



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Succession Cause 179 of 1991

IN THE MATTER OF THE ESTATE OF MWIRICHIA KWIRIGA (DECEASED)

JANE KITHIRU NYAMU.....PETITIONER'S LEGAL REPRESENTATIVE

AND

- 1. MISHECK KIRAI MBWIRIA.....1ST OBJECTOR**
- 2. GRACE MAINGENE.....2ND OBJECTOR**
- 3. JULIA NCHUGUNE.....3RD OBJECTOR**

RULING ON A PRELIMINARY OBJECTION

1. The Preliminary Objection dated 4.11.2006 by Mr. Kioga for the Administrators in this cause is worded as follows:

1. That the 2nd and 3rd Objector/Administrator shall raise a Preliminary Objection to the protest dated 6th day of June, 2006 on the following grounds:-

- (i) That the affidavit of protest was filed late as the order for filing such protest was issued on 8th day of May, 2006 limited to 21 days, yet the protest was filed on 6.6.06 which was 7 days late.
- (ii) That the protest was filed without extension of time by the court and no application for such extension has been made.
- (iii) That the protest is not receivable by the court nor can the same be entertained by this court.
- (iv) The protest is based on grounds of Adverse Possession which is a claim of a Trespasser and she cannot avail herself on the Rules of succession. Therefore the protest is an abuse of process of court.
- (v) The whole tenor of the protest renders the same incompetent and a total nullity.

2. The response by Mr. Mwarania for the petitioners is that the remedy for the delay in filing the Protest is enlargement of time to file it and not striking out and enlargement can be done by validation of an

already filed document. Further that the Judicature Act empowers courts to look at the substance of a dispute and avoid technicalities so that substantive justice can be done.

3. On the last point raised, that the Petitioner cannot raise a claim of adverse possession in a Succession Cause, Mr. Mwarania argues that the two claims can be pursued separately with no conflict whatsoever and that a Preliminary Objection is not the right means of resolving whatever issues may be canvassed along those lines.

4. A Preliminary Objection by its very nature is predicated on a pure point of law which if upheld would bring to an end the entire matter in contest. (see the illustrious case of Mukisa Biscuits vs West End Distributors [1969] EALR 696). If the point is not one of law but of contested issues or facts that are not agreed upon, then it must not be upheld. So far as I can see, what triggered the objection now before me is the failure by the protesters to abide by the orders of Sitati J. made on 8.5.2006 to the effect that the Petitioners should **“file and serve their affidavits within 21 days”**. The Affidavit was in fact filed on 6.6.2006 by the Petitioner and she was therefore 7 days late in doing so. The question of days and dates is a matter of fact and not of law but Mr. Kioga argues that Order XLIX of the Civil Procedure Rules as read with Rule 63 of the Probate and Administration Rules is applicable. I agree but the power to strike out a document already on record is a drastic one and should be used sparingly. That is why Order XLIX Rule 5 of the Civil Procedure Rules cures that anomaly and to that extent, Mr. Mwarania is right when he argues that enlargement of time is the cure for a document filed out of time. Rule 5 provides as follows in that regard:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

5. I shall overrule Mr. Kioga’s objection on the first limb and no prejudice would be caused to the opposing party because costs are payable as a matter of law and the proviso to Rule 5 above is clear in that regard.

6. On the second limb, I shall say very little about it; there exists in this court HCCC No. 55/2006 and in that suit the Petitioner is enforcing her rights to the land in dispute by way of adverse possession. The originating summons dated 28.6.2006 is exhibited to a supporting Affidavit sworn on 7.7.2006. There also exists and pending within this Cause a Summons for stay of proceedings under Rule 73 of the Probate and Administration Rules. To delve into the arguments on these pending matters in a Ruling on a Preliminary Objection would be an error of Judgment and may lead to prejudice if any aspect of the matter is decided now. In any event I did not see what pure point of law arose in determining the twin issues of rights to land by adverse possession and in Succession. I say so because to determine the issues of fact one must do so alongside the law and once law and fact are mixed, then the issues ceases to be a demurrer.

7. I should only conclude by quoting the words of Sir Charles Newbold, President in Mukisa Biscuits (Supra):

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objections. A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the matters pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion.

The improper raising of points by way of Preliminary Objection does nothing but unnecessary increase costs and on occasion, confuse the issues. This improper practice should stop”.

8. I wholly adopt the above remarks as fitting the issues raised in the matter before me and will without further ado overrule the objection and dismiss it with costs to the Administrators.

9. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 17th DAY OF FEBRUARY 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In presence of

Mr. Kioga Advocate for the Administrator

Mr. Mwanzia Advocate for the Objectors

ISAAC LENAOLA

JUDGE