



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION DIVISION
SUCCESSION CAUSE NO. 680 OF 2010
IN THE MATTER OF THE ESTATE OF LEKERA KIKAE OLE REIPA (DECEASED)

MOHAMMED SHAHID MOUGHAL.....INTERESTED PARTY APPLICANT

VERSUS

MICHAEL MOOKE KIKAYE.....1ST RESPONDENT

NORKISHI LENANA.....2ND RESPONDENT

FAITH SOPILALENE KASHIMIR.....3RD RESPONDENT

ELIZABETH NAIPOTA MOOKE.....4TH RESPONDENT

R U L I N G

1. The Interested Party/Applicant Mohammed Shahid Moughal filed a summons dated 19th December 2014 for revocation of the grant issued to the 1st Respondent Michael Mooke Kikaye in the Estate of the deceased herein Lekere Kikai Ole Reipa. The Respondents filed a Preliminary Objection thereto on 29th January, 2016 alleging that:
 - i. The Applicant lacks *locus standi* to file and prosecute the application dated 18th December 2014
 - ii. The said application does not lie because the estate has been fully distributed.
 - iii. The application as filed is an abuse of the court process as there exists another suit being ELC 999 of 2012 touching on the same subject matter.
2. For the Respondents, Miss Guserwa learned counsel argued in the Preliminary Objection, that the Applicant being neither a dependant nor a beneficiary of the Estate, he lacks *locus standi* to bring this application and that his earlier application to be enjoined as a bona fide purchaser was denied on 11th May 2011. Miss Guserwa contended that the grant having been confirmed on 26th March 2013 and the Estate having been fully distributed, the matter cannot be reopened. She submitted that this application is an abuse of the court process for reasons that the Applicant has filed ELC No. 999 of 2012 over the same subject matter and has also instigated criminal proceedings against the Respondents. That he should therefore prosecute the ELC matter and let the Estate rest.
3. For the Applicant learned counsel Mr. Mengich opposed the Preliminary Objection and argued

that it did not meet the threshold for this court to consider it. That the Applicant who bought 69 acres out of the Estate property had been included in the earlier distribution of the Estate in the confirmation of grant on 16th May 2011. That in the said confirmation of grant it was agreed that his portion would come out of the Administrator's share of the Estate. He submitted that the Applicant was subsequently served with summons dated 8th February 2012 for revocation of grant, to which he filed a replying affidavit and witness statements but was never accorded a hearing. Instead the Objectors and the Respondents entered into and recorded a consent as to the distributions of the Estate without involving the Applicant herein.

4. Mr. Mengich urged the court to be guided by **Section 1(a) and (b) of the Civil Procedure Code** on the overriding object of the court, **Section 66 law of Succession Act** on the position of a creditor and **Article 159(2)(d) of the Constitution** to render justice without undue regard to technicalities.
5. Having considered the application, and the rival arguments therein the court finds that the main issue for consideration is whether the Applicant has *locus standi* to prosecute the application dated 19th December 2014 within this cause.

It is trite law that Preliminary Objection should be based on pure points of law. **Law JA** in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** rendered himself thus:

“So far as I’m aware, 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.”

6. Similarly **Sir Charles Newbold** in the above mentioned case of **Mukisa Biscuit** had this to say:

“The first matter relates to the increasing 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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

7. The suit property in the application belongs to the Estate subject of the succession cause herein. The undisputed facts of the cause are that the Applicant entered into a sale agreement with the 1st Respondent sometimes in 2009 for the sale of 69 acres of land belonging to the Estate of the deceased. **Section 82 (b)(ii) Law of Succession Act** provides that:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

(ii) no immovable property shall be sold before confirmation of the grant.”

The said transaction of sale was entered into after the deceased had died and before the grant was confirmed.

8. In the initial confirmation of grant the parties agreed to have 69 acres hived out of the 1st Respondent's share of the Estate in the distribution of the assets. When an application for the revocation of grant was subsequently filed and confirmed, the Applicant and one of the Respondents recorded a consent to the exclusion of the Applicant herein. The said consent compromised the summons completely.
9. The definition of the term *locus standi* in the Black's Law Dictionary 9th Edition is, "**the right to bring an action or to be heard in a given forum.**" Had the contract of purchase been entered into before the demise of the deceased or after confirmation of the grant the Applicant's claim would have fallen under **Section 66 (d) Law of Succession Act.**
10. The 1st Respondent did not have a confirmed grant of letters of Administration and was therefore not the legal representative of the Estate of the deceased. He had no capacity to sell the assets of the Estate or any part thereof. Therefore, whereas the court recognises that the Applicant has a claim, against the 1st Respondent, that claim does not lie against the Estate of the deceased herein.

Reasons wherefore the Preliminary Objection is withheld.

SIGNED DATED and DELIVERED in open court this **17th day of February 2016.**

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L. A. ACHODE

JUDGE