



REPUBLIC OF KENYA



**In re Estate of Fraciah Wanjiru Kariuki (Deceased) (Succession Cause 151 of 2017) [2024] KEHC 5811 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5811 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE 151 OF 2017**

**A MSHILA, J**

**MAY 17, 2024**

**RULING**

1. Before court is the Notice of Preliminary Objection dated 5<sup>th</sup> October, 2023 by Grace Njeri Kirima the registered proprietor of land parcel no. Muguga/Kanyariri/T.440 against the protests presented by Mary Wambui Kariuki and Michael Kariuki Kamanu as they seek to include the said parcel of land in these proceedings and/or have the title thereto cancelled on the grounds that:-
  - a. Land parcel no. Muguga/Kanyariri/T.440 was never part of these Succession proceedings as its title was not in the name of the deceased.
  - b. The title having been transferred to Stephen Kariuki Mwaura and Salome Wambui Kariuki and later to Grace Njeri Kariuki through a normal transfer process and not by transmission any question relating to such transfer can be addressed by an ELC Court.
  - c. This court lacks jurisdiction to cancel or otherwise deal with title number Muguga/Kanyariri/T.440.
  - d. Whether the title was obtained by fraud, misrepresentation or otherwise is a question that can only be addressed by the ELC court and there are already two cases pending before the Principal Magistrate Court where those issues can be raised.
  - e. Plot no. Muguga/Kanyariri/T.440 should be expunged from the list of properties forming part of this estate.
2. The Preliminary Objection was canvassed by way of filing and exchanging written submissions.

**Submissions By Grace Njeri Kirima**

3. The applicant submits that her Preliminary Objection relates to the jurisdiction of the court in as far as the Protestors seek to include the subject plot in the list of estate properties. It was submitted that the Environment and Land Court was established to hear and determine questions relating to the Environment and Land. Further, the applicant submitted that the court herein cannot deal with property of a stranger in succession proceedings.



## 1st And 2nd Protestors' Submissions

4. It was submitted that there is no pure point of law on jurisdiction and that Cap 160 deals with the free property of the deceased. It was submitted that an administrator cannot sell the immovable assets of the deceased without confirmation as the same would render the transaction a nullity. The court was sought to dismiss the Preliminary Objection.

## Issues For Determination.

5. Having considered the Preliminary Objection and the parties' rival submissions, the main issue arising for determination is whether this court has jurisdiction to hear and determine the Protests.

## Analysis

6. A proper preliminary objection must be on a pure point of law. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, the locus classicus on preliminary objections in this region, Law JA stated:

“So far as I'm aware, 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.

7. For a Preliminary Objection to succeed it must satisfy the following tests in that it should only raise a pure point of law, it is argued on the assumption that all the facts pleaded by the other side are correct and lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should dispose of the suit if successful.
8. In the case of *Attorney General & Another vs Andrew Mwaura Gitinji & another* (2016) eKLR:- where it was discussed what amounts to the scope, nature and meaning of a Preliminary Objection *inter alia*:-
  - (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
  - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
  - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
9. Grace Njeri Kirima contends that the court herein lacks jurisdiction to determine the protests as filed as the subject land sought to be included in these proceedings is registered in her name. The Protestors, aver that the Administrator should not sell immovable assets without the grant being confirmed as such the title is voidable.
10. In the Court of Appeal case of *Peter Gichuki King'ara vs Independent Electoral And Boundaries Commission & 2 others* (2013) eKLR the court therein was mindful of the case of *Lillian 'S'* (1989)



KLR 1 in which this Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, *inter alia*:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. The Protestors herein have raised serious issues in regard to the title for Plot No. Muguga/Kanyariri/T.440. They contend that even though the subject parcel of land is registered in the name of Grace Njeri Kirima, the same was acquired illegally.
12. Article 165(3) of the Constitution confers the High Court with jurisdiction where it provides that:-  
Subject to clause (5), the High Court shall have-
  - a) Unlimited original jurisdiction in criminal and civil matters;
13. Further the said jurisdiction is subject to Article 165(5) of the Constitution which provides that:-  
(5)The High Court shall not have jurisdiction in respect of matters:-
  - a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
  - b) Falling within the jurisdiction of the courts contemplated in Article 162(2).
14. Pursuant to Article 162(2) of the Constitution, the Environment and Land Court Act 2011 was enacted and in Section 13 it confers the Environment and Land Court with jurisdiction as follows:-
  - (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-
    - a) Relating to environment planning and protection, climate issues, land use plannings, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - b) Relating to compulsory acquisition of land;
    - c) Relating to land administration and management;
    - d) Relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land; and
    - e) Any other dispute relating to environment and land.
15. In the instant case, Grace Njeri Kirima contends that she is the registered proprietor of land parcel no. Muguga/kanyariri/T.440 which Mary Wambui Kariuki and Michael Kariuki Kamanu sought the court to include in these proceedings or cancel the title thereto. The Applicant avers that this court lacks the necessary jurisdiction to determine whether the transfer of land to Grace Njeri Kariuki was marred with fraud or misrepresentation.
16. The Protestors, however, contend that that the administrator of the estate cannot sell the immovable assets of the deceased without confirmation as the same would render the transaction a nullity.
17. In the circumstances and bearing in mind the above, it is the finding of this court that this court being a probate court is therefore, not clothed with the requisite jurisdiction to deal with the protest as it raises issues that touch on ownership of land.



18. This court has no jurisdiction to determine any disputes that centers on ownership, occupation and use of land. This dispute is better placed in the Environment Land Court as the probate court only deals with distribution of ascertained assets belonging to the deceased's estate and/or free property of the deceased.
19. In the upshot therefore, the Preliminary Objection is found to be merited.

### **Findings & Determination**

20. In the light the forgoing this court makes the following findings and determinations;
21. For the foregoing reasons this court finds that it is not the proper forum as it has no jurisdiction to entertain and determine any disputes that center on ownership, occupation and use of land.
22. The orders being sought by the Applicant are best pursued before the Environment and Land Court as such parties are directed to channel their dispute in the right forum.
23. The Protests are found to be incompetent and are hereby struck out
24. Each party to bear their own costs.

Orders accordingly

**DATED, SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 17<sup>TH</sup> DAY OF MAY, 2024.**

**A. MSHILA**

**JUDGE**

In the presence of;

Mourice – Court Assistant

– for the Applicant

– for the Respondent

