



**In re Estate of John Muthiora Gathuna (Deceased) (Succession Cause 1161 of 2022) [2024] KEHC 7485 (KLR) (Family) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7485 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY**

**SUCCESSION CAUSE 1161 OF 2022**

**HK CHEMITEI, J**

**JUNE 20, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE  
JOHN MUTHIORA GATHUNA (DECEASED)**

**BETWEEN**

**DANIEL KIRUI MUTHIORA ..... APPLICANT**

**AND**

**JOSEPH KWINGA MUTHIORA ..... RESPONDENT**

**RULING**

1. In his preliminary objection dated October 24, 2023 the objector's grounds are that:
  - (a) The application seeks to appeal against a mediation agreement.
  - (b) It is bad in law as it flouts rule 9 of the civil procedure rules (2010 as amended) as the purported Applicant has not at any instance issued instructions to the firm of Moses N Siagi & Co Advocates to act on his behalf nor is the said Paul Mayaka Ogari a party to this succession proceeding.
  - (c) That the application does not lie as the court lacks jurisdiction to entertain the application as currently framed on these grounds:
    - (i) The estate of the deceased in succession cause no 1161 of 1990 (Misc. E120 of 2022) was not party to The Supreme Court Petition No 9 of HC No. 6 of 2012 (OS) and
    - (ii) The enforcement of the judgement for Supreme court petition No. 9 is a matrimonial matter currently being heard by the right forum under HC No. 6 of 2012(O.S).



2. The court directed the parties to file their written submissions which they have done and the court has perused the same exhaustively.
3. The Applicant relied on the case of *Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors Ltd* (1969) E A 696 as well as order 9 rule 1 of the *Civil Procedure Rules*.
4. He further submitted that the order having emanated from mediation proceedings could not be challenged in the manner the Applicant was doing.
5. He also submitted while relying on the case of *Owners Of The Motor Vessel v Caltex Oil Limited* (1989) that this court lacked jurisdiction to entertain the application.
6. The respondent in his submissions opposed the preliminary objection arguing among others that the law firm of Siagi & co was well instructed even before the filing of the application
7. He further submitted that this court was seized of jurisdiction specially to deal with issues surrounding Plot number 29. Conversely he has argued that the Applicant has subjected himself to this court as regards plot number 29.
8. He prayed for the preliminary objection to be dismissed.
9. I have perused the said objections carefully and taking cue from the Mukisa Biscuits case above I doubt whether it passes the muster.
10. The court stated as follows regarding what is a preliminary point of law.

“ 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 in the exercise of judicial discretion.”

(underlining mine)

11. To the extent that this court will look elsewhere so as to support the objection, then the same does not qualify. Looking for instance at the first ground, all that the applicant is asking the court to do is to peruse the mediation agreement and come to a conclusion in the manner he wants the court to follow.
12. This is a factual issue. The same ought to be argued in the application so that the parties can test the veracity or otherwise by way of affidavit evidence.
13. The same goes to the second ground. Whether the firm of Moses Siagi was instructed by the applicant or one Paul Mayaka Ogari is a factual issue. It ought to be tested by way of evidence.
14. The same goes to ground 3. The cases cited therein on their own cannot help the court come to a conclusion that the preliminary objection is meritorious. It will require the court to search for them, read, understand and come up with a conclusion on whether or not it affects the proceedings herein.
15. For the above reasons I think I have stated much to show that the preliminary objection is unmeritorious and it is hereby dismissed with costs.
16. Let the application be set down for hearing.

**DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**H K CHEMITEI**



**JUDGE**

