



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 937 OF 2012

IN THE MATTER OF THE ESTATE OF ROSE KAKII MULUNGU (DECEASED)

JOHN MULI MUASYAAPPLICANT

MUTAVE MUIINDEAPPLICANT

MUTUA MULELUAPPLICANT

TIMOTHY MUTISO.....APPLICANT

DOROTHY MUSAUAPPLICANT

VERSUS

DAVID MUSAU MULUNGU1ST ADMINISTRATOR

RICHARD MULUNGU KAKII.2ND ADMINISTRATOR

RULING

The Preliminary Objection

The Applicants herein filed an application by way of a Notice of Motion dated 12th November 2015 seeking the following substantive orders:

1. Leave be granted to the Applicants to be joined in these proceedings as interested parties and be granted the liberty to participate in these proceedings by virtue of being beneficial and equitable owners of MACHAKOS/MUA HILLS/684 the suit land herein.
2. Consequent to prayer No.1 hereinabove being granted, the Applicants be allowed to file an Affidavit in Protest of Confirmation of grant issued to David Musau Mulungu and Richard Mulungu Kakii.
3. The affidavit in protest against confirmation of grant attached herein to be deemed as dully filed upon payment of the requisite court fees.
4. Confirmation of grant issued to David Musau Mulungu and Richard Mulungu Kakii be stayed until the issue between the parties herein and the Administrators has been resolved and the grant is amended to include the Applicants/proposed interested parties as beneficial owners to the land .

5. An injunction be issued against the Administrators herein barring them from interfering with the quiet stay of the Applicants in the parcel of land known as MUA HILLS SETTLEMENT B/684 formerly known as Plot No 134 until the matter herein has been resolved.

6. An injunction be issued against the Administrators herein barring them from dealing or undertaking any land transaction in regard to the parcel of land known as MUA HILLS SETTLEMENT B/684 formerly known as PlotCNo 134 until the matter herein has been resolved.

7. The costs of this application be borne by the Administrators

The grounds for the application were that Applicants have a beneficial and equitable interest in the registered parcel of land MUA HILLS SETTLEMENT B/684 formerly known as Plot No 134, and have been occupying the said parcel of land for between fifteen years and thirty years which is within the knowledge of the Administrators, the said land having been sold to the Applicants .

However, that in in the year 2007 the initial plot no 134 was divided into three plots namely plots No 684, 685 and 686, and that during the subdivision the surviving members of Mulungu family ignored the purchasers in plot No 684 and went ahead to apportion the land illegally to the three surviving brothers and sister of the deceased Rose Kakii Mulungu.

Further, that the said family applied for letters of administration fraudulently by indicating that the Estate belonged to Rose Kakii Mulungu who is their sister, while the real truth is that the Estate belonged to their late parents. The Applicants claim that it is their right as purchasers to be included as beneficiaries of the Estate of the deceased initially known as Plot No 134 Mua Hills Settlement Scheme.

The 1st and 2nd Petitioners subsequently filed a Preliminary Objection dated 2nd February 2016 objecting to the said Notice of Motion on the following grounds:

1. The Notice of Motion is incompetent as it offends the provisions of Section 7 (2) of the constitution as most of the documents to which the Applicants allude are not in any of the official languages of the Republic of Kenya.
2. The Applicants' perceived claims are against the estates of persons other than the estate to which these proceedings relate, and are thus irrelevant to these proceedings.
3. The Applicants' application does not disclose any or a reasonable cause of action against the estate of Rose Kakii Mulungu to which this succession cause relates. The application is thus frivolous.
4. The Applicants are not entitled to the orders sought and particularly as against the estate of Rose Kakii Mulungu.
5. The Applicants' application ought to be struck out.

The Determination

The preliminary objection was canvassed by way of written submissions. The Applicants' Advocates, Mbaluka & Company Advocates, filed submissions dated 30th June 2016, wherein reliance was placed on Order 2 rule 9 of the Civil Procedure Rules (2010) and the Court of Appeal decision in **Mukisa Biscuit manufacturing Co. Ltd vs West End Distributors Ltd. (1969) EA 697**, for the position that 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.

The Applicants submitted that the Petitioners' Preliminary Objection does not meet the said threshold for the following reasons :

- a) The Preliminary Objection raises factual issues which can only be determined during hearing.
- b) As to whether the interested parties' perceived claim (over to land parcel Mua Hills Settlement B/684 formerly known as Plot 134) is against the estate of other persons other than the estate to which current proceedings relates to can only be determined by adducing evidence, and hence ought not to be dismissed on a Preliminary Objection.
- c) Whether land parcel Mua Hills Settlement B/684 formerly known as Plot 134 belongs to the estate Rose Kakii Mulungu (Deceased) or to other persons is an issue which requires evidence which can only be determined during hearing and ought not be disposed by a Preliminary Objection.

The Applicants conceded that they filed a Supporting Affidavit sworn on 12th November 2015 by John Muli Muasya with annexures in Kamba language, and inadvertently omitted to file the corresponding translation together with a Certificate of Translation. According to the Applicants, filing annexures to a Supporting Affidavit which are not in official language is not fatal as the same can be remedied, and they prayed for the exercise of this Court's powers and discretion pursuant to Article 159 (2) (d) of the Constitution 2010 to grant them leave to file translations of the annexures and a Certificate of Translation by an Advocate of the High Court of Kenya.

F.M. Mulwa, the learned counsel for the Petitioners filed submissions dated 31st May 2016, and it was urged therein relying on the decision in **Mukisa Biscuit Co Ltd v West End Distributors Ltd (supra)** that Article 7 (2) of the Constitution of Kenya 2010 states that "the official languages of the Republic are Kiswahili and English", yet the Applicants filed a supporting affidavit in support of their Notice of Motion dated 11th November 2015 to which there were some documents attached which were not in any of the official language. Further, that there was no certificate of translation of the said documents into any of the official languages, and the Petitioner cannot sufficiently reply to all the averments thereto and thus he has not been able to file a replying affidavit. They urged the Court to expunge the said documents from the court record.

According to the Petitioners, none of the alleged purchasers bought any parcel of land from Rose Kakii Mulungu to whom these succession proceedings relate, and are not dependants of the Deceased's estate by virtue of the provisions of Section 29 of the Law of Succession Act. It was also contended that the succession proceedings herein are in respect to the estate of Rose Kakii Mulungu and is only concerned with land parcel No Machakos Mua Hills/684, and that the Applicants can file their claim against the family of Mulungu in the Environment and Land Court whereby they can seek the titles in question.

Further, that the agreements alluded to by the Applicants are over agricultural land which are controlled transactions, and are rendered void for lack of Land Control Board consent in view of section 6(1) (a) as read together with Section 8(1) of the Land Control Act. In addition, that section 7 of the Limitation of Actions Act bars any claim to recover land after expiry of 12 years, and the applicant's claims are thus statute barred by law, as they are basing their claims on allegedly having bought and being in possession of the land in question between 15-30 years ago. Reliance was placed in the case of **Nancy Waithira Mburu v Catherine Kathoni Marete & another, [2014]eKLR** in this regard. Lastly, it was submitted that the Applicants ought to have filed summons and not a notice of motion application and thus the same should be struck out with costs.

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided in this preliminary objection are firstly, whether the Petitioners' preliminary objection raises pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. The circumstance in which a preliminary objection may be raised was explained 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.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

A preliminary objection cannot therefore be raised if any fact requires to be ascertained. I have detailed out the submissions of the Petitioners to illustrate the point that their arguments require the establishment of certain facts before they can be upheld, and particularly the particulars of the land that the Applicants are claiming, and the nature of the Applicants' occupation of the said land, and cannot therefore be raised as points of law. In the case of **Oraro -vs- Mbaja (2005)1KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd(supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion. This Court in this regard is clothed with powers and discretion by law to allow amendments of, or filing of additional pleadings to cure the defects noted in the Applicants' pleadings .

It is thus the finding of this Court that the Petitioners' preliminary objection does not raise pure points of law for the foregoing reasons, and that the Petitioners' Preliminary Objection dated 2nd February 2016 is in the circumstances not competently before the Court and is hereby struck out.

Each party shall bear their respective costs of the Preliminary Objection.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 15th day of December 2016.

P. NYAMWEYA

JUDGE