



REPUBLIC OF KENYA



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**Kamau v Githogori (Civil Appeal E3 of 2020)
[2025] KEHC 1720 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1720 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E3 OF 2020
MA ODERO, J
FEBRUARY 21, 2025**

BETWEEN

MARGARET NYANGUTHII KAMAU APPELLANT

AND

VIRGINIA WANJIKU GITHOGORI RESPONDENT

(Appeal was heard by Hon. Justice J. N. NJAGI. In the judgement delivered on 26th October 2022)

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated 16th September 2024 filed by the Applicant Margaret Nyaguthii Kamau.
2. The Respondent Virginia Wanjiku Githogori opposed the Preliminary Objection.

Background

3. This matter concerns the estate of Kamau Kamiti who disappeared from his home without trace and was later presumed dead vide an order of the court issued on 14th June 2018 in Karatina Misc. Application No. 5 of 2018.
4. The Deceased was survived by a daughter (Applicant) and a daughter in law (the Respondent). His estate consisted of a parcel of land being LR No. Kirimukuyu/Ngandu/313 measuring five (5) acres.
5. Following the declaration of Death the Applicant filed a Succession Cause at the Karatina Law Courts. The Applicant thereafter filed a Summons for Confirmation of Grant in which she proposed that the land be divided equally between herself and the Respondent.
6. The Respondent then filed a Protest in which she proposed that she be allocated four (4) acres of the land and the Appellant be allocated one (1) acre.



7. The Protest was heard by way of oral evidence. The trial magistrate agreed with the Respondent and directed that the estate be divided as she had proposed being four (4) acres to the Respondent and one (1) acre to the Applicant.
8. Being aggrieved by the decision of the trial court, the Applicant filed an appeal in the High Court being Succession Appeal No. 3 of 2020. That appeal was heard by Hon. Justice J. N. NJAGI. In the judgement delivered on 26th October 2022, the learned Judge allowed the appeal, set aside the decision of the trial court and directed that the estate be divided equally between the Applicant and the Respondent.
9. On 16th September 2024 the Respondent filed an application seeking the following orders
 - “(a) Spent.....”.
 - (b) Spent..
 - (c) That pending the hearing and determination of the application interpartes the court be pleased to stay the execution of the judgement delivered by this court on 26th October 2022 and all consequential orders arising therefrom.
 - (d) That the Respondent/applicant be granted leave to file out of time to the court of appeal the judgement delivered by this court on 26th October 2022.
 - (e) That costs be provided for.”
10. In response to this application the Applicant filed the Notice of Preliminary Objection dated 16th September 2024 which notice was premised upon the following grounds:-
 - “1. The court is functus official as the grant is already affected and deceased’s estate transmitted to the beneficiaries awaiting partition only.
 2. The Advocate for the Applicant is improperly out of record as he has not sought leave of the court to represent the Applicant after judgement in place of the earlier Advocate M/C Kamwenji & Co. Advocates.
 3. The Application is an abuse of the court process brought under allegations of non communication of court updates by counsel properly on record who has received all process on behalf of the Applicant up to the application to have the document signed by the E.O dated 18/9/2023 whose affidavit of service is on court record and received copies attached herewith for ease of reference.
 4. The application should thus be struck out with costs.”
11. The Preliminary Objection was canvassed by way of written submissions. The Applicant filed the written submissions dated 6th November 2024, whilst the Respondent relied upon the written submissions dated 2nd November 2024.

Analysis And Determination

12. I have carefully considered the Preliminary Objection as well as the written submissions filed by both parties.



13. The definition of what constitutes a Preliminary Objection was given in the case of Mukisa Biscuit Manufacturing Company Ltd -vs- West End Distributors Ltd [1969] E.A in which the court stated as follows.

“ 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 the suit. Examples are an objection to the jurisdiction of the court, or a place of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....A Preliminary Objection is in the nature of what is used to be a demurrer.

It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is exercise of judicial discretion.”

14. In Aviation & Allied Workers Union Kenya -vs- Kenya Airways Limited & 3 Others [2015] eKLR, the Supreme Court of Kenya stated that

‘a Preliminary Objection may only be raised on a “pure question of law”

15. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed as they are prima facie presented in the pleadings on record.”

16. Therefore in order for a Preliminary Objection to succeed, the following tests must be satisfied;-

- (i) The Preliminary Objection should raise a pure point of law.
- (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
- (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
- (iv) A valid Preliminary Objection ought if successful dispose of the entire suit.

17. Therefore a genuine and proper Preliminary Objection can only raise pure points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.

18. The Applicant has basically raised two objections to the application dated 16th September 2024 filed by the Respondent.

- (i) That the Court is functus officio.
- (ii) That the Advocate representing the Respondent is not properly on record.

19. As has been stated earlier a Preliminary objection can only be considered (allowed) on points of law. The question of whether or not the court is functus officio is not a pure point of law. It is a disputed fact and would require arguments from both parties to determine.

20. Similarly the question of whether or not counsel for the Respondent is properly on record cannot be deemed to be a pure point of law. This too is a matter of fact which would require arguments as well as interrogation by the court to determine.



21. Finally I find no merit in this Preliminary Objection. The same is dismissed in its entirety. Costs are awarded to the Respondent.

DATED IN NYERI THIS 21ST DAY OF FEBRUARY 2025.

.....

MAUREEN A. ODERO

JUDGE

