



REPUBLIC OF KENYA



KENYA LAW
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**Njigoru v Liquidator Kenya National Assurance Limited & 2 others
(Civil Suit 6 of 2017) [2025] KEHC 4864 (KLR) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4864 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL SUIT 6 OF 2017
RM MWONGO, J
APRIL 23, 2025**

BETWEEN

KUDGETA WAMUGO NJIGORU PLAINTIFF

AND

**THE LIQUIDATOR KENYA NATIONAL ASSURANCE LIMITED 1ST
DEFENDANT**

KENYA COMMERCIAL BANK LIMITED 2ND DEFENDANT

FREDRICK MUKUA NJIGORU 3RD DEFENDANT

RULING

1. What is before this Court for determination is a notice of preliminary objection dated 23rd November 2024. It is based on the following grounds:

1. That the Application dated 7th November 2024 offends Section 7 of the *Civil Procedure Act* because:

1. In the Honourable Court Ruling delivered on the 29th day of December 2023, the Honourable Court pronounced itself on this when it stated the following;

“This being a succession cause, the grant of probate was issued and confirmed for necessities of distribution of the estate save for the impugned property which has been presented in this application as a property jointly owned by the applicant and the respondent. According to the green card, the property was transmitted to the applicant and the respondent jointly after issuance of the grant of probate. The role of this court is exhausted at the point of confirmation of the grant of probate or any other subsequent orders in that regard. Once the property is passed from the estate of the deceased to



the beneficiary/beneficiaries, any other issues regarding title to the land are to be placed before the ELC. For my above stated reasons, I find that the application lacks merit and is hereby struck out with no order as to costs”

2. The Honorable Court pronounced itself in the consent entered by the Parties in the Ruling dated 11th April 2024, when it stated the following in Paragraph 24:

“The 3rd defendant/respondent/applicant has not given sufficient reasons to warrant setting aside the consent. The cause of action that triggered the consent is commercial in nature and was rightly consent brought before this court hence the consent. In any event, the 3rd defendant/ respondent/ applicant does not suffer any prejudice since the restructured debt affecting both him and the plaintiff/respondent. In addition to the fact that there are no vitiating factors to warrant setting aside of the consent, there is no legal basis for the same given that the favours the 3rd defendant/respondent/ applicant from a commercial point of view and he does not stand to suffer any prejudice if the consent is not set aside”.

3. This Application should therefore be dismissed at this Preliminary Stage.

Background

2. The objection is against the application dated 07th November 2024 through which the applicants sought the following orders:
 1. That this application be certified as urgent and be heard on a priority basis.
 2. That this Honourable court be pleased to, review its Ruling dated 11th April 2024 and issue clear orders allowing the 1st and 2nd Defendants liberty to sell the suit property in terms of the consent order of 11th May 2022.
 3. That this Honourable court to order the lifting of the caution filed against the L.R Embu Township/330.
 4. That the 1st and 2nd Defendants be allowed to sell the suit property and recover the agreed sum of Kshs.16,800,000/- pursuant to the consent order.
 5. That the Deputy Registrar be authorized to execute sale agreement and transfer documents should the Plaintiff and the 3rd Defendant decline or fail to execute the same.
 6. That the balance of the purchase price be deposited in a joint interest earning account between the Plaintiff and the 3rd Defendant whilst they litigate on the issue of ownership of the suit property.
 7. That in the alternative, should the court be unable to grant the above orders to facilitate the implementation of the consent order dated 11th May 2022, then the said consent be set aside and the matter be listed for trial.
 8. That cost of the Application be in the cause.
3. This application referred to the consent order made between the applicants and the plaintiff, in the consent, the parties had agreed that the plaintiff would pay the applicants Kshs.16,300,000/= together with thrown-away costs of Kshs.500,000/= within 6 months of the order. It was the plaintiff's plan to



raise this money from sale of the land parcel number Embu Township/330 (“suit property”). In fact, a buyer had been identified and an offer made.

4. The 3rd defendant frustrated the sale by telling that buyer that he is an undisclosed co-owner of the property, thus the buyer’s offer significantly reduced; from Kshs.90,000,000/= to Kshs.55,000,000/=. The 3rd defendant moved the court to set aside the consent order but his application was disallowed through a ruling of this court delivered on 11th April 2024 (published as *Njigoru v Liquidator Kenya National Assurance Limited & 2 others* [2024] KEHC 3443 (KLR)). The decision of this court on the matter was upheld by the Court of Appeal in *Nyeri Civil Application No. E039 of 2024* (published as *Njigoru v Liquidator, Kenya National Assurance Limited & 2 others (Civil Application E039 of 2024)* [2024] KECA 1386 (KLR) (11 October 2024)). Through their application, the applicants are keen to have the money paid since the consent order still stands.
5. This court, in its ruling delivered on 11th April 2024, found that there is an issue of ownership which could not be determined through this civil suit before the High Court. As a result, there is a pending case known as Embu ELC(OS) No. E009 of 2023 through which the 3rd defendant seeks, inter alia, a declaration that he is a joint owner with the plaintiff of the suit property. From a perusal of that file, currently, there is an Originating Summons, an application for inhibition and a preliminary objection challenging the jurisdiction of that court, all of which are pending hearing and determination.
6. The suit property emanates from the Estate of Njigoru Muya Katheri (Deceased) who died testate, leaving a Will dated 08th June 1973. A grant of probate was issued on 29th October 1981. Through testate succession, the property was bequeathed to the Plaintiff but at some point, the same was registered in the names of both the plaintiff and the 3rd defendant. The plaintiff raised the matter with the court through summons dated 26th October 2023 seeking orders, inter alia, that the 3rd defendant who is one of the executors of the Will, does transfer the suit property to her as the rightful beneficiary.
7. Through its ruling delivered on 29th November 2023 (*In re Estate of Njigoru Muya Katheri (Deceased)* [2023] KEHC 26204 (KLR)), this court stated that its role in determining administration of the estate is exhausted and any further orders towards transmission of the property to beneficiaries should be sought before the ELC.

Parties’ Submissions.

8. The preliminary objection was canvassed by way of written submissions.
9. The plaintiff who is the objector, submitted that the issues raised through the application are res judicata, having been determined by this court. The court had also clarified that it could not give further orders regarding transmission of the property to the plaintiff because it had exhausted its jurisdiction in administration of the estate. She argued that there is no legal basis to interfere with the consent order, a position that was upheld by the Court of Appeal. She urged the court to allow the preliminary objection.
10. The applicants stated that the ruling of the court delivered on 11th April 2024 determined 2 applications but that the issues arising from their application dated 07th November 2024 were not addressed. They relied on the provisions of section 1B of the *Civil Procedure Act* which gives the court power to determine disputes without undue regard to technicalities. It was their argument that the consent order recorded by the court cannot be enforced in light of the 3rd defendant’s disruption of the sale process. They also relied on the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and stated that the preliminary objection does not meet the requirements of a preliminary objection.



Issue for Determination.

11. The sole issue for determination is whether the preliminary objection has merit.

Analysis and Determination.

12. It is trite that a preliminary objection raises purely questions of law. In the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (supra) at page 700 paragraphs D-F the court stated:

“....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. 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.”

13. In the present case, the objector has raised the issue of *res judicata*, stating that the issues raised in the application dated 07th November 2024 were settled through the ruling delivered on 11th April 2024. A consent was reached between the plaintiff and the applicants and the same was adopted as an order of the court.
14. According to the plaintiff, before she could sell the property to raise the money agreed in the consent order, she discovered that the 3rd defendant had encumbered the property with a caution. The plaintiff moved the court to have the caution removed to enable the sale but the court declined to make that order through its ruling delivered on 23rd November 2023, stating that it lacked jurisdiction. The 3rd defendant withdrew their claim against the applicants through a notice of withdrawal dated 17th October 2017.
15. The applicant’s frustration, therefore, is that the sale has not and could not be effected because the plaintiff and the 3rd defendant are still litigating about ownership of the title before the ELC. In the meantime, this court had ordered settlement of a total of Kshs.16,800,000/= within 6 months of the consent order. This period is long past and it appears to the applicants that the court’s order was made in vain and to their disadvantage, even though it was by consent. They thus want the court to review the consent order.
16. When the 3rd defendant moved the court to have the consent order set aside on allegations that he was not present at the time, the court, through the same ruling delivered on 11th April 2024, failed to find a legal basis for setting aside the consent order. The court explained that a consent order can only be set aside where there are clear and present vitiating factors. That ruling is still pending appeal before the Court of Appeal, which denied the 3rd defendant stay orders.
17. All this time, the suit property is in the joint names of the plaintiff and the 3rd defendant a matter that is hotly contested in light of the provisions of the Will of Njigoru Muya Katheri (Deceased) dated 08th June 1973. This is how the court found it necessary to have the issue of ownership settled before the ELC.
18. The consent order stated as follows:

“ 1. The plaintiff do pay the defendants the following amounts in full settlement:

- a. Kshs.16,300,000/=



- b. Throw-away costs of Kshs.500,000/=
2. The plaintiff do have a period of 6 months from the date of this order to pay the said amount of Kshs.16,800,000/=;
 3. If within that period the plaintiff has not paid the said amount, both the plaintiff and the defendants jointly to subdivide the property which is L.R. Embu Township 330 under the Sectional Properties Act and sell the resulting units jointly; and
 4. In the sale, the defendants to first recover the amount agreed (Kshs.16,800,000/=) and any extra costs and leave the remaining units to the plaintiff free of any encumbrances.”

Conclusions and Disposition.

19. From a perusal of the consent order, it is my view that it clarified its execution. It was upon the parties to find the most relevant mode of execution. Through the ruling delivered on 11th April 2024, the grounds for offsetting the consent order were discussed and settled. However, the consent order did not anticipate that an ownership issue would arise which would affect execution of the consent order.
20. Whilst, clearly, some of the issues raised through the application are res judicata; Some others can be considered by the court. For a preliminary objection to succeed, it should potentially dispose of the substantive suit, in this case the review application dated 07th November 2024. Here, this will not happen.
21. Accordingly, I am not persuaded to allow the preliminary objection, and hereby dismiss it.
22. Costs to be borne equally by the parties.
23. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 23RD DAY OF APRIL, 2025.

.....
R. MWONGO

JUDGE

Delivered in the presence of:

Ms. Wanjiku holding brief for Njeru Mbogo for Plaintiff

Ms. Muhonja for 1st and 2nd Defendants

Nyamweya for 3rd Defendant

Francis Munyao - Court Assistant

