



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC NO. 14 OF 2020

NESHIRO NOONKIPA KUKUU (suing as the adm

of the estate of Mikis Lekinye Kipasenua deceased).....PLAINTIFF

-VERSUS-

DANIEL TOBIKO KUKUU.....1ST DEFENDANT

SIMION ORAMAT KUKUU.....2ND DEFENDANT

NANGORUNI KUKUU.....3RD DEFENDANT

SIMON LEBOO MORINTAT.....4TH DEFENDANT

THE COMMITTEE OLOMISMIS GROUP RANCH.....5TH DEFENDANT

THE LAND REGISTRAR TRANS MARA.....6TH DEFENDANT

RULING

Before this court is a Notice of Preliminary Objection dated 28/9/2020 seeking the suit to be dismissed or struck out on the following grounds: -

(a) That the suit herein is bad in law and otherwise an abuse of the due process of this honourable court

(b) That the court lacks jurisdiction to hear and determine this suit

Counsel for the Plaintiff and counsel for the 1st to 4th Defendants canvassed the Notice of Preliminary Objection by way of written submissions.

Counsel for the 1st to 4th defendants submits that the Plaintiff's suit is anchored on paragraph 10 and 11 of the plaint. Paragraph 10 of the plaint reads "The Plaintiff is the widow of one MIKIS LEKINYE KIPAENUA (Deceased) who died on 4/7/2002 leaving a written will and having settled his 5 widows and their beneficiaries in their separate parcels of land within Olomismis Group Ranch. Paragraph 11 of the Plain reads "the deceased, Mikis Lekinye Kipasenua (deceased) bequeathed land parcel Olomismis Land Adjudication Section 137 measuring 67.527 Acres to the Plaintiff as beneficiary and trustee for her six children:-

1. LILIAN NEMUTI
2. JACKLINE SILIHO
3. VIOLET NATANYA
4. SAMUEL SAITOTI
5. LEAH SUDOI
6. ISAAC OREU

It is the Defendants' submissions that the plaintiff is laying claim to the land based on an alleged will. It is also the Defendants' submissions that this court lacks jurisdiction to hear and determine this matter. Counsel for the Defendants relies on the case of **BENSON AMBUTI ADEGA & OTHERS VERSUS KIBOS DESTILOLERS LTD & 5 OTHERS (2020)Eklr** and the case of **OSMAN TAHIR SHEIKH SAID & ANO (suing as the executors of the will of Tahir Sheikh Said Ahmed Versus Nomad Energy Ltd; Sabir Tahir Sheikh Said & 5 others (interested parties (2019)eklr** in support of their application.

On the other hand the Plaintiff in his submissions dated 15/12/2020 submits that the averments in paragraph 10 and 11 lay basis as to how the plaintiff acquired the land as a successor to the title of her deceased husband. The core issue in the plaint for determination is the fraud perpetrated by the Defendants in obtaining registration in their names of land parcels No. Trans Mara/Olomismis/1053, Trans Mara/Olomismis/1054, and Trans Mara/Olomismis/1055 arising out of Land Adjudication Section 137 which ought to have been adjudicated, and registered in the Plaintiff's names. The Plaintiff prays that the preliminary objection be dismissed with costs.

I have looked at the Notice of the Preliminary objection and the submissions filed by both parties and the issue for determination is whether this court has jurisdiction to hear and determine this matter. In the case of **Mukhisa Biscuit Manufacturers Ltd –versus-West End Distributors Ltd {1960} EA 696 the court of appeal said:-**

“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 improper raising of points by way of Preliminary Objection does nothing but unnecessarily the costs and on occasion, confirms the issues. This improper practice must stop, as per Sir Charles Newbold.

In the case of **Nzele David Nzomo Versus Moses namayi Anyangu & ano {2009}eKLR** the court stated in the present case the facts relied upon are facts from one side. The facts are disputed. It would require an investigation to find the truth. Furthermore, the evidence offered by the Defendants and the annexures are not proved. A Preliminary Objection cannot be supported by evidentiary documents. It would be necessary to place the witness in the witness box to give sworn evidence and be cross examined on the documents.

In the **Mukhisa Biscuits versus West End Distributors** aforementioned, law, J.A. at page 700 observed:-

“So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded on which arises by clear implication out of pleadings and which if argued as preliminary objection may dispose of the suit.”

Rule 23 of the Probate and Administration Rules provides that:-

1. A citation to propound a document as a will shall be supported by an affidavit in form 23 and be directed to the executors named therein (if any) and still living and to all persons interested thereunder, and may be issued at the instance of any citor having an interest contrary to that of the executors or such other persons.
2. If the time limited for appearance in either the principal registry or Mombasa registry, or if no person who has appeared proceeds with reasonable diligence to propound the document, the citor may petition the court for a grant as if the document were not a valid will and the court before making a grant may direct such inquiries and make such orders as it thinks fit.

Rule 53 of the Will Register provides that at every registry there shall be maintained a register called the wills register for that registry in which the following information shall be recorded relating to every will of a deceased person to which an application is made:-

- (a) The name of the testator
- (b) The cause number
- (c) The serial number assigned to the will
- (d) The date of filing the will and of the issue of any grant; where a grant has been confirmed, the date of confirmation.

Rule 52 of making of wills and furnishing of translations provides that (1) a photocopy of every will in respect of which an application for a grant is made shall be marked by the signature of the applicant and shall also be executed and shall also be exhibited in any affidavit or declaration which may be required under these rules as to the validity, terms, physical condition or date of execution of the will.

Rule 52 (2) provides that: -‘where the will is written in any language made that English, there shall be an English translation thereof, made by a competent person to do so, annexed to the application for the grant, and the translation shall be verified by the translator in the following manner.....,

Having stated the above, I do note that the Principal Magistrates' Court in Kilgoris Law Courts issued Limited Grant of letters of Administration Ad Litem for the purposes of only filing suit. The issues as raised in the application touch on sub division of the deceased land known as Olomismis Adjudication Number 137. In my view it is only prudent that the plaintiff in this case completes the process through confirmation of grant of letters of Administration which is not in this court's jurisdiction.

For the reasons stated above, I hereby dismiss the application for lack of jurisdiction with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KILGORIS ON THIS 27TH DAY OF JULY, 2021

Mohamed N. Kullow

Judge

In the presence of:

CA:Chuma

N/A for the parties