



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 344 OF 2009**

**KIPRUTO KANDIE.....1<sup>ST</sup> PLAINTIFF**

**KIPTUI KANDIE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MIOTONI WEST VILLAS LIMITED.....1<sup>ST</sup> DEFENDANT**

**SHADY ACRESS LIMITED.....2<sup>ND</sup> DEFENDANT**

**ANDREW WANDAMBWA WANDAMBWA ADVOCATES.....3<sup>RD</sup> DEFENDANT**

**CHEPCHUMBA KANDIE LOKI.....1<sup>ST</sup> INTERESTED PARTY**

**KIGENI KANDIE.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

The plaintiff herein moved to the seat of justice vide a plaint dated 15<sup>th</sup> day of July 2009, filed on the same date. The salient features of the same are as follows:-

- The Plaintiffs are the administrators of the estate of their late father Aaron Kimosop Kandie.
- The deceased was the registered owner of the land parcel No. LR. 1055/19 situated at Karen area in the city of Nairobi.
- That the letters of administration were issued to the administrators in Nairobi succession cause No. 991 of 2004.
- The administrators named were:-
  - (a) Rhoda Chelangat Kandie – deceased
  - (b) Kiptui Kandie
  - (c) Kipruto Kandie
  - (d) Kigen Kandie

- One of the administrators Rhoda Chelangat Kandie died on the 31<sup>st</sup> October 2008.
- The grievances in the case arise because the Registrar of government lands and or his agents and or employees (the land registrar) made or caused to make entries in the register kept by him relating to the suit property that the suit property had been transferred and vested in Miotoni West Villas Limited the defendant herein.
- Contend that the said transfer is a fraud as the plaintiffs do not know the first defendant and have had no dealings with the said first defendant.
- That the deceased administrator Rhoda Chelangat Kandie denied executing an agreement of joint venture with the first and 2<sup>nd</sup> defendant or any other person and even reported the matter to the CID for investigation, and made a statement to that effect.
- There is in place a joint venture agreement between Rhoda Chelangat Kandie with the second defendant. It was allegedly agreed among others that the estate of Aaron Kimosop Kandie deceased would enter into a joint venture agreement with the second defendant to develop the suit property and that the deceased Rhoda Chelangat Kandie would have 50% share capital in the 1<sup>st</sup> defendant (Miotoni West Villas) Limited
- That the said joint venture agreement was drawn by the third defendant who also purportedly witnessed the thumb print and counter fact signature of Rhoda Chelangat Kandie (deceased)
- That the 3<sup>rd</sup> defendant had acted for the deceased Rhoda Chelangat Kandie in high court civil case No. 1055/2004.
- That the 3<sup>rd</sup> defendant and his employee/court clerk George Chweya are Directors of the first defendant (Miotoni West Villas) limited which is now registered as the owner of the suit property.
- The plaintiffs contend that the said transfer and vesting of the property in the 1<sup>st</sup> defendant was fraudulent whose particulars have been given in paragraph 15 of the plaint as here under:-
  - (a) As at the time of execution of the said joint venture agreement dated 18<sup>th</sup> December 2007, the said late Rhoda Chelangat Kandie was incapacitated due to ill health and could not comprehend the terms thereof and could not willingly execute it.
  - (b) Consent of all the administrators of the estate of Aaron Kimosop Kandie was not sought and obtained before executing the purported joint venture agreement.
  - (c) The 3<sup>rd</sup> defendant drew and witnessed the signature and thumb print of Rhoda Chelangat Kandie in the joint venture agreement contrary to law.
  - (d) The estate does not hold any share in the first defendant (Miotoni West) Villa limited contrary to the purported joint venture agreement.
  - (e) The suit property was transferred to the first defendant.

That on the 21<sup>st</sup> December 2007 and 3<sup>rd</sup> March 2008 the 3<sup>rd</sup> defendant without permission or consent of the administrators paid to ICDC the sum of Kshs. 16,900,000.00 and Kshs. 485,000/= respectively, settlement of the mortgage sum.

- That the transfer and vesting of the suit property upon the 1<sup>st</sup> defendant was illegal and of no legal effect.

- That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants without any lawful right, took possession of the suit property and unlawfully demolished two residential houses together with personal property of monumental value on the suit property.
- That the defendants through Hass consult have placed bill boards advertising to sell houses to be constructed on the suit property without any regard to the interests of the beneficiaries of the estate.

In consequences thereof, the plaintiff sought the following reliefs:-

- (a) A declaration that the legal representatives of the estate of Aaron Kimosop Kandie (deceased) are the only lawful proprietors of the suit property known as L.R. NO. 1055/19.**
- (b) A declaration that the purported transfer and vesting of the suit property to Miotoni West Villa limited is of no legal effect.**
- (c) An order directing the land Registrar to cancel any entries made on or about 14<sup>th</sup> July 2008 in the title and in the register in favour of the defendants of their agents or servants.**
- (d) A mandatory injunction directing the first to third defendants or any one of them or their agents or servants to vacate the suit property and to hand over possession of the same to the plaintiff.**
- (e) Any other or further order that may be necessary in the circumstances.**
- (f) General damages.**
- (g) Costs of the suit.**

On the plaint was anchored an application by way of notice of motion dated and simultaneously filed with the suit. It has been brought under the inherent powers of the court, section 52 of the transfer of the property Act, section 5 of the judicature Act, order XXXIX rules 1 and 2 of the civil procedure rules and all enabling provisions of the law. The following reliefs were sought:-

- (a) Spent**
- (b) An order be issued against the defendants and any one claiming through or under them prohibiting each one of them from dealing in any manner with the suit property namely LR. NO. 1055/19 Nairobi (registered in volume N. 27 Folio 391/3362) pending the hearing and determination of the suit.**
- (c) The land Registrar Nairobi be ordered to register forthwith the order referred to in paragraph (b) above against the title to the suit property.**
- (d) The Registration of the first defendant against the title to the suit property purportedly made on 14<sup>th</sup> July 2008 be cancelled by the Registrar or any other official authorized by law so to do.**
- (e) An injunction be issued directing the defendants and any one claiming under or through them (and their agents and servants) to vacate the suit property and to hand over the immediate vacant possession of the same to the plaintiffs.**
- (f) The officer in charge of Karen Police Station be directed to assist the plaintiff in ensuring that the order referred in (e) above is carried out peacefully.**
- (g) An order confirming that the said transfer of the suit property in favour of the first defendant is declared null, void and of no effect.**

**(h) The plaintiff be authorized to notify and/or warn members of the public through the print media to the effect that the estate of Aaron Kimospp Kandie will not take any responsibility for any person who may have paid deposits for the house to be erected in the suit property (LR. NO. 1055/19 Karen)**

**(i) Directions be given for hearing of this application on a priority basis and then to proceed to hearing on day to day basis.**

**(j) Such further or other orders (including for but not limited to contempt of courts as are just in the circumstances)**

The record shows that the plaintiff/applicant appeared in court before Mbogholi J on 16/7/2009 apparently on account of the first interim application. Upon oral representations from the plaintiffs counsel exparte the learned judge certified the matter urgent.

**(b) Granted interim orders in favour of prayer (a) (b) for 14 days.**

**(c) Orders and application were ordered to be served onto the defendants.**

**(d) Hearing interpartes was ordered to be on 30/7/2009.**

**(e) Costs were ordered to be in the cause.**

On 30/7/2009, when the matter came up for hearing interpartes, the court was informed that although the plaintiff was ready to proceed with the hearing of the interim application, there were preliminary objections raised which needed to be disposed off. The court was informed that counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendant's had filed preliminary objections where as the counsel for the 3<sup>rd</sup> defendant was going to associate himself with the preliminary objections filed by the other counsels.

The first defendants' preliminary objection is dated 22<sup>nd</sup> day of July 2009, and filed on the 24<sup>th</sup> day of July 2009. It raises one ground but based on (6) six reasons as follows:-

**1. That the plaintiffs' application and the entire suit is fatally and incurably defective and incompetent in law and ought to be struck out or dismissed with costs to the 1<sup>st</sup> defendant for reasons that:-**

**(a) It is premised on a grant issued to Rhoda Chelangat Kandie in high court succession cause No. 991 of 2003 which has neither been annulled, nor revoked by a court of competent jurisdiction.**

**(b) This honourable court has no jurisdiction to make a finding contrary to the orders confirming the grant in high court succession cause No. 911 of 2003.**

**(c) According to paragraph 7 of the supporting affidavit of Kiptoo Kandie sworn and filed on the 15<sup>th</sup> July 2009, Rhoda Chelangat Kandie has since died and no letters of administration have been taken out to give the said plaintiff/applicant, a locus standi.**

**(d) The 1<sup>st</sup> defendant is the registered owner by assent of the property LR. NO. 1055/19 and by didn't of section 93 (1) of the law of succession Act, the transfer of the said property by the person to whom representation was granted is indefeasible and cannot be challenged.**

**(e) The plaintiffs having consented to the confirmation of grant of probate in favour of Rhoda Chelangat Kandie are estopped from challenging the transfer of the said property to the 1<sup>st</sup> defendant.**

**(f) Consequently all the averments in the said affidavits are hearsay and of no basis in law at all.**

Simultaneously with the preliminary objection was filed a notice to strike out affidavit also dated and filed the same date. It sought that **“the 1<sup>st</sup> plaintiff/applicant affidavit sworn and filed herein on 15<sup>th</sup> July 2009 is fatally defective in form and substance and thus incompetent and should be struck off on the grounds that:-**

- (1) The “affidavit” as drawn sworn and filed violates the express provision of order XVIII/18 of the civil procedures rules as read together with the evidence Act.**
- (2) The “Affidavit” drawn contains neither a specification as to which part is based on information (and documents forming the basis of such information) and where on belief, the grounds of belief thereby offending the provisions of order XVIII (18) of the civil procedures rules.**
- (3) The “Affidavit” offends, violates the provisions of section 176 and 177 of the evidence Act.**
- (4) Other grounds to be adduced at the hearing thereof.**

The second defendants’ preliminary objection is dated 27<sup>th</sup> day of July 2009 and filed the same date. It raises the following grounds:-

**(i) That the plaintiffs have not obtained letters of administration and/or have not demonstrated to this honourable court that they have a grant of probate entitling them to represent the estate of their late mother one Rhoda Chelangat Kandie with the result that they lack locus standi to bring, maintain and prosecute the suit and the pending application.**

**(ii) By virtue of the provisions of section 93 of the law of succession Act (Chapter 160 of the laws of Kenya) the plaintiff’s suit is misconceived and does not lie as the title passed by Rhoda Chelangat Kandie to the 1<sup>st</sup> defendant is indefeasible.**

**(iii) That by didn’t of the provisions of section 136 of the government lands Act (Chapter 280 of the laws of Kenya) the plaintiff suit is time barred and no leave of this Honourable court was sought or obtained for extension of time prior to the filing of this suit and application.**

**(iv) No cause of action has been shown against the 2<sup>nd</sup> defendant and there is no privity between the plaintiff and the 2<sup>nd</sup> defendant.**

**(v) There is a misjoinder of parties on the part of the 2<sup>nd</sup> defendant.**

The 3<sup>rd</sup> defendant’s preliminary objection is dated 23<sup>rd</sup> day of November 2009 and filed on the 25<sup>th</sup> day of November 2009. It is to the effect that **“they take objection to the suit as filled and the application dated 15<sup>th</sup> day of July 2009 on the grounds that:-**

- 1. Prayer (a) and (g) of the notice of motion are final in nature and sustainably in the interim.**
- 2. The plaintiffs have no locus standi to institute the subject proceedings.**

Parties elected to proceed by way of written skeleton arguments. Those for the 1<sup>st</sup> defendant are dated the 3<sup>rd</sup> day of August 2009 and filed on the 4<sup>th</sup> day of August 2009. The salient features of the same are as follows:-

- The letters of grant of administration ad colligenda Bona allegedly issued to Rhoda Chelangat Kandie (widow) Kiptui Kandie (son), Kipruto Kandie (son) and Kigen Kandie (son) under section 67(1) of the laws of succession Act is limited to collection and preservation of the estate only. Contends that the plaintiffs lost their rights as administrators to their late mother Rhoda Chelangat Kandie, the moment the grant was confirmed in the name of their late mother Rhoda Chelangat Kandie. As such they have no

right or locus standi to file any suit in respect of their late father's estate property.

- The plaintiffs were only bonafide administrators of their late father's estate between November 2004 and 29<sup>th</sup> January 2008 status which ceased to operate upon the confirmation of the grant in the name of their late mother on the 30<sup>th</sup> day of January 2008.
- The court is invited to note that the court in succession cause number 991 of 2003 was satisfied with the respective identities and shares of persons beneficially entitled to the estate before confirming the grant in the name of their late mother Rhoda Chelangat Kandie.
- Contend that the plaintiffs ought to have moved the court in succession cause number 991 of 2003 to either revoke or annul the grant in the succession proceedings instead of filing a suit against the 1<sup>st</sup> defendant.
- The plaintiffs having consented to the confirmation of the grant in the name of their late mother, that consent vested all the rights in the said late mother of the plaintiff and that validates the subsequent transfer of the property in LR. NO. 1055/19 to the 1<sup>st</sup> Defendant/Respondent under section 93 of the law of succession Act validating the assent that the late Rhoda Chelangat Kandie gave to the 1<sup>st</sup> defendant in her capacity as the sole administrator.
- For unexplained reasons the plaintiffs have not found it fit to enjoin to the suit another brother of theirs who has been listed to be a beneficiary of Kshs. 10,000,000.00 from the proceeds of sale of units being developed on LR. NO. 1055/19 being developed by the 1<sup>st</sup> defendant.
- The plaintiff cannot agitate any suit in relation to the suit property because they are not personal representatives.
- Contend that Rhoda Chelangat Kandie as the title holder was competent to pass wholly or in part and either absolutely or conditionally in the circumstances of each case.
- Contends the transfer of property passed in the property as in intended by the transfer or and since these rights passed under section 93(1) of the law of succession Act leaving no interest to be pursued by the plaintiffs, the plaintiffs' suit as well as their interim application cannot hold.
- Contends the plaintiffs actions is time barred because there being one relief that falls under the government lands Act, section 136 of the said Act requires that an action be presented in respect of any rights arising under the said Act within one year which year started running on 14<sup>th</sup> day of July 2008, which period expired before the plaintiff moved to court on 15<sup>th</sup> July 2009 a Wednesday being one year and one day after the cause of action arose.

Those for the 2<sup>nd</sup> defendant are dated 29<sup>th</sup> day of July 2009 and filed on the 14<sup>th</sup> day of August 2009. The salient features of the same are as follows:-

- The plaintiffs have not demonstrated to this court that they have a grant of probate entitling them to represent the estate of their late mother Rhoda Chelangat Kandie with the result that they lack locus standi.
- Though the plaintiff averment in their plaint and deponement in their supporting affidavit claim that they are administrators to the estate of Aaron Kandie the letter of administration of the said grant was confirmed in the name of their late mother Rhoda Chelangat Kandie with the consent of all beneficiaries as can be seen in the succession file P&A 991 of 2003.
- The said grant in favour of Rhoda Chelanga Kandie has never been revoked not challenged and it is still valid.

- Since the plaintiff relinquished their rights in favour of their mother, they ceased to have any locus standi to bring the action in respect of their late father's estate.
- The plaintiffs have not filed the suit in their capacity as beneficiaries and so it does not hold.
- The plaintiffs have not also taken out a grant of representation to the estate of their late mother.
- The plaintiffs cannot seek any relief under order 39 civil procedure rules because the relief is only available to a person with a legal right to be protected.
- The plaintiffs' action does not lie because title passed from Rhoda to the 1<sup>st</sup> defendant after the grant had been issued and confirmed in the name of the said Rhoda where upon she validly entered into a joint venture agreement with the 1<sup>st</sup> defendant whereby it was agreed that the said property would be transferred to and developed by the 1<sup>st</sup> defendant.
- The estate of the deceased was to benefit from four houses including the liquidation of the estate indebtedness to ICDC.
- Contends the said assent given by the late Rhoda is protected by law as the late Rhoda had authority to pass all the interests in the suit property as administrator to the 1<sup>st</sup> defendant which passing is protected by section 93 (1) of the law of succession Act.
- By reason of what has been stated above, there is nothing left for the plaintiff to pursue save their beneficial interest as beneficiaries.
- Contends the 1<sup>st</sup> defendant obtained a good title to the said property which cannot be impeached by any person even if the grant were to be subsequently revoked or revised.
- The plaintiff's suit is time barred by reason of section 136 of the Government Lands Act cap 280 of the laws of Kenya which required that actions under this Act have to be presented before the expiry of one year from the date of the commencement of the cause of action and no leave of court has been sought to extend the time for presenting of the said suit.
- Also contends that the action does not lie because though the plaintiff seeks reliefs against the land Registrar, the land Registrar has not been joined to these proceedings.
- No cause of action has been demonstrated against the 2<sup>nd</sup> defendant. As such the 2<sup>nd</sup> defendant has been wrongly joined to these proceedings and the 2<sup>nd</sup> defendant should be struck out from these proceedings.

In response to both preliminary objections, the plaintiff's counsel filed their skeleton arguments dated 6<sup>th</sup> day of August 2009 and filed the same date. The salient features of the same are as follows:-

- They have exhibited an exhibit to demonstrate that the four administrators were register as legal representatives of the registered owner of the suit property and the suit property vested in all the four administrators.
- The court has jurisdiction to issue the reliefs sought namely an injunctive relief and reverse a transaction obtained through fraud. The grant having been issued in the joint manes of four administrators the property vested in the names of the surviving administrators who have lawfully and rightfully presented the current suit.
- They contend that they do not need a grant of representation to their late mothers estate in order to protect the interests of their late father's estate, which duties vested on the plaintiffs.

- Section 93(1) of the law of succession Act protects a purchaser of immovable property. It is not available to shield the 1<sup>st</sup> defendant herein because there is no proof that the 1<sup>st</sup> defendant purchased any of the suit property from any of the administrators of the estate of late Aaron Kandie.
- Still contends that the transfer of the property to the first Respondent was fraudulent which allegations have not been controverted in the 1<sup>st</sup> instance and in the second instance, there is nothing to demonstrate purchase as such, the title cannot be protected.
- Contends the preliminary objection raised do not qualify to be preliminary objections as they require facts to be adduced in order to prove the same.
- The plaintiffs' supporting affidavit is within the law as the deponent has deponed to matters within his own knowledge as supported by documents annexed.
- Their claim is not time barred as time starts running from the time they come to learn of the fraud complained of namely 9<sup>th</sup> October 2008.
- They are within the period of limitation on recovery of land which is 12 years and fraud upon its discovery under section 26 of cap 22.
- Maintain they have a cause of action against the 2<sup>nd</sup> defendant because he signed a joint venture agreement with the late Rhoda Chelangat Kandie which the plaintiffs allege is fraudulent on the one hand and on the other hand that the defendants through their agents have offered to sell the said houses to 3<sup>rd</sup> parties.
- The affidavit is in line with the provisions of order 18 CPR as the 1<sup>st</sup> defendant has not specified which matters are scandalous, oppressive or irrelevant in order to qualify for striking out.
- Section 176 and 177 of the Evidence Act are not applicable.
- Contends that plaintiffs are properly before the seat of justice as the cause of action pursued here cannot be pursued in the succession cause.
- Estoppel does not arise as it has not been demonstrated that the cause of action in the succession cause is the same as the one subject of these proceedings.
- Maintains that plaintiffs as personal representative are entitled to champion the proceedings herein.
- Dismissal of the suit is not available as it has not been demonstrated that it is so hopeless that it plainly and obviously discloses no reasonable cause of action.
- That objections raised by the respondent do not qualify as preliminary objections as they are anchored on facts which are in dispute.

Parties also referred the court to legal authorities as guide lines. Those of the first defendant are dated 29<sup>th</sup> day of July 2009 and filed the same date. The case of **GULAM AND ANOTHER VERSUS JIRONGO (2004) KLR 158** decided by Ringera J as he then was where it was held inter alia that:-

**1. A preliminary objection on a point of law may be taken at any stage of the proceedings.**

**Section 93(1) of the law of succession Act cap 160 L.S.A which reads:-**

**“Section 93(1) A transfer of any interests in immovable property to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variations of the grant either before or after**

the commencement of this Act.

2. A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities funeral and testamentary administrative expenses duly and legally of the deceased have not been discharged nor provided for.

Section 7, 8 of the transfer of property Act Rev. 1962, group 8. These read:-

“Section 7. Every person competent to contract and entitled to transfer property or authorized to dispose off transferable property not his own is competent to transfer such property either wholly or in part, on either absolutely or conditionally in the circumstances to the extend and in the manner allowed and prescribed by any law for the time being in force.

8. Unless different intention is expressed or necessarily upheld a transfer of property passes forthwith to the transferee all the interest which the transfer or is then capable of passing in the property and in legal incident thereof.

54. Sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties”

The case of TROURISTIK UNION INTRNATIONAL AND ANOTHER VERSUS MBEYU AND ANOTHER (2008) IKLR (G&F) 730 decided by the court of appeal where it was held inter alia that:-

“ To determine who may agitate by suit any cause of action vested in the deceased at the time of his death , one must turn to section 82 (a) of the law of succession Act. That section confers that power on personal representatives and on them alone”

Section 3 of the law of succession Act provides that an Administrator is a person whom a grant of letters of administration has been made...”

The case of RE SUCCESSION LIMITED GRANT (2002) 2EA 488 (CCK) decided by Angawa J where the learned judge held inter alia that gazetteement is not necessary for a limited grant under section 67(1).

Section 136 of the Government lands Act GLA cap 280 laws of Kenya. It reads:-

“Section 36(1) All actions unless brought on behalf of the government for anything done under this Act shall be commence within one year after the cause of action arose and not afterwards.

(2) Notice in writing of the action and the cause thereof, shall be given to the defendant one month at least before the commencement of the action.

(3) In every action the defendant may plead the general issue, and give this Act and the special matter in evidence at the trial to be had thereupon.

(4) No plaintiff shall recover in the action if tender of sufficient award has been made before action brought or if a sufficient sum of money has been paid into court by or on behalf of the defendant after actions brought together with costs incurred up to that time.

The case of INTERNATIONAL MANUFACTURERS LIMITED VERSUS AKIBA BANK LIMITED AND 2 OTHES NAIROBI HCCC NO. 619 OF 2003 decided by Mohamed K Ibrahim J on the 25<sup>th</sup> day of November 2004. In which the learned judge upheld application for an injunctive relief on account of demonstration of existence of a prima facie case and a likelihood of suffering irreparable loss

which cannot be compensated for by way of damages.

The case of **JOVENNA EAST AFRICA LIMITED VERSUS SYLVESTER ONYANGO AND 4 OTHERS** decided by Nyamu J as he then was now J A on the 7<sup>th</sup> day of April 2003 in which the learned judge struck out a verifying affidavit for failing to state that it was verifying the correctness of the averments but refused to strike out the plaint on that account and gave leave to the affected party to file another verifying affidavit”

Also the case of **GULAM AND ANOTHER VERSUS JIRONGO (SUPRA)** in which Ringera J as he then was also held inter alia that:-

(3) An affidavit by one plaintiff verifying the correctness of the facts of a plaint where the plaintiffs are two and where the deponent does not state that he is making it on behalf of himself and the other plaintiff, and the authority and basis on which he would so do on behalf of that other plaintiff, is defective.

(4) The court has a discretion to strike out a plaint which is accompanied by a defective verifying affidavit. The affected party may make an oral application for the exercise of the court’s discretion and the court should exercise its discretion as appropriate in the light of the circumstances.

The authorities for the 2<sup>nd</sup> defendant are dated the 28<sup>th</sup> day of July 2009, and filed the same date. The court will only highlight those not highlighted under the submissions of the first defendant.

Section 82 of the L.S.A. cap 160 laws of Kenya which read:-

“Section 82 personal representatives shall subject to any limitation imposed by their grant have the following powers:-

(a) To enforce by suit or otherwise all causes of action which by virtue of any law survive the deceased or arise out of his death for his estate.

(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.

Section 52 of the transfer of property Act (supra) which reads:-

“ Section 52 During the pendency in any court having authority in British India or established beyond the limits of British India by the governor general in council of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the court on such terms as it may impose....”

The case of **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED VERSUS WEST END DISTRBUTORS LIMITED (1969) EA 696** . At page 700 paragraph D-E law JA as he then was had this to say:-

“ So far as I am 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 off the suit. Examples are an objection to the jurisdiction of the court’s 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...”

While Sir Charles New Bold P at page 701 paragraph A-C had this to say:-

**“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 case of **NAIORBI MAMBA VILLAGE VERSUS NATIONAL BANK OF KENYA (2002) IEA 197** decided by Ringera J as he then was where it was held inter alia that:-

**“(a) A party seeking to prevent alienation, waste or damage to the property in dispute under order XXXIX of the CPR had to establish that it had legal rights in such property.....though the plaintiff had an interest in the charged property as it was both the security for its indebtedness and the location of its business, neither of those interests amounted to appropriation interests in the property”**

This holding is anchored on the learned judge’s reasoning found at page 199 paragraph d-f thus:-

**“An interlocutory injunction is an equitable remedy which may be issued at the instance of a party to the suit to protect his legal right from violation by unlawful acts of another party. In the context of rule (1) of order XXXIX of the civil procedure Rules, the party seeking to prevent alienation wastage or damage to the property in dispute therein must establish that he has legal rights in such property which he seeks to protect by the injunction sought.”**

The case of **GIELLA VERSUS CASSMAN BROWN AND COMPANY LIMITED (1973) EA 358** where it was held inter alia that:-

**(iv) An applicant must show a prima facie case with a probability of success.**

**(v) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.**

**(vi) When the court is in doubt, it will decide the application on the balance of convenience”**

The case of **SHOW WIND INDUSTRIES LIMITED VERSUS GUARDIAN BANK LIMITED AND ANOTHER (2002) EA 284** decided by Ringera J as he then was where it was held inter alia that:-

**“An interlocutory mandatory injunction would be granted sparingly and only in exceptional circumstances such as where the applicants case was very strong and straight forward. Moreover being an equitable remedy, any application would be denied where it was in equitable to grant it for example where the applicants conduct did not merit the courts approval or his equity had been defeated by laches “**

The case of **KENYA BREWERIES LIMITED VERSUS OKEYO (2002) IEA 109** in which the court of appeal held inter alia that **“a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary Act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff”**

This holding is anchored on the reasoning and authorities cited by the said court found at page 111 paragraph C-G where the court quoted with approval volume 24 Hallisburry Laws of England (4<sup>th</sup> edition) paragraph 948 thus:-

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances it will not normally be granted. However if the case is clear and one which the court thinks it ought to be decided at once or if the act done is simple and a summary one which can be easily remedied if the defendant attempted to steal a match on the**

**plaintiffs a mandatory injunction will be granted on an interlocutory application...”**

The CA also quoted with approval the decision in **LOCABAIL INTERNATIONAL FINANCE LIMITED VERSUS AGRO EXPORT AND OTHERS (1986) ALL ER** where it had been held inter alia that:-

**“ A mandatory injunctions ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.**

**Moreover before granting mandatory interlocutory injunction the court had to feel a high degree of assurance that the trial it would appear that injunction had rightly been granted that being a different and high standard then was required for a prohibitory injunction.**

The case of **TAIBOT VERSUS BERKSHIRE COUNTY COUNCIL (1993) 4ALL ER9** where it was held inter alia that:-

**“(1) The rule that a plaintiff was barred by cause of action estoppel from pursuing a claim which would have been litigated at the same time as proceedings brought by a Co-plaintiff having the same cause of action against the same defendant applied to personal injury litigation.**

The case of **BUEHLER AG VERSUS CHRONOS RUHARDSON LIMITED (1998) 2AER 960** where it was held inter alia that:-

**“A cause of action estoppel only applied when the cause of action in the earlier proceedings was identical to that in the later proceedings and there was a judicial decision that was final”**

Those for the plaintiff were attached to the submission. There is the case of **MARY NJERI NGAWO VERSUS HOUSING FINANCE COMPANY OF KENYA LIMITED CHERI KENYA LIMITED AND STARE NGANGA MUIGAI NAIROBI MILIMANI COMMERCIAL COURT HCCC NO. 1864 OF 2000** decided by Onyango Otieno J as he then was now JA on the 11<sup>th</sup> day of October 2001. The issue before his Lordship were two application under order 6 rule 13 (1) (a) on striking out. At page 3 thereof the learned judge quoted with approval the decision of Madan JA as he then was in the case of **D.T. DOBIE AND COMPANY (KENYA) LIMITED VERSUS JOSEPH MBARIA MUCHINA AND LEAH WANJIKU MBUGUA NAIROBI CA NO. 37 OF 1978** Thus:-

**“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits, “Without discovery”, without oral evidence tested by cross examination in the ordinary way...**

**As far as possible indeed not at all there should be no opinion expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right...”**

The case of **KENYA PORTS AUTHORITY VERSUS WAY LAND LIMITED AND 2 OTHERS MOMBASA HCCC NO. 499 OF 2001** decided by DK Maraga J on the 28<sup>th</sup> day of July 2005, where the learned judge declined to dismiss the plaintiffs’ action because it could not be said to be unarguable and totally hopeless.

This court has given due consideration to the rival arguments herein and in the light of case law principles cited for guidance of the court by both sides and in this court’s opinion, the following are own framed

questions for determination in the disposal of this matter:-

- (i) What reliefs are the objectors seeking from this court?**
- (ii) What principles of law is this court enjoined to apply?**
- (iii) Have the objectors brought themselves into the ambit of those ingredients?**
- (iv) What are this courts final orders in the disposal of this matter?**

In response to own framed question (i) the reliefs the objectors are seeking from this court is for this court not to allow the Plaintiff's/Respondent's suit as well as its baby, the interim application not to crawl out of their cribs and see the light of the day. The weapons the court has been called upon to use are the preliminary objections raised here in which the court has been called upon to deploy and use them as an axe to axe both the suit and its interim application anchored on it.

The ingredients that the objectors are required to demonstrate to exist are the principles applicable to the determination of the existence and non existence of a preliminary objection. The yard stick for determining this existence and non existence of a preliminary objection has been set by the land mark case of **the MUKISA BISCUIT MANUFACTURING COMPANY LIMITED VERSUS WEST END (SUPRA)** and has been dutifully followed by both the court of appeal and the superior court of this jurisdiction. The central theme running through the said case law on the subject are as follows:-

- (a) In order to hold, the preliminary objection has to be on a pure point of law and not facts.
- (b) All matters pleaded by the opposite party must not be disputed by the party raising the preliminary objection.
- (c) There should be no room for a situation whereby the courts discretion can be called into play.

This court has been called upon to apply these ingredients on each of the two sets of preliminary objections raised by both the first and the 2<sup>nd</sup> defendants and associated with by the 3<sup>rd</sup> defendant. The preliminary objections have been raised against the plaintiff's assertions both in the plaint and the interim application anchored on the plaint set out herein. For purposes of reasoning only the plaintiffs assertions in a summary form are that:-

- (i) The subject property namely LR. NO. 1055/19 situated in Karen previously was owned by one Aaron Kimosop Kandie who is now deceased.
- (ii) The property became a subject of succession upon the death of the deceased.
- (iii) By reason of it becoming a subject of succession, there arose a need to identify who may have been interested in the said property either by own volition or by operation of law.
- (iv) That the plaintiff and one Rhoda Chelangat Kandie became so interested both as administrators and beneficiaries.
- (v) They were allegedly legally vested with that interest by reason of them moving jointly to initiate legal proceedings by way of succession cause number 991 of 2003 whereby they were alleged grant of letters of administration to the said estate and by virtue of this vesture the property became vested in them as legal representatives.
- (vi) For the reasons to be revealed only by way of them goings in the succession file number 991/2003 the confirmation of the grant was done infavour of one Rhoda Chelangat Kandie to the exclusion of the plaintiffs.

(vii) It has been argued by the preliminary objectors that the plaintiffs consented to their being excluded from the confirmed grant where as the plaintiffs consent was done behind their backs.

(viii) By reason of the afore said confirmation in the name of Rhoda Chelangat Kandie alone, she alone was able to sign off a joint venture agreement with the first defendant over the suit property.

(ix) The plaintiffs became aggrieved and moved to court seeking to protect their rights both at the interim stage and ultimately at the conclusion of the trial. They assert they have a right to the protective relief they are seeking in their capacity both as administrators as well as beneficiaries.

(ix) It is against the plaintiffs assertions of this protective right at the said both stages that the preliminary objectors have stepped in stating that , that right has been lost by reason of events that took place in the succession cause No. 991/2003.

The events put forward by the first defendant preliminary objector are summarized as:-

(a) Both the suit and interim application cannot hold as long as the grant confirmed to Rhoda Chelangat Kandie in HCCC P&A 991/03 stands un annulled and or unrevoked by a court of competent jurisdiction.

(b) This court lacks jurisdiction to make a finding contrary to the one made in HCCC P&A 991/2003.

(c) Since the confirmed grant in HCCC 991/2003 had been confirmed in favour of Rhoda Chelangat Kandie who has since died, the plaintiffs can only question what Rhoda did with 3<sup>rd</sup> parties if they have a grant of representation to the estate of the said Rhoda Chelangat Kandie. In other words the plaintiffs have no independent rights of their own which they can pursue independently of those of Rhoda Chelangat Kandie which stand or fall together.

(d) The plaintiffs intention to pursue the rights put forward is an exercise in futility because these have been fore closed by the action of the late Rhoda Chelangat Kandie assenting to the vesting of the title in the 1<sup>st</sup> defendant which foreclosure is guaranteed by section 93(1) of the law of succession Act which this court is in capable of upsetting in order to avail the relief being sought to the plaintiffs.

(e) Further foreclosure rendering the plaintiffs claims to be an exercise in futility is by reason of them having assigned their rights to late Rhoda Chelangat Kandie through their consent to having the grant confirmed in her favour as the sole administrator of the estate and by reason of these they are estopped from initiating these proceedings to challenge what the late Rhoda Chelangat Kandie did on their behalf as the sole administrator.

In addition to the above, the first defendant also sought to unseat the interim application by reason of the filing of a notice to strike out the supporting affidavit filed by the first plaintiff deponed on the 15<sup>th</sup> day of July 2009 by reason of the said affidavit offending both the provisions of the old order 18 CPR now order 19 CPR and section 176 and 177 of the evidence Act.

Those of the second defendant are summarized as follows:-

(a) Both the suit and interim application have no chance of survival because of lack of locus standi on the part of the plaintiffs arising from their failure to take out a grant of representation to the estate of the late Rhoda Chelangat Kandie before commencing the action.

(b) The transaction between the first defendant and the late Rhoda Chelangat Kandie sought to be faulted is protected by section 93(1) of the Law of Succession Act.

(c) The plaintiffs stand non suited on account of the action being statutorily barred by reason of their failure to present the action within a period of one year as per requirements of section 136 of the Government Lands Act cap 280 of the laws of Kenya.

(d) That there is no cause of action demonstrated against the 2<sup>nd</sup> defendant, and or in the alternative that there is misjoinder of the 2<sup>nd</sup> defendant to these proceedings.

The plaintiffs responses to those objections which have already been reflected on the record are on two fronts, namely technical front based on the assertion that these do not hold because they are not purely on points of law and 2<sup>nd</sup>ly they have no merits.

By interrogation of the two aspects of the preliminary objections it is imperative on the part of the court to reflect on the record the on goings in the succession file HCCC P&A 991/2003 as this will form the anchor for the merits interrogation since both parties have touted the proceedings in HCCC P&A 991/2003 as both their shield and swords.

Starting with the paper work section of the filings, a perusal of file No. P&A 991/2003 reveals the following:-

(i) The deceased Aaron Kimosop Kandie died on 7/7/2002 aged 64 years.

(ii) The deceased was statutorily married to one Rhoda Chelangat Kandie now also deceased on the 27<sup>th</sup> August 1966.

(iii) The subject property appears in the list of assets as item No. 6 and the same is described as LR. NO. 1055/19 Miotoni West Road Karen Nairobi comprising 4.03 ha (9.96 acres) valued at 34,860,000.00.

(iv) There is an affidavit in support of the petition for letters of administration vide paragraph 4 thereof the following have been listed as survivors of the deceased, late Aaron Kimosop Kandie:-

- **Rhoda Chelangat Kandie – widow**
- **Chepchumba Kandie- 37 years daughter.**
- **Kiptui Kandie- 35 years son.**
- **Kipruto Kandie – 34 years son**
- **Kigen Kandie – 32 years son**

(v) The daughters consented to the grant being issued to the widow and the three sons and the grant was duly issued to Rhoda Chalangat Kandie, Kiptui Kandie, Kipruto Kandie and Kigen Kandie on the 9<sup>th</sup> day of November 2004.

(vi) There has been no rectified grant rectified under section 67 of the L.S.A. Cap 160 laws of Kenya whereby the sons were ceeding the administration of the estate to the widow before application for confirmation was made.

(vii) The application for confirmation traced on the file is dated 2<sup>nd</sup> May 2007. It was indeed presented by the advocates firm sued as the 3<sup>rd</sup> defendants. Prayer 1 reads as follows:-

**“(i) The Honourable court be pleased to order that the grant of letters of administration intestate made to the said Rhoda Chalangat Kandie by the Honourable court in this cause on the 9<sup>th</sup> day of November 2004 be confirmed.”**

The supporting affidavit is very brief paragraph 1 and 2 thereof reads:-

**“Paragraph 1: I am one of the Administrators of the deceased’s estate and have been given the mandate to swear this affidavit on behalf of the administrators herein and I am familiar with the**

**subject of this application and as such I am competent to depone the matters herein.**

**Paragraph 2: the grant of letters of administration of the estate was made to us in this matter on the 9<sup>th</sup> day of November 2004. I annex a photocopy of the same and mark it as RCK1.**

(b) The rest of the paragraphs 4,5,6,7 and 8 do not mention that the other beneficiaries and administrators as well as the other beneficiaries have given consent that the grant be confirmed in the name of one administrator.

(c) ( Paragraph 7 thereof reads:-

**“The identification and shares of all persons beneficiaries entitled to the estate have been ascertained and determined in the manner set out in the annexed agreement marked RCK2.**

(d) The assumption is that both annexure RCK1 and RCK2 would bear the same date stamp as the one on the application. This court has not addressed these annexure annexed to the said supporting affidavit. It is not clear whether these had not been annexed in advertently or that they may have been reaped off or vandalized.

(viii) There is observation that the date of the application bears alterations which are not counter signed. The supporting affidavit bears a date which has also been altered. The alteration is counter signed but it is not clear as to whether the alteration were made by the deponents or the commissioning counsel (advocate).

(ix) There is a consent filed on the 5<sup>th</sup> May 2007, purported to have been signed by the daughters and sons of the deceased purporting to consent to the confirmation and observations on the same are made as hereunder: -

(a) The names of those giving the consent have been given as:-

- **Chepchumba Kandie.**
- **Kiptui Kandie**
- **Kipruto Kandie**
- **Kigen Kandie.**

The documents bear's signatures but no ID card numbers have been indicated. The date on which the said consent was given has not been indicated but the same was filed on the 5<sup>th</sup> May 2007. For purposes of the record it reads:-

**“Consent to confirmation of grant. We Chepchumba Kandie, Kiptui Kandie, Kipruto Kandie and Kigen Kandie of Post office BOX 24176 Nairobi dependants within the meaning of section 29 of the law of succession Act of the above named Aaron Kimosop Kandie (Deceased) who died on 7<sup>th</sup> July 2002 do hereby consent to confirmation of the grant of letters of administration intestate made to Rhoda Chelangat Kandie by this Honourable court on the 9<sup>th</sup> November 2004”**

(b) It is observed that it is not correctly stated that the grant made on 9<sup>th</sup> November 2004 was made to only one administrator namely Rhoda Chelangat Kandie. The correct position is that the said grant was made to four persons namely the widow Rhoda and her sons Kiptui, Kipruto and Kigen

(c) It is apparent that with the exception of the in correct fact in number (b) above a clear reading of the wording reveals that the consent is for confirmation. There is no mention or content of the words in the said consent which are to the effect that the said four were consenting to the grant being confirmed in the

name of one administrator instead of the four of them.

(d) The said consent was allegedly signed before an advocate one Willis Odede Nyende.

(e) There is no mention in the said consent to the effect that they were consenting to the mode of distribution.

(x) Besides the said consent there is no supporting affidavit from the other administrators either individually or one on behalf of the rest to the effect that they were ceding their administratorship to their late mother.

(xi) There is a further affidavit deposed by the said Rhoda Chelangat Kandie on the 22<sup>nd</sup> day of October 2007, and filed on the 26<sup>th</sup> day of October 2007, allegedly deposed pursuant to leave of court given on the 18<sup>th</sup> day of October 2008. Paragraph 2 thereof deposes that **“the identification and shares of persons beneficially entitled to the said estate have been ascertained and determined in the memorandum of agreement dated the 3<sup>rd</sup> day of May 2007 and annexed to the application for confirmation of grant and is summarized as follows (summary)...**

(xii) The RCK 1 traced on the record is the one filed on the 28<sup>th</sup> day of September 2007 and not 3<sup>rd</sup> May 2007.

(xiii) There is also traced on the record memorandum of agreement which does not bear a filing stand but it bears an exhibit stamp and marked RCK2 indicated to have been marked on the 3<sup>rd</sup> day of may 2007.

(b) Clause 11.6 and 11.7 thereof read:-

**“11.6 To the surviving widow of the intestate, Rhoda Chelangat Kandie as part of her shares on the Residue intestate estate, a portion measuring five acres (or 50%) of the land on which her matrimonial home is built of the immovable property known as LR. NO. 1055/19 Miotoni West Road, Karen Nairobi comprising 9.96 acres or thereabouts (otherwise known and hereinafter referred to as the “matrimonial home”**

**11.7. It is hereby expressly understood by the Administrators of the estate and the beneficiaries that the said property known as LR. NO. 1055/19 Miotoni West Road, Karen (The Karen property) shall at the execution of this deed be transferred to Miotoni West Villas Limited a company beneficially owned by the administrators and beneficiaries in the following proportions:-**

**(a) To Rhoda Chelangat Kandie – five acres (or 50%) of the land on which her matrimonial home is built. The matrimonial home”**

**(b) The balance in trust for the other beneficiaries whose interests are set out in Paragraph 11.17 here below.**

**11.8 After the transfer of the property known as LR. NO. 1055/19 Miotoni West Road, Karen to Miotoni West Villas limited the following beneficiaries shall be entitled to the following:-**

**(i) Chepchumba Kandie Loki to receive one house in Miotoni West Villas but no amount to be received in Kenya shillings.**

**(ii) Kiptui Kandie to receive no house but sixteen (16) Million Kenya shillings.**

**(iii) Kipruto Kandie no house but to get thirty million (30,000,000.00)**

**(iv) Kigen Kandie to get no house but ten million (Kshs. 10,000,000.00) Kenya shillings.**

(c) At clause 22 the following words are found:-

**“In witness whereof this agreement has been duly executed by the several parties hereto, the day and year herein is before written signed, sealed and delivered.** It is observed that the date and the year the agreement was signed is not indicated. Those indicated to have signed are Rhoda Chelangat Kandie, Chepchumba Kandie Loki, Kiptui Kandie, Kipruto Kandie and Kigen Kandie. The signatures are appended but no ID cards are indicated against either the names or signature. The rubber stamp of the advocate who witnessed the appending of the signatures is faint on the copy traced on the file.

(xiv) There is traced on the record a certificate of confirmation indicating that the same was issued on the 30<sup>th</sup> day of January 2008. The heading reads in part:-

**“Certificate of confirmation of grant.**

**I hereby certify that the above written grant of representation to the estate of the late Aaron Kimosop Kandie issued to Rhoda Chelangat Kandie therein named has this 30<sup>th</sup> January 2008 been confirmed by the court pursuant to the provisions of sections 71(1) and (3) of the law of succession Act cap 160 laws of Kenya.**

**Dated at Nairobi this 30<sup>th</sup> day of January 2008.**

(b) Item 6 thereof reads:-

**LR. Number 1055/19 Karen shall be transferred to Miotoni West Villas Limited, a company beneficially owned by the beneficiary for purposes of developing the same.**

(c) It is observed that the content of this clause 6 is a departure from the content of clause 11.6, 11.7 and 11.8 of the Agreement of understanding.

(d) The framing of the wording of item 6 in the manner done as opposed to the wording of clause 11.6 and 11.7 and 11.8 of the agreement can be read to mean beneficiaries of the said company as opposed to the intended purport of clause 11.6, 11.7 and 11.8 which indicate clearly that the beneficiaries are the administrators and the beneficiaries of the estate.

(e) Contrary to clause 11.6. of the agreement which reserved 50% of LR. 1055/19 Karen for the widow, item 6 of the confirmed grant does not have such a reservation.

(xv) Counsel for the applicant moved the court vide a certificate of urgency dated 8<sup>th</sup> day of January 2008, to have the said grant certified urgent and ordered to have the confirmation application heard and disposed off during the court vacation. The supporting affidavit was deponed by counsel and the reason for moving the court so are contained in paragraph 7 and this reads:-

**“Paragraph 7: The industrial and commercial Development Corporation intends to sell property given as Security LR. NO. 1055/19 Karen, Nairobi on which the deceased’s family resides, to recover debts arising from an unpaid loan, pursuant to a consent order recorded between the applicants and the ICDC and the various correspondences exchanged between the parties. Annexed hereto are copies of the consent and the correspondence and I mark the same as exhibit AW-1.**

(XVI) On 22<sup>nd</sup> day of October 2009, the plaintiffs presented an application for revocation of grant dated 19<sup>th</sup> day of October 2009, presented under certificate of urgency. The court has been informed that this application is still pending disposal.

Turning to the hand draft portion of the record the following entries are highlighted:-

(i) The grant was issued by Kubo J as he then was on the 9/11/2004 after being satisfied that the cause

had been gazetted and that there was no pending objection to the issuance of the grant.

(ii) The application for confirmation of grant came up before Aluoch J as she then was now her highness judge of the International Criminal Court (ICC) who directed a further affidavit to be filed showing the mode of distribution which this court has already made observation on that indeed this further affidavit was filed on October 2007.

(iii) Certificate of urgency to have the application for confirmation heard urgently during the vacation went before Lesiit J on 8/1/2008 who certified it urgent and gave directions that the same be heard during the vacation in the family division on 11<sup>th</sup> January 2008.

(iv) Apparently the matter was not listed on the 11<sup>th</sup> day of January 2008. It was however listed before Visram J as he then was now JA on the 20/1/2008 and the following orders were made:-

**1. 30/1/2008**

**Coram before Visram J.**

**Murithi for Wendabwa for the applicant.**

**David court clerk**

**2. Court**

**Based on reasons outlined and the matter having been certified urgent previously that it be heard today.**

**3. Grant dated 3/5/2007 is hereby confirmed as per application dated 8/1/2008**

**Signed 30/1/2008.**

(v) On 22/10/2009 Dulu J gave the following directions.

**1. Application for revocation certified urgent.**

**2. It has to be served immediately on all interested parties including administrators.**

**3. Registry to give hearing date on priority basis.**

(vi) On 9/3/2010 Dulu J granted the Respondents leave to file a **replying affidavit within 7 days and applicants may file a supplementary affidavit within 7 days from service.**

**(2) Mention on 6/4/2011.**

(vii) On 4/5/2011 summons for revocation was fixed for hearing on 29/9/2010.

This court has given due consideration to the afore set out findings and or transactions in P&A cause 991/2003 and the same considered in the light of the rival arguments herein and the court proceeds to make the following findings on the same.

1. The observations made by the court on the transactions in P&A cause No. 991/2003 were justified as these were necessitated by the fact that the central theme in both sets of the preliminary objections and as associated with by the 3<sup>rd</sup> defendant was that the suit as well as its interim application anchored on it cannot crawl out of its crib to see the light of merit adjudication because that right had been fore stalled and or fore closed by the transactions and or ongoing in HCCC P&A 991/2003 where orders had been

granted in finality and for this reason the court seized of the proceedings herein cannot make contrary orders unless and until the orders in P&A 991/2003 have been vacated in one way or another.

2. The court is satisfied that by reason of the entries of the assessment set out above on the ongoings in HCCC P&A 991/2003 there is no way a merit pronouncement could be made on the preliminary objections raised without an interrogation of the said entries.

3. This court has duly interrogated these entries and in its opinion they have revealed the following which are relevant to the rival arguments herein:-

(a) That the grant issued on the 9<sup>th</sup> day of November 2004 had been issued to four persons namely:-

(i) **Rhoda Chelangat Kandie.**

(ii) **Kiptui Kandie**

(iii) **Kipruto kandie**

(iv) **And Kigen Kandie.**

In their capacity as widow and sons on the one hand, and beneficiaries on the other hand. This was on their own behalf and on behalf of one other beneficiary, a daughter Chepchumba Loki, who had signed a consent for the four to be granted the grant of representation.

(b) By reason of the above, persons being granted the said grant they became vested with the protective powers donated by section 45 of the law of succession Act cap 160 laws of Kenya. The powers donated include the power **“to take possession dispose off, shield the free property of the deceased from intermeddlers”**.

(c) The property subject of these proceedings falls into the category of free property of the deceased forming his estate as defined in section 3 of the L.S.A which defines **“an estate”** as meaning the **“free property of a deceased person”** and free property as defined as meaning **“the property of which that person has legally competent freely to dispose during his life time and in respect of which his interest has not been terminated by his death”**. The same section defines **“a personal representative”** as meaning the **“executor or administrator of a deceased person’s estate.”** Whereas **“representation”** on the other hand means **“the probate of a will or the grant of letters of administrations”**.

(d) The proceedings therein (P&A 991/04) were intestate which as per the provisions of section 34 L.S.A. It meant that the deceased died without making a will capable of taking effect.

(e) The granting of the grant mentioned in the names of the 4 administrators on the 9<sup>th</sup> day of November 2004, is not absolute and indefeasible. It is capable of undergoing changes by way of application for revocation and or annulment under the section 76 L.S.A and rule 44 of the probate and administrations rules procedures. Or alternatively it could undergo rectification by way of application under section 74 L.S.A. and rule 43 of the probate and administration procedures. This court has judicial notice of the fact that annulment and revocation would remove the entire purpose, strength and effectiveness of a grant. Whereas rectification is simply to make alterations on the grant.

(f) From the observations assessed herein, both on the paper work filed as well as the hand draft entries by the court, the grant issued to the four administrators on the 9<sup>th</sup> day of November 2004 has never been revoked , annulled and or rectified. This being the case, it means that the said grant is the one which should have formed the anchor for the application for confirmation vide the application for confirmation dated 3/5/2007 meaning, that the content of the application should have shown that the application sought to be confirmed had been issued to the four administrators and it was being sought to be confirmed as such.

The issue of the said application fronting Rhoda Chelangat Kandie as the only person to whom the grant had been issued and therefore the only person to receive a confirmation could only arise upon demonstration that the other three administrators had been procedurally deleted from the said grant by way of rectification. In the absence of existence of an application for rectification, and a resultant order to that effect, the consent by the beneficiaries and the three administrators filed herein does not operate to shield the process as it has been faulted by this court by reason that the Id Card numbers of the signatures were not indicated and the date on which the same was given was not indicated. Further that it was consenting to confirmation and not for the removal of the other three administrators.

(g) The faulting of the process of confirmation in number (f) above notwithstanding, the confirmation order itself made on 30/1/2008 by Visram J as he then was now JA stands faulted. In that what the application of 3/5/2007, sought from the court was to confirm the grant issued on 9/11/2004. The confirmation was sought to be fast tracked by an application under certificate of urgency dated 8/1/2008. The learned judge however inadvertently confirmed a grant which had been issued on 3/5/2007 by allowing an application for confirmation dated 8/1/2008. As assessed herein there was no grant issued to anybody herein on 3/5/2007 and there is no application for confirmation presented herein on 8/1/2008. Further on this, the extracted confirmed grant extracted and which is on the record is also faulted as it does not tally with the orders of 30/1/2008. It talks of the grant confirmed having been the grant issued on 9/11/2004 and not 3/5/2007 as per the court order and in pursuance of an application made on 3/5/2007 and not 8/1/2008 as per the court order.

(h) The net result of what this court has found in (g) above, is that the grant of representation granted to the four administrators on 9/11/2004 still stands unconfirmed to date.

(i) Before making the orders of 30/1/2008 the learned law Lord of the CA was supposed to have satisfied himself to the effect that all the pre requisites of section 71 of the L.S.A. had been complied with. For purposes of the record and in a summary form these are:-

(j) That the applicant is in fact the holder of the grant sought to be confirmed. In this case the court should have satisfied itself that Rhoda Chelangat Kandie was in fact the sole holder of the grant sought to be confirmed.

(ii) To satisfy itself that the grant was rightfully made to the applicant. Had this been inquired into, the court would have found out that in fact no grant had been rightly made to the sole applicant Rhoda Chelangat Kandie. The court would also have found out that no such grant was made on 3/5/2007 and that no application was made for confirmation of the same.

(iii) The rest of the prerequisites not complied with, are candidates for application for revocation still pending and their interrogation herein would mean pre-empting the outcome of that application.

(j) It is undisputed that the subject property formed part of the free property of the intestate estate of the deceased subject of the proceedings in HCCC P&A 991/2003 as the assessment herein demonstrates that it was itemized as item 6 in the list of assets. This being the case, it means that it could only be divested from the estate by a person mandated by law to divest it from amongst the estate free property on the one hand, and on the other hand that such divestment can only be undertaken after the grant of representation has been confirmed.

The relevant provisions of law to be interrogated are sections 55(i), 79 and 82 of the L.S.A. In a summary form section 55(1) makes provision that a grant of representation whether limited or not does not confer on the holder of such a grant power to distribute capital assets constituting a net estate or to make any division of the property unless and until the said grant has been confirmed as provided for in section 71 of the Act. Section 79 on the other hand vests all the property belonging to the net estate into a personal representative whereas section 82 on the other hand mandates the personal representative with powers relevant to the arguments herein among others are those vide.

**(i) Vide 82 (a) to enforce, by suit or otherwise, all causes of action which by virtue of any law**

survive the deceased or arise out of his death for his estate.

- (ii) **Vide 82 (b) (ii) to ensure that no immovable property is sold before confirmations of grant.**
- (iii) **Vide 82 (c ) to assent at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof.**
- (iv) **Vide section 82 (d) to appropriate in whatever manner.**

(k) It is only after complying with the prerequisites as assessed in (h) (i) and (j) above that the protection conferred above by section 93(1) of the L.S.A. Can be invoked as a shield. This provision has already been set out herein but for purposes of reasoning only the court has revisited the said provision and it notes that the protection to a purchaser arises where the transfer has been **“effected by a person to whom representation has been granted...”**

In this court’s opinion this provision cannot be read in isolation but in conjunction with the other section caveating the right of transfer by a personal representative to pass on capital assets namely section 55(1), 79 and 82 of the L.S.A. when so read, the action of the sole administrator Rhoda Chelangat Kandie of divesting an estate property alone does not hold because she was not a sole grant holder as the grant had not been issued to her alone but jointly with three (3) others who needed also to participate in the transaction . In their absence, the transaction stands faulted. Secondly the confirmed grant on the basis of which the transaction was allegedly done stands faulted as well as confirmation order as afore assessed which fact also removes the shield from the said transaction.

(l) There were other irregularities pointed out in the assessment namely the deed of arrangement or agreement on distribution failing to indicate the ID card numbers of the signatories, failure to indicate the date on which the agreement was executed, item 6 of the purported confirmed grant being at variance with clause 11.6,11.7 and 11.8 of the agreement forming the anchor of the confirmation though relevant to the rival arguments herein, they are proper candidates for the application for revocation.

(m) The orders for confirmation which have been faulted made on 30/1/2008 have not been varied or set aside and they stand to date.

Before considering the assessment it is important for this court to bear in mind two relevant provisions of the current Kenyan constitution namely article 22(3) (d) and 159 (2) (d). These read:-

**“Article 22(3) (d) the court while observing the rules of natural justice shall not be unreasonably restricted by procedural technicalities” Article 159 (2)(d) Justice shall be rendered without undue regard to technicalities.**

When applied to the rival arguments herein, it is necessary for this court to determine whether the objection raised by the preliminary objectors falls into the category of technical objections or substantive objections. In addition to the constitutional provisions, this court has to take judicial notice of other provisions of the law of succession Act besides these assessed. These are as follows:-

(a) The preamble which indicates clearly that the Act applies to administration of estates of persons dying after the commencement of the Act.

(b) That the Act applies both to testamentary and intestate succession. By intestate it is meant **“an estate of a deceased person dying without leaving a will capable of enforcement”**. Whereas by **“testamentary”** is meant succession governed by a will capable of being enforced.

(c) Proper candidates for proceedings under this legislation are personal representatives for the intestate litigation and executors for the testamentary succession on the one hand, and beneficiaries and creditors on the other hand as claimants, meaning that anything outside the above is not a proper candidate for litigation in the succession proceedings.

The next aspect of the objection to be assessed is that one relating to the affidavit in support of the interim application in relation to the requirements of order 18 CPR now order 19 CPR and section 176 and 177 of the evidence Act. Starting with old order 18 CPR now 19CPR the key provisions are found in rule 3, 4 and 5 CPR these read:-

**“ Order 19 rule 3(1) Affidavits shall be confirmed to such facts as the deponent is able of his own knowledge to prove, provided that in interlocutory proceedings, or by leave of the court an affidavit may contain statements of information and belief showing the sources and grounds thereof.**

(2) ...

**(4) Every affidavit shall state the description, the place of abode and postal address of the deponent and if the deponent is a minor shall state his age.**

**(5) Every Affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject”**

These ingredients have been applied to the affidavit complained of and the court proceeds to make the following findings on the same:-

- (i) Rule 4 on the description part of the affidavit has been complied with in the heading of the affidavit.
- (ii) Paragraphs 33 provides general clause for matters within ones personal knowledge of the deponent especially those dealing with aspects clearly participated in by the deponent. The paragraphs saved by this clause are paragraph 12, 13, 14,15,18,19 and 24.
- (iii) The following have the source of information disclosed namely 4, (5) five ties up with paragraph 4,7,8,9,16,21,22,23,29,31 and 32.
- (iv) Paragraph 2 the source is not disclosed but it is covered by clause 33 because the title is exhibited.
- (v) The paragraphs which are proper candidates for axing are paragraphs 3, 6, 10, 11,17,20,25,26,27,28 and 30 and are accordingly struck out.
- (vi) The axing of the affected paragraphs will not prejudice the plaintiff /applicants as there is room for them to seek leave of court to file a further affidavit remedying the defaults noted.

Turning to section 176 and 177 of the evidence Act cap 80 laws of Kenya, a perusal of the same reveals that these deal with the nature and mode of proof of bank entries in bank statements. It has not been stated in relation to which paragraphs of the plaint or affidavit such proof is required. A revisit to the plaint reveals that paragraphs 16 and 17 would require proof of the figure mentioned. This is however proof required at the stage of giving of evidence. Turning to the supporting affidavit, paragraph 21, 22 and 23 relate to the ICDC issues. It is correct that there is no back information. These paragraphs were not struck out because the deponent stated that he had perused the records. It is however clear that when it comes to use of the information is when the applicant would be caught up by the requirements of section 176 and 177 of the evidence Act. The issue that arises for determination is whether this can be raised as a preliminary objection or a point with regard to the merits of the application. In this court’s opinion, this is a matter of proof for purposes of establishing of a prima facie case and is therefore a better candidate for the merit determination of the interim application and the main suit should both survive the axe.

With regard to final reliefs sought at an interlocutory stage, this is a correct complaint in relation to interim prayer d, and g. This court has given due consideration to this argument and in its opinion this is not a matter for a preliminary objection. It can safely be handled by the trial judge handling the interim application if it survives the preliminary objection axe as the Judge will be in a position to tell which of

the said reliefs are proper candidates for granting at an interim stage and then grant them and which of them are not proper candidates for granting at an interlocutory stage and then decline to grant the same and then dismiss them.

With regard to the reliefs sought against the chief land Registrar, the position in law that this court has judicial notice of is that a relief can never be given in a vacuum. It has to be directed at a party capable of responding to the same meaning that with the exception of prayer (c) which is a formality relief prayer (d) and (g) would require the participation of the chief land Registrar in these proceedings in order for him to respond to these reliefs should the court find it fit to save the main suit and the interim application.

Last consideration is the fact that the court has to note that all that the defendants have done is to simply enter appearance and file preliminary objections without disclosing the nature of their defences to the claim if any.

For the reasons given in the assessment, the court proceeds to make the following concluding findings on each set of the preliminary objections.

**1. (A) ON THE NOTICE TO STRIKE OUT AFFIDAVIT IN SUPPORT OF THE INTERIM APPLICATION SWORN ON 15/7/2009.**

- (i) The heading of the affidavit complies with order 19 rules 4 CPR.
- (ii) Paragraph 33 provides a general cure on matters within personal knowledge of the deponent especially those dealing with aspects clearly participated in by the deponent. The paragraphs cured and or saved by this clause are paragraphs 12, 13, 14,15,18,19 and 24.
- (iii) The following paragraphs 7, 8, 9,16,21,22,23,29,31 and 32 have disclosed sources of information.
- (iv) The source of information for paragraph 2 has not been disclosed but this is cured by clause 33 because the information deponed is sourced from the title document annexed.
- (v) The following paragraphs which do not disclose the source of information are struck out namely paragraphs 3,6,10,11,17,20,25,26,27,28 and 30.
- (vi) The axing of the said paragraphs does not leave the plaintiffs' remediless. There is room for seeking leave to cure the defects in the struck out paragraphs by filing a further affidavit should the suit and the interim application survive the axe.

**1. (B) FOR THE PRELIMINARY OBJECTION FILED BY THE FIRST DEFENDANT THE COURT PROCEEDS TO MAKE THE FOLLOWING FINDINGS ON THE SAME.**

(a) **GENERAL.** As assessed herein all the objections filed by the first defendant stand faulted and are dismissed on two fronts namely on the technical front on the one hand and the merit front on the other hand. The technical front arises because all the preliminary objections as raised by the 1<sup>st</sup> defendant do not meet the criteria for upholding a preliminary objection as per the yardstick in the case law assessed herein in that they are not purely on points of law but are entirely anchored on the facts demonstrating transactions undertaken in the succession cause number 991/2003 which transactions led to orders alleged to be providing a shield for the defendants on complaints raised against them both in the plaint and the interim application which are not obvious on the face of the record and one needs to interrogate those transactions in order to determine whether the shield is available as claimed or not.

(ii) Secondly they also invite the court to exercise its unfettered discretion to determine whether the shield sought to be shielding the defendants against the plaintiffs' claims is well anchored or not.

**(b) In particular**

(i) Preliminary objection (a) is disallowed because of the following reasons:-

(b) the suit and the interim application are not premised on the grant issued to one Rhoda Chelangat Kandie but on the assertion of the plaintiffs that there was no such grant issued solely to Rhoda Chelangat Kandie and which was also capable of being confirmed solely in her name as the only grant they were aware of and which is on the record in the succession cause 991/03 is the one issued to the late Rhoda Chelangat Kandie and her three sons which has never been revoked and which as long as it remains unrevoked there is no way the same could have been confirmed in the name of Rhoda Chelangat Kandie alone without their knowledge and consent.

(c) They have been consistent in their submission that they did not consent to the change in the status of the grant, that they were not aware of the confirmation of grant process and they did not consent to the same.

(d) They have asserted that they are still personal representatives to the estate of the late Aaron Kimosop Kandie.

(e) This court revisited the record and as assessed herein, it has ruled that the initial grant issued to four persons was never revoked and or rectified in accordance with the relevant provisions of the L.S.A. and as long as the same stands there is no way it could have been confirmed in the name of one original personal representative only.

(ii) Preliminary objection (b) is also disallowed because although the proceedings in P&A 991/2003 are not before this court as part of the proceedings herein, it is not true that this court is precluded from making a finding contrary to the findings in the said file. Having been informed that the shield under which the defendants have taken refuge was allegedly acquired in P&A 991/2003 and which shield is under attack from the plaintiffs and which shield forms the anchor of all that preliminary objections, it was prudent and the court has jurisdiction to inquire into its proceduralty in order to determine the merits of the preliminary objections. This court did so inquire and faulted the proceduralty of the acquired shield as per the reasons given in the assessment.

(iii) Preliminary objection (c) also stands faulted because of the following reasons.

(a) For the reasons given in the assessment, the two plaintiffs have locus standi because in the absence of a rectification of the grant issued to late Rhoda Chelangat Kandie and her 3 sons among others the two plaintiffs, the three sons still remain as lawful personal administrators of the estate of the late Aaron Kimosop Kandie and are vested with the duties and obligations donated to them by section 82 and 83 of the L.S.A. cap 160 laws of Kenya and by reason of which they have locus standi to champion their own rights as beneficiaries and as personal representative .

(b) As per findings in the assessment the supporting affidavit by Rhoda Chelangat Kandie in support of the application for confirmation deponed that the grant had been issued to four persons and never mentioned any rectification of the said grant in her favour by deleting the names of her sons. Neither did she depone that her said three sons have consented to having the grant confirmed in her names only. Nor was there a deponement that the said other co administrators had been served with the application for confirmation.

(c) They do not need a grant of representation to the estate of late Rhoda in order to champion their interests in the estate of Aaron Kandie.

(d) The consent alleged to have been relied upon to support the issuance of the confirmation in the name of Rhoda has been faulted in the assessment in that the ID cards of the signatories had not been indicated, no accompanying deponement was sourced from any of the signatories, filed later after the filing of the application for confirmation without an accompanying deponement.

(v) Objection (d) stands faulted because by reason of what has been stated in the assessment, and above, section 93(1) of the L.S.A. cap 160 laws of Kenya does not afford a shield to the first defendant because the process leading to it stands faulted.

(b) Item (6) of the confirmed grant on which the protection is anchored differs from clause 11.6, 11.7 and 11.8 of The alleged agreement on distribution where it had been alleged in the agreement that Miotoni Investment was owned by the beneficiaries of the estate. In the agreement, it reads that it is owned by other persons under item 6 of the confirmation.

(c) In the agreement 50% of the subject property LR. NO. 1055/19 was supposed to go to the benefit of the widow, but under item 6, the entire portion goes to the 1<sup>st</sup> defendant and yet there is no other agreement varying that earlier agreement.

(v) Preliminary objection (e) also stands faulted because estoppel cannot hold where the same is anchored on an irregularity.

(b) The shield provided by section 93 (1) of the L.S.A. under which the 1<sup>st</sup> defendant has taken shelter or stands faulted.

(vi) Preliminary objection (f) only succeeds on account of the paragraphs of the supporting affidavit which were struck out under (A) above which are paragraph 31,,6,10,11,17,20,25,26,27,28 and 30. The balance of the paragraph not struck out can support the interim application.

(b) There is also room to seek leave of court to cure the defects in the struck out paragraphs by seeking leave to file a further affidavit.

**1. (C ) FOR THE PRELIMINARY OBJECTION FILED BY the 2<sup>nd</sup> defendant the following findings are made.**

(i) Preliminary objection (i) stands faulted because :-

(a)The plaintiffs are not championing the interests of the estate of the late Rhoda Chelangat Kandie but their own interests as beneficiaries and joint personal representatives and or administrators of the estate of the late Aaron Kandie.

(b) As long as the grant in respect of which they were vested with power of personal representatives had not been procedurally rectified, the two plaintiffs still remain personal representatives.

(c) The process leading to the confirmation of the grant in the sole names of the late Rhoda Chelangat Kandie in the manner done stands faulted as per reasoning in the assessment and under 1.B above.

(ii) Preliminary objection (ii) stands faulted for the same reason given in the assessment and under I B above.

(iii) The preliminary objection (iii) stands faulted for the reasons that:-

(a) It can only be championed by an agent of the government of which the 2<sup>nd</sup> defendant is not.

(b) It has to be anchored on a pleading by the 2<sup>nd</sup> defendant which is absent.

(c) Preliminary objection number (iv) stands faulted as the same required the 2<sup>nd</sup> defendant to put in a defence to plaintiffs claim before they can plead that no cause of action has been disclosed against them.

(v) Preliminary objection (v) also stands faulted for the same reasons as preliminary objection number (iv). It should have been anchored on pleadings by the said 2<sup>nd</sup> defendant.

0. For the reasons given in the assessment and the findings in 1 (A), 1(B) and 1 (C) above faulting the suit and the interim application in the manner sought would have been in breach of the provisions of Article 22 (3) (d) and 159 (2) (d) of the current Kenyan constitution which enjoins courts of law to render justice on the basis of substantial justice as opposed to denying justice on account of technicality. More so when the defendants have not stated their side of the story demonstrating that they have a good defence against the plaintiffs' claims.
  
  1. issue of seeking final claims at an interim stage is no ground for rejecting both the suit and the interim application as the court seized of the interim application is competent enough to sift through the claim and determine which ones are proper candidates for granting at the interim stage and which ones do not so qualify and then exercise its unfettered judicial discretion with regard thereto.
  
  2. Lastly still on the merits the late Rhoda Chelangat Kandie was incapable of passing title capable of being protected under Section 93(1) L.S.A because the process leading to confirmation was faulty in so far as it sought to confirm a grant in the names of one administrator without procedural rectification of the grant to date and remove the names of the other co-administrators. None rectification stands to date.
- (ii) The order of confirmation itself stands faulted because the application of 3<sup>rd</sup> May, 2007 sought to confirm the grant issued on 9<sup>th</sup> November, 2004 but the learned Judge Visram J as he then was now J A inadvertently confirmed a grant issued on 3<sup>rd</sup> May, 2007 which was none existent. As matters stand now the grant issued on 9<sup>th</sup> November, 2004 has not been confirmed.
0. Since all the preliminary objections have been faulted, and dismissed the plaintiffs will have costs of the preliminary objection.

**DATED, READ AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF OCTOBER, 2011.**

**R.N. NAMBUYE  
JUDGE**