



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 90 OF 2010 (OS)

IN THE MATTER OF THE ESTATE OF KIMANI GACHAU (DECEASED)

KAHIU KARUGOAPPLICANT

V E R S U S

KAMAU NJIGUA

MONICA MUTHONI MWANGI

WAMBUI KAHORERIA

WAMBUI MUGURU MWANGI

PRISCILLA WAMBUI NGUGI

WAMBUGU NJURU ALL T/A

KENDA BOARDING AND LODGING RESPONDENTS

RULING

1. What I am called upon to determine is a preliminary objection raised by the 1st, 3rd, 4th, 5th and 6th defendants. It is predicated on the grounds that the advocates of record for Wambugu Njuru, Nyamu Muchunu and the estate of Kaihu Karugo had previously acted for them in another related matter.
2. Their case is that the involvement of their former advocates in the matter would be prejudicial to their case, and in any event it would be contrary to professional ethics, and the said advocates should be barred from acting in the matter.
3. In response to the preliminary objection, the parties named in the objection filed a replying affidavit through their lawyer, Henry W. Muriithi, explaining the situation and placing evidence on record to the effect that the said advocates ceased to act after instructions were withdrawn from them.
4. It was directed that the preliminary objection be disposed of by means of written submissions. I have gone through the record and noted that the parties did file their respective written submissions advancing their various arguments for and against the preliminary objection.

5. A preliminary objection is raised on a point of law with regard to the pleadings or an application for determination by the court. The objection should be founded on a pure point of law, such as jurisdiction or competence of the pleadings. It should be of such nature as to dispose of the entire suit or application upon which it rides. It should not be of such nature as would require facts to be disposed of.
6. What has been placed before me as a preliminary objection does not touch on matters which are the subject of the pleadings or the application before me. It does not raise points of law with respect to the suit itself, its pleadings or the applications before the court. It raises issues that are extraneous to the substance of the suit or applications. It is therefore not a proper preliminary objection as a point of law.
7. The other thing is that the determination of the preliminary objections can only be founded on facts. It is alleged that the advocates on record previously acted for defendants raising the objection. This is a matter of fact which cannot be gleaned from the pleadings. Evidence will have to be placed before the court for it to determine whether or not the advocates on record previously acted for the parties in question in other matters or suits.
8. This is indeed reinforced by the replying affidavit placed on record in reply to the preliminary objection. A preliminary objection is determined on the basis of legal arguments generated from the pleading. It is for this reason that there is no necessity to file any replies to the objection. The fact that a party finds it necessary to file an affidavit to present facts before court is adequate evidence that what is before the court is not a proper preliminary objection on a point of law.
9. As the issues raised are extraneous and touch on matters which require the parties to adduce evidence, the parties raising objection should have considered filing a substantive application to have the advocates in question barred. That way the said advocates would have opportunity to file counter-evidence.
10. I need not say more. The objection raised in the notice dated 13th February 2013 cannot be disposed of as a preliminary objection on a point of law for the reasons given above. I do hereby therefore overrule the objection and dismiss the notice with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 27TH DAY OF MAY, 2016.

W MUSYOKA

JUDGE