue of section 29 of the Law of Succession Act, Cap 160.

iii. The instant application is an abuse of the court process.

2. The respondents filed written submissions in respect to the preliminary objection filed herein. It was submitted that the late Wambui Kiigi had 3 daughters whom are now all deceased. The daughters of the deceased were disinherited by the step son of the deceased. The respondents applied for a grant of letters of administration of the estate of the late Wambui Kiigi who is their grandmother. That the dispute herein

in is premised on the ownership, use and occupation of the two properties being administered by the 1st and 2nd Respondent. On the 1st ground on the preliminary objection, the respondents submitted that the dispute is not whether or not they are legal bonifide Administrators of the estate of Wambui Kiigi, following the confirmation of grant of letters of administration. That real issue in dispute is the use, occupation and titles of two properties belonging to the estate of the Late Wambui Kiigi i.e Komothai/Igi/171 and half share of Komothai/Igi/97, which they both administer.

3. It was then submitted that the Family division of the high court is not suited and lacks the necessary jurisdiction to hear this matter as it relates to a dispute touching on the Environment, use, occupation and title of two parcels of land in dispute. That Article 162(2)(b) and Article 169(1)(d) of the Constitution as read with Section 4 of the Environment and Land Court Act deal with the setting up of the Environment and Land Court and provides for the enactment of enabling legislation by parliament to operationalize the Environment and Land Court. That section 13 of the Environment and Land Act provides the Environment and Land Court with original and appellate jurisdiction with relation to all disputes as stated in Article 162(2)(b). Sub-section 2 of the provision highlights the area of jurisdiction of the said court.

4. In relation to the lack of locus standi by the applicants, the respondents submitted that they are direct and biological grandchildren of the deceased. They stated that the applicants are not direct descendants of the late Wanjiku Kiigi and as envisaged under section 29 of the Law of Succession Act they have no locus standi to file the application seeking to revoke or annul the grant issued to the respondents.

The 1st and 2nd respondents also submitted that they had obtained a copy of the certificate of confirmation of grant in respect of the estate of the late Njogu Kiigi in succession cause no 18 of 1992 and the said grant does not list the two properties in dispute. Similarly, the last will and testament of the late Waweru Kiigi dated 22nd April 2006 indicates that he only bequeathed 1/3 of his entitlement in Komothai Mbari ya igi 171 to his son, Ndichu Waweru absolutely. The Will only makes provision for a third of the property and not the whole. It does not state who owns the remainder.

The applicants also filed written submissions they submitted that the current preliminary objection filed by the respondents is bad in law and an of their last defense. With regards to the question of jurisdiction the applicants relied on number of cases, defining what is a preliminary objection and when can a preliminary objection be raised. On this they relied on the case of **Owners of Motor Vessel Lillian S v Caltex oil Kenya Limited**, *in which the court pointed out that the question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.*

5. The applicants further submitted that in the case of Patrick Musimba V National Land Commission & 4 Others where the court stated that the jurisdiction of a court refers to the matters the court as an organ not an individual was competent to deal with and reliefs it was capable of granting. That Section 47 of the Law of Succession Act provides for the jurisdiction of the High Court, provides that;

The high court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient provided that the High court may for the purpose of this section be represented by Resident Magistrate appointed by the chief Justice.

The applicants relied on section 76 of the Law of Succession Act and Rule 44 of the probate and administrative rules in reference to their right to approach the court so as to apply for summons of revocation of the grant issued to the respondents.

6. With regards to the issue of locus standi, the applicants submitted that the application for revocation is well brought under this court as the applicants are all legal representatives of the estates of the Kibunga Kiigi, Njogu Kiigi and Waweru Kiigi who were beneficiaries of the estates of the late Wambui Kiigi having acquired absolute interest in the suit properties. The applicants relied on the case of *The Matter of the Estate of Hemed Abdalla Kaniki (Deceased) Succession Cause No. 1831 of 1996*, where the court stated that Section 76 is open to any person who may be interested in the estate of the deceased person.

They also relied on the Constitution in particular, Article 27(1) which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law, Article 48 which provides that the state shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice and Article 50 which states that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.

7. At the close of their submissions the applicants submitted that the preliminary objection has not met the legal threshold as required and that the application for the revocation of the grant is rightfully before this court as the Environmental and land court has no jurisdiction.

DETERMINATION.

Having considered the preliminary objection on the issues for determination are;

- i. Whether the preliminary objection has met the legal threshold as set out.
- ii. Whether this court has jurisdiction to hear and determine the matter before it.
- iii. Whether the applicants have locus standi.

8. I will embark on the first issue on whether the preliminary objection as filled by the respondents has met the legal threshold as set out in the law. A preliminary objection has been defined by the courts in a number of case, the celebrated one being **MUKISA BISCUITS MANUFACTURING CO LTD VS WESTEND DISTRIBUTION LTD [1969] E.A. 696** where the courts defined it as

‘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 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 ... 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

9. The supreme court of Kenya held in **Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others [2015] eKLR**,...“a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.”

10. The preliminary objection raised by the respondent’s is that this court has no jurisdiction to hear and determine the matter as the subject matter falls within the scope of the Environmental and Land court. From the face of it and as stated above, the preliminary objection must raise points of law as opposed to points of facts. A preliminary objection when raised ought to have such an effect that if allowed, would render the suit in its totality void or dismissed. The Civil Procedure Rules at order 51, Rule 14 stipulates, that (1) any respondent who wishes to oppose any application may file any one or a combination of the following documents -

- (a) a notice preliminary objection
- (b) replying affidavit
- (c) a statement of grounds of opposition;

(2) the said documents in sub-rule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.

11. Ordinarily, the filing of a preliminary objection ought to be before the start of a hearing such that if in the objection issues of jurisdiction are raised, then the court can make a determination before proceeding any further. The subject matter before this court pertains to two properties acquired through the estate of the late Wambui Kiigi via Succession Cause 49 of 1975 issued to her step-sons in accordance to customary laws as opposed to the deceased daughters who at the time were married. The dispute over the property thus stems from a succession matter of the deceased estate, thus this court has jurisdiction over the said matter.

12. With regard to the locus standi, the Succession Act under section 29 defines who is a dependant, it states,

For the purposes of this Part, "dependant" means—

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

13. As of now there is a claim that the applicants are dependents/beneficiaries of the estate of the deceased. They therefore have locus standi to present their case and adduce evidence on their entitlements if any. This shall be established at the hearing and the court will make a finding on the same. The Preliminary Objection is therefore dismissed. Costs shall be in the cause. The matter to proceed to further on the date to be taken before the court.

No order as to costs.

Dated, signed and delivered this 30th day of JUNE 2017.

R. E. OUGO

JUDGE

In the presence of;

Mrs Manyonge holding brief for Mr. Nabutete For the Applicants/Respondents

Miss Aisha Namwoli holding brief Mrs Ndungu For the Respondents/Applicant.

MS. Charity Court Clerk