



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT NO 163 OF 2004 (OS)

JUDITH GATHONI WILLIE.....APPLICANT

VERSUS

GEORGE KIHARA MUCHUKI

CHARLES KIMITA MUCHUKI

JOHN ALEX MUCHUKI.....RESPONDENTS

RULING

The applicant herein has filed an originating motion under the provisions of section 2, 45, 55 and 59 of the Law of Succession Act, rules 49, 59 and 73 of the Probate and Administration Rules, order XXXVI rule 1 and 2 of the Civil Procedure Rules and the enabling provisions of the law for orders that:-

(a) The applicant herein be entitled to participate in the administration of the estate of Willie Mwangi Muchuki (deceased) as a duly recognised executor, administrator and/or trustee together with other executors, administrators and/or trustees of the same.

(b) George Kihara Muchuki, Charles Kimita Muchuki and John Alex Muchuki be restrained by themselves or through their agents, as individuals or as executors, administrators, trustees and personal representatives of the estate of the deceased, from disposing of the immovable and other properties comprising the estate of the deceased pending the hearing interpartes and pending the issuance of letters of grant of representation as confirmed and or from disposing of and/or dealing in the same in any manner inconsistent with the provisions of the will or the law.

(c) the same parties delineated in paragraph 3 above be and are hereby compelled to render accounts of the estate of the deceased.

The respondents were served and duly entered appearance. They also filed a notice of preliminary objection to the entire suit on the grounds that the suit was *res judicata* in that the matter in issue had been heard and conclusively determined in succession proceedings in respect of the estate of the late Willie Mwangi Muchuki in Nakuru High Court Succession Cause No 68 of 1992. The respondent further stated that the suit was brought in bad faith and if entertained, would amount to an abuse of the due process of the Court. The respondents further stated that the applicant had come to court with dirty hands by not disclosing very material facts to this Court.

When this suit came up for hearing, Mr Chuma Mburu, learned counsel for the respondents argued the

preliminary objection. Mr Chuma Mburu argued that the issues that the applicant was purporting to raise in her application had already been dealt with in Nakuru High Court Succession Cause No 68 of 1992. The respondents argued that the said grant of letters of administration was confirmed on the 21st of October 1994 and a certificate of confirmation of grant issued. The respondents further argued that the estate of the deceased had already been distributed to all the beneficiaries of the deceased, including the applicant in this suit. Mr Chuma Mburu therefore argued that in so far as the applicant was seeking to reopen the issue of the administration of the estate of the deceased, the matters in issue would be *res judicata*. He further argued that if this Court were to entertain this suit, it would amount to the nullification of the grant issued by this Court. It was further his submission that the application herein was made in bad faith. He therefore submitted that the preliminary objection ought to be allowed and the suit herein be dismissed.

Mr Odhiambo, learned counsel for the applicant opposed the preliminary objection raised. It was his submission that the issues in question were not *res judicata*. Learned counsel for the applicant argued that what the applicant was seeking were orders of accounts and restraining orders to prevent the respondents from interfering with the family property. Mr Odhiambo submitted that the foundation of the suit was the last will written by the late Willy Mwangi Muchuki made on the 30th of March 1985. The applicant further submitted that it was the said deceased's intention that his estate was to be administered in accordance with his will. The applicant argued that it was the duty of the respondents to apply for the grant of letters of administration with the will annexed.

The applicant further submitted that there was a succession cause in respect of the deceased's estate where a grant of letters of administration was made to Grace Njeri Gachuka on the 24th of July 1989. The succession cause was Nakuru High Court Succession Cause No 172 of 1989. It was the applicant's submission that the position as regards the said letters of administration had not been controverted. It was further the applicant's submissions that the issues raised by the applicant in her suit could not be determined by a preliminary objection. No pure point of law had been raised by the respondents in their preliminary objection. The applicant reiterated that the issue of accounts which was raised was not *res judicata*.

The applicant referred this Court to several decided cases in support of her opposition to the preliminary objection.

In response, Mr Chuma Mburu submitted that the question of the will of the late Willy Mwangi Muchuki was not in issue. The respondents submitted that the applicant had not acknowledged the fact that the respondents were the administrators of the estate of the said deceased.

The respondents submitted that the Succession Cause No 172 of 1989 was for Letters of administration *ad colligenda bona* and not full grant of letters of administration.

I have read the pleadings filed in this suit. I have also considered the rival arguments made by counsel for the applicant and counsel for the respondents. I have also read the authorities which were referred to me by counsel for the applicant. The issue for determination by this Court is whether or not the suit filed herein by the applicant is *res judicata*. The other issue that emerged from the pleadings is whether the applicant had capacity or *locus standi* to file this suit against the respondents herein.

The final issue for determination is whether the respondents properly raised the preliminary objection in this suit. I will begin with the last point. The law as regards what constitutes a proper preliminary point of law was restated in the oft-quoted case of *Mukisa Biscuit Manufacturing Co Ltd – versus- West End Distributors Ltd* [1969] EA 696 where it was held at page 700 E that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, 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.”

At page 701B

“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.”

Having considered all the issues that were raised by the parties to this suit I do find that the respondents properly raised the preliminary objection.

The object of the preliminary point of law raised by the respondents is to dispose off the suit filed by the applicant. The respondents have argued that the subject matter of the suit filed by the applicant to the administration estate of the late Willy Mwangi Muchuki. It was the respondents submission that letters of administration intestate were issued and confirmed by the High Court at Nakuru in Succession Cause No 68 of 1994. The respondents in the replying affidavit sworn by George Kihara Michuki have annexed a copy of the certificate of confirmation of grant which is marked as “GKM 1”. In the said certificate of confirmation of grant, the applicant is named as one of the beneficiaries.

In the originating summons filed the applicant seeks the orders of this Court to allow her to participate in the administration of the estate of the said deceased. The applicant further prays for orders that the respondents, one of whom is the administrator of the deceased estate be restrained from disposing of some assets comprised of the deceased estate. She finally prays for the taking of accounts of the deceased’s estate. From the aforesaid prayers, it is evident that the applicant is first and foremost seeking to be made one of the administrators of the estate of the deceased. Secondly, she is raising questions on the way the estate of the deceased has since the grant of the letters of administration been administered.

The applicant has further raised the issue of a last will which was allegedly written by the deceased. All these issues are issues which are supposed to be addressed in a succession cause and not in an independent suit. If the applicant felt aggrieved by the way the estate of the deceased was being administered, she is at liberty to file for the revocation or the annulment of grant issued to the administrators of the estate of the deceased under the provisions of the Succession Act. She is also at liberty to make an application under the said Act for the provisions of a dependant like herself.

She may also file an appropriate application to restrain the respondents from intermeddling with the deceased’s estate. It is the view of this Court that the applicant, by filing this suit, has deliberately sought to circumvent the provisions of the Law of Succession Act as regards the issuance and the annulment of grants.

Further the subject matter of the applicants suit is basically the subject matter which was substantially in issue in Nakuru High Court Succession Cause No 68 of 1992 which was determined in the said succession cause.

In Nairobi HCCC No 1322 of 1993 *Caltex Oil (Kenya) Ltd – versus- Mohamed Yusuf & Others*, Bosire J (as he was then) held at page 4 of the said ruling that:

“The third and the last issue is one of *res judicata*. The doctrine is provided for under section 7 of the Civil Procedure Act. For the doctrine to apply three basic conditions must be satisfied. The party relying on it must firstly, show that there was a former suit or proceeding in which the same parties as in the subsequent suit litigated. Secondly, the matter in issue in the later suit must have been directly and substantially in issue in the former suit. Thirdly, that a court competent to try it had heard and finally decided the matter(s) in controversy between the parties in that former suit.”

Applying the principles set out in the above quoted case to this case, it is clear that it cannot be said that the applicant was an active participant in the litigation of the former suit ie Succession Cause No 68 of 1992. In any event, my understanding of succession proceedings is that they cannot be termed as suits as envisaged in the Civil Procedure Act where there are two parties litigating over a dispute. In most of the succession causes the issuances of the letters of administration and the distribution of the deceased estate

is endorsed by the Court, the successors to the deceased estate having agreed on all the modalities of who the administrators of the estate will be and who will inherit what from the deceased's estate. In those instances where there are disputes, then the doctrine of *res judicata* may apply. In the instant case, the fact that letters of administration was issued to the administrators of the estate and the estate of the deceased distributed, does not mean that a person who is dissatisfied by the administration of the said estate cannot invoke the provisions of the Law of Succession Act to either seek the proper administration of the said estate or to seek the revocation and the annulment of the letters of administration. As stated earlier in this ruling, the applicant in this case ought to have raised the issues that she has raised in this suit in the succession cause which was filed to enable the estate of the deceased to be administered.

The legal point that will determine this suit, in my view, is whether the applicant had the capacity or *locus standi* to bring this suit. From the pleadings filed in court, it is evident that the applicant is seeking to be made an administrator of the estate of the deceased in proceedings which are not succession proceedings. Secondly, she is seeking to restrain the respondent from disposing off part of the deceased's estate, where in actual fact she does not have letters of administration to give her capacity to file such a suit. In *Trouistik Union International & Anor –versus- Mrs Jane Mbeyu & Anor* CA Civil Appeal No 145 of 1990 (unreported) it was held by the Court of Appeal that where a party seeks to file a suit on behalf of the estate of a deceased person, he must, of necessity, obtain letters of administration. In the instant case, there is no indication that the applicant obtained letters of administration before filing this suit. The applicant did not therefore have *locus standi* or capacity to file this suit. For this reason and the reasons stated earlier in this ruling, the preliminary objection raised by the respondents is hereby upheld. The applicant's suit is hereby struck out with costs to the respondent.

For the avoidance of doubt, the applicant is at liberty to raise the issues that she purported to raise in this suit in a proper forum, namely, in the succession cause where the letters of administration was issued in respect of the deceased estate.

It is so ordered.

Dated and delivered at Nakuru this 20th day of September, 2004

L.K.KIMARU

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Ag JUDGE