



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 969 OF 2009**

**IN THE MATTER OF THE ESTATE OF DAVID NGOOSA MUA (DECEASED)**

**RICHARD KASONGO NGOOSA**

**RICHARD MWAU NGOOSA.....PETITIONERS**

**VERSUS**

**CHARLES MUNYAO KITHOME.....OBJECTOR**

**RULING**

**Introduction**

The Objector filed an application by way of a Chamber Summons dated 30<sup>th</sup> October 2013 seeking a temporary injunction to restrain the Petitioners from sub-dividing, putting beacons, alienating and/or in any other manner interfering with his possession and occupation of the parcel of land known as Machakos Town Block 5/1733 held at Katheka-Kai Farmers and Ranching Co-operative Society . The Objector claimed that the deceased David Ngoosa sold a portion of 3 acres of the said parcel of land to him in 1998 before his death, and that the Objector has been in peaceful and active occupation of the said portion since then. However, that the Petitioners have purported to enter the land and threatened to sub-divide and/or put beacons thereon.

The Objector also filed another application by way of chamber summons dated 10<sup>th</sup> October 2014 wherein he sought orders that his application dated 30<sup>th</sup> October 2013 be declared as duly filed and be heard on merit. The application was based on grounds that the application dated 30<sup>th</sup> October 2013 was filed when there was no formal protest on record. Secondly that the Objector had since filed an affidavit of protest dated 23<sup>rd</sup> September 2014.

Further, that the said application had been filed with the intention of preserving the portion of land sold to the Objector by the deceased, and that the filing of the said application prior to filing of the protest was out of a genuine mistake on the part of the counsel for the Objector and was also a technicality that should not be visited on an innocent litigant.

**The Preliminary Objection**

The 1<sup>st</sup> Petitioner subsequently filed a Notice of Preliminary Objection dated 21<sup>st</sup> October 2014 seeking that the Objector's application dated 30<sup>th</sup> October 2013 be struck out with costs, on the grounds that the application was incompetent, fatally defective and an abuse of court. Further, that the Objector had no capacity to file the said application and was a stranger to the proceedings herein.

The 1<sup>st</sup> Petitioner's counsel Mulyungi & Mulyungi Associates filed written submissions dated 17<sup>th</sup> June 2013, wherein it was argued that for any party to competently participate and object to any issuance of the grant, one must issue a notice of objection as stipulated under section 68 of the Law of Succession Act. It was further submitted that the affidavit in protest was filed on 23<sup>rd</sup> September 2014 after the application of 30<sup>th</sup> October 2014 had been filed. It was also argued that the notice under section 68 of the Law of Succession Act or the affidavit of protest under rule 40(6) of the rules to the Act formed the pleadings for the objector or protestor.

B. M Mungata Advocates for the Objector filed reply submissions dated 17<sup>th</sup> June 2015 where it was argued that the provisions of Article 159(2)(d) of the Constitution provide that justice should be meted out by courts without due regard to technicalities. It is their opinion that the filling of the application without an affidavit in protest was a technicality, and the decision of Makau J. in N.G.M V A.G (2015) eKLR was cited in this respect. It was further stated that the mistake was not made intentionally or with ill motive and the same should not be used to deny the Objectors' access to justice. In that regard they referred to the case in Paul Asin t/a Asin Supermarket V Peter Mukimbi (2013) eKLR.

### The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided are firstly, whether the 1<sup>st</sup> Petitioner's preliminary objection raises a pure point of law, and if so, whether it has merit and should be upheld. The law on the circumstances when a preliminary objection may be raised was settled by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, as follows:

**“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.”**

A preliminary objection cannot therefore be raised if any fact requires to be ascertained, and the effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

The 1<sup>st</sup> Petitioner relied in this respect on section 68 of the Law of Succession Act which provides for objections to applications for grants as follows:

**“(1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.**

**(2) Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross application within a specified period.”**

Section 68 has to be read together with the provisions of section 67 of the Act which provides for the procedure for application of grants and the requirement for publication of notice. Section 67 provides as follows:

**“(1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.**

**(2) A notice under subsection (1) shall be exhibited conspicuously in the courthouse, and also published in such other manner as the court directs.”**

In the present case the application for grant of letters of administration was by way of a petition filed in Court on 24<sup>th</sup> November 2009. The said application was subsequently published in the Kenya Gazette Notice No. 750 dated 14<sup>th</sup> January 2010 and 30 days' notice given for objections. The grant was subsequently issued to the Petitioners on 15<sup>th</sup> March 2010. The application by the Objector dated 30<sup>th</sup> October 2013 was filed in Court on 4<sup>th</sup> November 2013 after the issue of the said grant. The provisions of section 68 are therefore inapplicable to the circumstances of the said application, and the said objection in the circumstances can only be taken to be an objection to any confirmation of grant.

In this regard, the procedure to be applied after issue of a grant is in section 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration rules as regards confirmation of grants, and in particular Rule 40(6) of the Rules provides that any person wishing to object to the proposed confirmation of a grant shall file an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection. As to whether such an objection is made by of an affidavit of protest or by chamber summons is an issue of technicality which this Court can dispense with in the spirit of Article 159 of the Constitution.

In addition, Rule 49 of the Probate and Administration Rules allows any person to bring an application relating to the estate of a deceased person for which no provision is made in the Rules, by way of summons supported if necessary by affidavit. In effect Rule 49 of the Probate and Administration Rules and section 47 of the Law of Succession which gives the Courts powers and discretion to entertain any application and determine any dispute under the Act and to make such orders in the interests of justice, give wide *locus standi* to any person affected by the administration of the estate of a deceased to file an application seeking redress in Court. The Objector's dated 30<sup>th</sup> October 2013 was filed in Court on 4<sup>th</sup> November 2013 is therefore properly.

This Court accordingly finds, applying the above provisions of the law and reasons, that the 1<sup>st</sup> Petitioners' Preliminary Objection dated 21<sup>st</sup> October 2014 does not raise a pure point of law, and therefore has no merit. The said Preliminary Objection is accordingly dismissed.

There shall be no orders as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 23<sup>rd</sup> day of March 2016.

**P. NYAMWEYA**

**JUDGE**