



**In re Estate of Cicilia Wanjiru Kimwere (Deceased) (Succession Cause 285 of 2020) [2024] KEHC 4530 (KLR) (Family) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4530 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**FAMILY**  
**SUCCESSION CAUSE 285 OF 2020**  
**MA ODERO, J**  
**APRIL 12, 2024**  
**IN THE MATTER OF THE ESTATE OF CICILIA WANJIRU KIMWERE (DECEASED)**

**RULING**

1. Before this court for determination is the Notice of Preliminary Objection dated 1<sup>st</sup> September, 2022 filed by the Objector Peter Stephen Kariuki.
2. The Preliminary Objection was opposed. The matter was canvassed by way of written submissions.
3. The Applicant filed the written submissions dated 24<sup>th</sup> February, 2023 as well as the Further Submissions dated 3<sup>rd</sup> August, 2022.
4. The Petitioner Simon George Kamau did not file any written submissions.

**Background**

5. This succession cause relates to the estate of the late Cecilia Wanjiru Kimwere (hereinafter ‘the Deceased’) who died intestate on 13<sup>th</sup> January, 2020 as evidenced by the copy of her Death Certificate serial number 418799 (Annexure BK ‘2’).
6. The petitioner who is a son of the Deceased filed an application dated 28<sup>th</sup> February, 2022 seeking the following orders:-
  - ”(i) The Respondent be found guilty of taking possession, disposing or otherwise intermeddling with the free property of a deceased person namely Cicilia Wanjiru Kimwere.
    - i. The Respondent herein is distanced by this court from enjoyment of properties belonging to the Estate of Cicilia Wanjiru Kimwere (Deceased) through illegality of intermeddling pending the hearing and determination of the Succession Cause Number No. 285/2020 in The High Court Of Kenya Milimani, Nairobi.



- ii. The orders made by this court be served upon the OCS Muthangari Police station (Nairobi County) and Engineer Police Station (Nyandarua County) for expeditious execution.
  - iii. Any other order may issue under the inherent powers of the court.”
7. In response to the above application the objector filed this Notice of Preliminary Objection which was premised upon grounds That
- “(a) That the pleadings and entire application has failed to conform to the law and rules of the court, rules 49, 59(1) and 63(1) of the *Probate and Administration Rules* pursuant to Law of Succession Cap 160 laws of Kenya.
  - (b) Failure to file a defense statement and submissions contrary to the time limitation as directed by court contrary to the *Administration and Probate rules* in the Substantive application dated 28<sup>th</sup> February, 2022.
  - (c) Usurping the powers of the and authority of the court and abuse of court process.
  - (d) Failure to serve mandatory notice of change of advocates hence no order of the court to take over the conduct of the Respondent’s case by SK Amani and Associates”

### **Analysis and Findings**

8. The only issue for determination is whether this Preliminary Objection has merit.
9. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA where 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 plea of limitation or a submissions 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 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 the exercise of judicial discretion.”
10. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court of Kenya stated as follows:-
- “a preliminary objection may only be raised on a “pure question of law.” 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.”
11. 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.
12. Therefore, a genuine and proper Preliminary Objection can only raise points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.
  13. I have carefully perused the Preliminary Objection raised by the Objector, the grounds raised therein as well as the written submissions filed. In my opinion the Preliminary Objection is founded more on questions of fact rather than on pure points of law as required.
  14. The Objector raises issues such as failure to file defence and submissions on time. This is not a point of law but a rather a question of fact which would require interrogation by the court.
  15. Likewise the question of whether the petitioners application amounts to an abuse of court process and failure to take note of the objectors notice of change of Advocate are not points of law.
  16. Certainly the issue of whether the petitioner has usurped the powers and authority of the court cannot be considered a point of law. The Objector would be required to adduce evidence in order to prove his claims.
  17. In *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another* (2014) eKLR, the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1<sup>st</sup> Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”. [Own emphasis]

18. The issues raised by the Objector cannot be canvassed under the ambit of a preliminary objection. The objector ought to have filed a substantive application /summons seeking specific orders.
19. Finally I find no merit in this Preliminary Objection. The same is dismissed in its entirety. Costs will be met by the Objector.

**DATED IN NYERI THIS 12<sup>TH</sup> DAY OF APRIL, 2024.**

.....  
**MAUREEN A. ODERO**

**JUDGE**

