



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Hiran Mururu Chege (Deceased) (Succession Cause
375 of 2009) [2024] KEHC 4627 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
SUCCESSION CAUSE 375 OF 2009**

MA ODERO, J

MAY 6, 2024

JUDGMENT

1. Before this court for determination is the Notice of Preliminary Objection dated 20th March, 2023 filed by the Applicants LUCY WANJIKU CHEGE and KEVIN KARAGU CHEGE.
2. The matter was canvassed by way of written submissions. The Applicants filed the written submissions dated 20th March, 2023 whilst the Respondent TABITHA WAKIYA KABUTHIA relied on her written submissions dated 30th May, 2023.

BACKGROUND

3. This succession cause relates to the estate of HIRAN MURURU (hereinafter ‘the Deceased’) who died intestate on 19th January 2008.
4. Following the demise of the Deceased his widow LUCY WANJIKU CHEGE and son KELVIN KARAGU CHEGE sought and obtained a Grant of letters of Administration Intestate which was issued to the two on 3rd March, 2011.
5. Thereafter on 19th January, 2011 the Respondent TABITHA WAKIYA KABUTHIA filed a summons seeking to revoke the Grant issued on 3rd March, 2011. The Respondent in her supporting Affidavit dated 18th May, 2011 averred that she was also a wife to the Deceased with whom she had borne one son called KEVIN KARAGU CHEGE. The Respondent claimed that the Deceased had been a polygamous man and objected to the exclusion of herself and her son as beneficiaries to the estate.
6. The summons for revocation of Grant was heard inter partes and on 10th April, 2013 Hon. Justice GBM Kariuki delivered a judgment in which he found and held that Tabitha Wakiya and her son were both dependants of the Deceased in terms of Section 29 of the *Law of Succession Act*. Accordingly the Judge revoked the Grant made on 3rd March, 2011 and directed that a fresh Grant be issued in the names of Lucy Wanjiku Chege, Kelvin Karagu Chege and Tabitha Wakiya Kabuthwa as joint Administrators of the estate.



7. On 3rd February, 2022 the Appellants Lucy Wanjiku Chege and Kelvin Karagu Chege filed a Summons seeking the following orders:-

QUOTE{startQuote “}

1 SPENT

2 THAT pending the hearing and determination of this application the Respondent TABITHA WAKIYA KABUTHIA be restrained from selling, dealing, intermeddling, charging, disposing and or in any other manner dealing with the property Title No. RUIRU/KIU BLOCK 3/1314.

3 THAT this Honourable court be pleased to order that the Respondent TABITHA WAKIYA KABUTHIA to deposit the original certificate of lease issued on 18th August, 2009 in respect of property known as Title No. Ruiru/kublock3/1214 with the Deputy Registrar, family Division, Nairobi within the next SEVEN DAYS.

4 THAT failure to comply with order 3 above, the Respondent be found guilty of intermeddling with the estate of the deceased and liable to a fine of Kenya shillings Ten Thousand or to a term of imprisonment not exceeding one year or both.

5 THAT this Honourable court do order that the Deputy Registrar, family Division, Nairobi to execute all necessary documents in order to facilitate the sale and transfer of Title No. RUIRU/KIU BLOCK3/1214 to the successful purchaser as shall be advised by the Applicants.

6 THAT any other favourable order to enforce and actualize the judgment delivered by Hon. Justice Musyoka on 25th September, 2015 and also the consent order to sell the house L.R NO. RUIRU/KIU/ BLOCK3/1314 as we given by Hon. Lady Justice R. E. Ougo on 19th September, 2016.

8. The Summons was premised on ground that on 25th September, 2015 Hon Justice William Musyoka had delivered a judgment directing that the house sitting on Plot No. 1370 KAHAWA SUKARI on LR No. RUIRU/KIU/BLOCK3/1314 was to be sold and the proceeds be shared equally amongst the five (5) beneficiaries of the estate of the Deceased.
9. The Applicants alleged that despite entering into a consent with the Applicants regarding the sale of said house the respondent had continually frustrated the sale by denying prospective purchasers access to view the property.
10. That the Applicants went back to court over the matter and on 14th March, 2019, Hon, Lady Justice Ali-Aroni (as she then was) ordered the Respondent and her son to vacate the Kahawa Sukari House within thirty (30) days. The Respondent eventually moved out of the property after one (1) year.
11. The Applicants further allege that despite a serious buyer having been identified the Respondent has again frustrated the sale of the Kahawa Sukari house by refusing to sign and release the relevant documents. That these actions of the Respondent amount to intermeddling with the estate.
12. The Respondents opposed this application through their Replying Affidavit sworn by Tabitha Wakiya Kabuthia on 21st February, 2022. On 25th May, 2022, the Court directed that the application dated 3rd February, 2022 would be disposed by way of Vive voce evidence. To that end the court directed parties to file and exchange witness statements, Affidavits and bundles of documents. The matter was then slated for hearing on 27th March, 2023.
13. In a surprising turn of events the Applicants who had themselves filed the summons dated 3rd February, 2022 then filed a Notice of Preliminary Objection against their own application seeking to have the same struck out on grounds that the issues raised therein were ‘Res Judicata’



14. In their Notice of Preliminary Objection dated 20th March, 2023, the Applicants sought the following orders;-
- (i) The affidavit of Tabitha Wakiyu dated 6/09/2022 be struck out with costs.
 - (ii) The Affidavit of Charles Kamau Karugu dated 6/09/2023 be struck out with costs.
 - (iii) The affidavit of Nazlin Wanjiru dated 6/09/2022 be struck out with costs.
 - (iv) The affidavit of Edward Rurii Kanjmbi be struck out with costs.
 - (v) The application dated 3rd February, 2022 be allowed with costs.
 - (vi) The Respondent be condemned to pay fine of Kshs. 1,000,000 for intermeddling with the estate of the deceased.

ANALYSIS AND DETERMINATION

15. I have carefully considered the Preliminary Objection filed by the Objectors as well as the written submissions filed by both parties.
16. 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 of 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 the exercise of judicial discretion.”
17. In AVIATION & ALLIED WORKERS UNION KENYA –VS- KENYA ARIWAYS LIMTIED & 3 OTEHRS [2015] eKLR, the Supreme Court of Kenya stated that
- “ a Preliminary Objection may only be raised on a “pure question of law”
18. 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”
19. 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.
20. 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.
 21. The dispute between the parties herein revolves around the court ordered sale of the Kahawa Sukari House. The Applicants contend that despite the parties having reached a consent over the matter on 5th October, 2016 the respondent has continued to frustrate the sale of the said property.
 22. According to the Applicants the issues raised in their own application are Res Judicata as these are issues which the courts have already made a determination on. Why then did the Applicants bother to file the application? Once they realized the application was Res Judicata then the simple thing would have been to withdraw the said application.
 23. The applicants claim that the matters raised in the application dated 3rd February, 2022 are Res Judicata as the same issues have already been determined in previous judgments/ Rulings delivered in this cause. The applicants then proceeded to list all the said Rulings/judgments previously delivered.
 24. The substantive law on res judicata is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

Black’s law Dictionary 10th Edition defines “res judicata” as (“An issue that has been definitely settled by judicial decision.... The three essentials are (1) an earlier decision on the issue, (2) a final judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties....”
 25. In the case of Christopher vs Salama Beach (2017) eKRL, the court clearly stated the ingredients to be satisfied when determining res judicata thus;
 - a. The suit or issue was directly and substantially in issue in the former suit



- b. Former suit between same parties or parties under whom they or any of them claim.
 - c. Those parties are litigating under the same title
 - d. The issue was heard and finally determined.
 - e. The court was competent to try the subsequent suit in which the suit is raised.”
26. I have perused the various judgments/rulings cited by the Applicants. They all dealt with various aspects of this cause as follows.
- Judgment of 10th April, 2013 made a determination of who the genuine beneficiaries to the estate were –
27. Judgement of 25th September, 2015 determined that the Kahawa Sukari property was matrimonial property and directed that the same be sold and the proceeds divided equally amongst the five (5) beneficiaries to the estate.
- Consent judgment of 19th September 2016 where parties agreed on the modalities of sale of the Kahawa Sukari Property.
 - Ruling of 14th March, 2019 wherein the court ruled that the Respondent do pay rent at Kshs. 45,000/= per month for illegally occupying the Kahawa Sukari Property and that the rent arrears due would be recovered from the Respondents share of the proceedings of sale of the property.
28. The present application in issue dated 3rd February, 2022 to have the Respondent declared an intermeddler seeks to restrain the Respondent from disposing off the Kahawa Sukari house and also seeks orders that the Respondent deposits the original certificate of lease for the said property with the Hon. Deputy Registrar of the Family Division. The application seeks that the Hon. Deputy Registrar be authorized to execute all documents necessary to facilitate the sale and transfer of the property. In a word the application seeks to enforce the judgement which ordered the sale of said property
29. In the circumstances this application cannot in any way be said to be Res Judicata as it does not raise any issues which has been previously heard and ruled upon in this matter. The application in my view raises new and distinct issues for determination.
30. Accordingly I find that the summons dated 3rd February, 2022 is not



Res Judicata. Moreover the application of 3rd February, 2022 does not raise only pure points of law. On the contrary it raises questions of fact which can only be determined upon hearing from both parties. The question of whether or not the Respondent is intermeddling with the estate is not a pure point of law but rather is a question of fact which can only be determined after a hearing. Accordingly this is not a genuine Preliminary Objection.

31. It is quite obvious that the real intention of the Applicants in filing this Notice of Preliminary Objection was to seek to have the statements Affidavits and other documents filed by the Respondents expunged from the record. The way achieve this was not by filing a Preliminary objection against their own application. A preliminary objection cannot be used as a strike out documents filed by the opposite party. The Applications ought to have filed a substantive application seeking to have those documents expunged from the record.
32. This Preliminary Objection in my view was vexatious, frivolous and an abuse of court process not to mention being entirely unnecessary.
33. Finally I find no merit in the Notice of Preliminary Objection dated 20th March, 2022. The same is dismissed in it entirety. Costs will be met by the Applicants.

Dated in Nyeri this 6th day of May, 2024.

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MAUREEN A. ODERO

JUDGE

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