



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

**IN THE MATTER OF THE ESTATE OF STEPHEN HUMPHREY KIMEMIA NJIRU
(DECEASED)**

SUCCESSION CAUSE NO. 155OF 2011

**WANGUI KARANJA (LAWFUL ATTORNEY OF BRIAN KARANJA AND FIONA HAZEL
DAISY MGHARO)...APPLICANT**

VERSUS

PETER KARANJA.....1ST RESPONDENT

AND

NADINE KARANJA.....2ND RESPONDENT

RULING

The notice of preliminary objection was filed on 11th November 2016. Therein the Respondents raised the following objections:

- 1. That the summons dated 12th October 2016 is frivolous, vexatious and an abuse of the court process.**
- 2. That Prayers 1 and 2 of the said Application could have been dealt with by the Applicants without recourse to court by simply withdrawing the Summons for confirmation of Grant dated 19th December 2014 and filing a fresh one as they deem fit without leave of the court which is not required.**
- 3. That prayers 3 and 4 of the Application which are the main remedies sought are RES JUDICATA by virtue of a previous Application dated 28th February 2014 seeking the same orders and dismissed vide a Ruling delivered on 25th September 2014 by Hon. Kimaru L.J.**
- 4. That prayer 5 of the Application is untenable as it seeks to stay proceedings on the basis of a non.-existent and non-filed Originating Summons and this court cannot stay proceedings by request of a party so that the party can decide how to proceed.**

PLEADINGS:

The deceased died on 15th January, 2001 as evidenced by the death certificate of serial number No 241196 dated 16th December 2010. Thereafter a petition for grant of letters of administration and an

affidavit in support was filed on 28th January 2011 since the deceased had died intestate. The beneficiaries listed therein are:

- a) Nadine Wanjiku Karanja**
- b) Brian Karanja**
- c) Peter KeiruKaranja**
- d) Fiona Hazel Daisy Mgharo**

The letter by the chief dated 16th December 2010 confirms that these are the dependants of the deceased.

All siblings consented to Brian Karanja being issued letters of administration. This was done in the name of Wangui Karanja, sister of the deceased and aunt to the beneficiaries, since she had been given specific power of attorney by Brian Karanja and Fiona Daisy Karanja as regards administration of the entire estate of the deceased since the two are not currently resident in Kenya. The documents attached to the petition marked **WK2** and **WK3** confirm the same. Peter Karanja was cited on 4th April 2011. He entered appearance through his advocates, Nyawara and Company Advocates. He consented to the grant of letters of administration. The Administrators thereafter corresponded by email as to the payment of debts left behind by the deceased, one being the loan by Chase Bank which they undertook to set off.

Later a petition for a grant *ad colligenda bona de functi* was sought by the Applicant for collection and preservation of the estate of the deceased on 23rd August 2011 by way of certificate urgency in that the bank loan of 700,000 Kenya shillings required to be offset and that the estate was in imminent danger of financial deterioration.

Thereafter a grant of letters of administration issued to all beneficiaries as joint administrators of the estate of the deceased on 22nd May 2013

Justice Kimaru delivered a Ruling dated 25th September 2014. He found that prior to the subsequent issuance of the grant of 22nd May 2013, there were differences between the Applicant and the 1st Respondent regarding the management of the property of the deceased. He invoked inherent jurisdiction and directed the Applicant to file and serve the application for confirmation of Grant within 14 days of the delivery of this ruling and propose how she intends to distribute the properties that comprise the estate of the deceased. Further the Applicant was to indicate how the debts owed by the estate are to be settled. The 1st Respondent was to file an affidavit of protest within 14 after service and thereafter parties be at liberty to list the case for further direction and hearing.

Summons for confirmation grant dated 19th December 2014 was filed for confirmation of the grant of 15th January 2009.

The application dated 12th October 2016 the Applicant sought orders inter alia;

- 1. The Summons for confirmation of Grant filed and dated 19th December 2014 be withdrawn with no orders as to costs.**
- 2. Parties be at liberty to apply for a confirmation of grant upon the determination of this Application.**
- 3. The Administrators of the estate open a joint bank account, in which all income for the estate , shall be deposited until further orders of this honorable court**
- 4. Peter Karanja and Nadine Karanja be compelled to furnish a statement of accounts for all**

income received by the estate properties and assets from the date of the deceased's death to present date. In the alternative this court does stay proceedings herein and refer the matter for determination of accounts by way of Originating Summons under Order 37 (1) of the Civil Procedure Rules.

The Applicant relied on grounds inter alia that it was impossible to determine the shares of each beneficiary due to the active involvement of the 1st Respondent impeding administration of the estate. Consequently, an incompetent summons for confirmation of Grant was filed by her former Advocates in compliance with the ruling by Hon. Kimaru L.J of 25th September 2014. No final orders can be made on the summons for confirmation of grant as drawn therefore entertaining it would be a waste of the court's time and an exercise in futility. The 1st Respondent has been receiving rent from the estate since the year 2009 and not December 2013 as deponed in his Affidavit of 14th April 2014. The estate is in danger of financial deterioration. It is urgent that the court intervenes and gives direction on the matter since the administrators continue to incur liability for waste of the estate. Cooperation from the Respondents has been impossible to attain even in the most basic issues such as the collection of rental income in a joint account. The Respondents are evasive in failing to render accounts. The Applicant has been compelled to file a fresh application for accounts due to the fact that reviewing the application for accounts dated 28th February 2014 will be an exercise in futility as the orders sought therein have been overtaken by events.

DETERMINATION:

The Respondent raised Preliminary Objection to the Application of 12th October 2016 filed on 14th October 2016. The Respondent stated the Applicant's application cannot be entertained in its format as it was filed in abuse of the court process. That prayers 1 and 2 of the said Application which seek the withdrawal of the summons for confirmation of Grant, parties are at liberty to file another summons for confirmation, by simply withdrawing the same summons and filing a fresh one. Recourse to the court was unnecessary.

This objection is not be supported in law. The Applicant sought other orders which are key in determining the main suit. The court also notes that the Respondents have not complied with the orders of 25th September 2014 by Hon. Kimaru L.J by protesting to the summons for confirmation of grant which the Applicant is now seeking to withdraw. Parties were to file the summons for confirmation and a protest thereto if any within 14 days each. Both parties have contributed to an abuse of court process by delaying this matter and therefore the 1st Respondent has not come to law with clean hands and cannot raise this objection in this premise.

The next ground of the Preliminary Objection is that;

Prayers 3 and 4 are RES JUDICATA by virtue of the Application of 28th February 2014 which sought the same orders and dismissed by the ruling of 25th September 2014. These prayers seek **orders that the administrators of the estate open a joint bank account in which all income from the estate shall be deposited until further orders are issued and that Peter Karanja and Nadine Karanja be compelled to file a statement of accounts for all income received by the Estate Properties and assets from the date of the deceased's death to present day.**

This court read the Ruling by Hon. Kimaru L. J and in no way has the ruling dismissed the above prayers. The matter would only be *res judicata* if it had been raised previously, heard and determined. In fact the respective ruling stated that the major issue in this suit is the distribution of the estate of the deceased and therefore parties were ordered to file the relevant applications so that the main issue may be heard and determined expeditiously.

The other objection is that, Prayer 5 of the said is untenable as it seeks to stay proceedings on the basis of a non-existent and non-filed Originating Summons and this court cannot stay the proceedings at the request of a party so that the party can decide what to do after the stay. Prayer 5 of that Application seeks a stay of proceedings and that the court refers the matter for determination of accounts by way of

Originating Summons under **Order 37 (1) of the Civil Procedure Rules.**

The Applicant is simply seeking leave of court so as to seek orders via Originating Summons for the rendering of accounts by administrators of this estate since the date of the issuance of the grant of representation.

Article 159. (2) of the Constitution of Kenya 2010 provides that *In exercising judicial authority, the courts and tribunals shall be guided by the following principles justice shall be administered without undue regard to procedural technicalities*

Order 2 Rule 9 of the Civil Procedure Rules provides;

A party may by his pleading raise any point of law.

This is raised by way of a preliminary objection. However, inasmuch as this is allowed by law a **preliminary objection should be raised on a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings** and which if argued as a preliminary point may dispose of the suit.

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“... 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”.

Based on this, the court finds no merit to this Preliminary Objection and it is hereby dismissed. The Applicant is entitled to withdraw by application to Court the summons for confirmation of grant as it is part of the Court record and if the Respondents object and/or ask for costs, these are applications to heard and determined by the Court.

DISPOSITION

- 1. The parties shall comply fully with the orders of Hon Justice Kimaru's Ruling of 24th September 2014.**
- 2. The Respondent is at liberty to amend and/or withdraw the summons for confirmation of grant and this Court grants leave to do so.**
- 3. The Respondent may set down the application dated 12th October 2016 for hearing after the Applicant files a Replying affidavit within 14 days from today.**
- 4. The Preliminary Objection is dismissed with Costs to the Respondent. It is so ordered.**

DELIVERED SIGNED & DATED IN OPEN COURT IN NAIROBI ON 22ND SEPTEMBER 2017.

M.W.MUIGAI

JUDGE

Mrs. Wachira for Respondent in the Preliminary Objection.

Mr. Wachira for Applicant in Preliminary Objection.