



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Stephen Ndingu’ri (Deceased) (Succession Cause
238 of 1990) [2024] KEHC 8784 (KLR) (Family) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 238 OF 1990
HK CHEMITEI, J
JULY 18, 2024
IN THE MATTER OF THE ESTATE OF STEPHEN NDINGU’RI (DECEASED)**

RULING

1. This ruling relates to the preliminary objection dated 30th June, 2023 which is based on the GROUNDS THAT:-
 - i. The application before Court is an abuse of the court process and is in breach of one of the sections of law that the Applicants (who have not been cited) in the application have relied upon.

Rule 73 of the Probate and Administration rules state as follows:

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
 - ii. The summons for substitution as headlines have no citation. There is no indication of either the Applicants or the Respondents.
 - iii. The summons are for substitution of the late Charles Njuguna and yet the persons purportedly intended to substitute the said late Charles Njuguna do not meet the requirements of sections 29 of the Succession Act.
 - iv. The summons is an abuse of the court process because the application is brought to court with a claim that the deceased Charles Njuguna never distributed his father’s estate.
 - a. By a copy of the green card brought before court by the Applicants, the only property that constituted the estate of the late Stephano Ndinguri was distributed to the only beneficiary Charles Njuguna on 14th December, 1990.



- b. Page ii of the green card above indicates that the parcel of land was transmitted to Charles Njuguna through succession on 14th December, 1990.
 - c. Page 2 of the same green card cited above indicates that the land was transferred to Wilson Mwangi Ramson on 9th March, 1994 for a price of Kshs. 150, 000/=.
 - d. It is therefore a brazen lie for the Applicants to claim that Charles died before he distributed the estate of the deceased Stephano Ndinguri.
 - v. The Applicants herein will continue to abuse the court process unless this court does not exercise its power to order them to cease their acts of attempted fraud and to order them to pay costs for their frequent, frivolous court actions testing the courts capacity to uphold its orders or to uphold the rule of law itself.
 - vi. The court ought to have the parties before court to state clearly who they are and what they are seeking to avoid waste of judicial time by advocates.
 - vii. The application herein ought to be dismissed for being an abuse of the court process with costs to the Respondent.
2. The notice of preliminary objection is opposed vide affidavit sworn by Beatrice Waithira Gachagwa, James Michael Chege and Lilian Wambui Mutethia on 16th August, 2023. They aver inter alia that paragraphs i to iv are not true. They have annexed the following documents to help the court understand the necessity of their application for substitution: letter dated 11. 8. 1988, letter dated 22. 2. 2023, chamber summons and affidavit dated 11. 9. 1991, grant of letters of administration intestate dated 7. 5. 1990, judiciary receipt number FSCA-0229279 dated 17. 8. 2023, ruling dated 29. 7. 2011, typed proceedings in Murang'a Senior Resident Magistrate's Civil Case No. 15 of 1995, judgment dated 24. 5. 2002 and decree dated 20. 2. 2023

Background

3. The genesis of the instant preliminary objection is summons dated 16th June, 2023 which seeks for ORDERS THAT:-
- (a) The grant of letters of administration intestate was issued by this honourable court to Charles Njuguna on 7th May, 1990 and confirmed on 22nd November, 1990.
 - (b) The said Charles Njuguna died before distribution of the estate of Stephano Ndinguri (the deceased herein) was completed (see death certificate attached).
 - (c) This honourable court be pleased to substitute the said deceased administrator (Charles Njuguna_ with the Applicants herein, namely: Beatrice Waithira Gachagwa, James Michael Chege and Lilian Muteithia, the Applicants herein as the new administrators of the estate of Stephano Nding'uri (Deceased).
4. The application is supported by affidavit sworn by Beatrice Waithira Gachagwa, James Michael Chege and Lilian Wambui Muteithia on 16th June, 2023. They aver inter alia that the immediate previous administrator, Charles Njuguna (deceased) was a biological brother to their father (Samuel Gathuri Nding'uri – deceased). He died before the estate of Samuel Gathuri Nding'uri had been distributed since 10th September, 1977 when he died. Samuel Gathuri Nding'uri died on 23rd July, 1986 and their mother, Hilda Nyambura died on 20th September, 2012. Hilda Nyambura had filed an application dated 11th September, 1991 seeking to revoke the grant of letters of administration to Charles Njuguna due to fraud and concealment of material facts.



5. That the application for substitution dated 16th June, 2023 is as a result of the deaths of Charles Njuguna and Hilda Nyambura. Their surviving siblings, who are also the deceased's grand children, have consented to their replacing their late uncle Charles Njuguna as the administrator of the deceased's (Stephano Nding'uri) estate. In compliance with this court's orders dated, 27th January, 2020, they cited Charles Njuguna's – their cousins – children but they refused to participate in the application for substitution. Charles Njuguna's wife, Nyagithua Njuguna, was deceased by the time of making the application.

Analysis and Determination

6. I have gone through the notice of preliminary objection and the response to it.
7. The law on notices of preliminary objection was well discussed In the East African Court of Justice at Arusha First Instance Division: Reference No. 8 of 2017: Pontrilas Investments Limited Versus Central Bank of Kenya & The Attorney General of the Republic of Kenya where it was stated as follows:

“ 23. Having carefully considered the parties' submissions, it is the considered view of the court that prior to a substantive consideration of the said submissions at this stage, it is imperative that the court confirms that what is before it, is indeed a preliminary objection point of law that would be properly determined as a preliminary objection.

24. whereas the matter under consideration was raised and argued by all the parties as a preliminary objection, the court is alive to the importance of proper procedure in the judicial process.

25. In Attorney General of the Republic of Kenya vs Independent Medical Legal Unit (supra), the Appellate Division of this Court held:

“The improper raising of points by way of preliminary objections does nothing on occasion confuse the issues. The court must therefore, insist on the adoption of the proper procedure for entertaining applications for Preliminary Objections. In that way, it will avoid treating, as preliminary objections, those points that are only disguised as such; and will instead, treat as preliminary objections, only those points that are pure law; which are unstained by facts or evidence, especially disputed points of facts or evidence or such like.”

26. This point was underscored in The Secretary General of the East African Community vs. Rt. Hon. Margaret Zziwa, Appeal No. 7 of 2015 where the court cited with approval the following exposition in Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited (1969) EA 696 (per Newbold, P):

“A Preliminary Objection is in the nature of what used to be demurer. 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 what is sought is the exercise of judicial discretion.”



27. The question of what would constitute a proper preliminary objection was further addressed in Attorney General *of Tanzania vs African Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011*, where the Appellate Division of this court held that a Preliminary Objection could only be properly taken where what was involved was a pure point of law, but that where there was any issue involving the clash of facts, the production of evidence and facts, the production of evidence and assessment of testimony it ‘should not be treated as a Preliminary Point. Rather, it becomes a matter of substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross – examined, and a finding of fact then made by the Court.’”

8. In light of the foregoing, I do not find merit in the preliminary objection dated 30th June, 2023 because it needs an analysis of the facts and evidence on record for a determination to be made on the issues raised. For instance, this court will have to inquire by way of evidence the relationships between the parties herein and whether or not they met the muster as provided under Section 29 of CAP 160.
9. At the same time the issue surrounding the green cards in regards to the properties cannot be determined by way of a preliminary objection as alluded in the various authorities above.
10. In the premises the preliminary objection is hereby disallowed and the Respondent granted 14 days to file and serve any replying affidavit to the applicant’s application.
11. Costs shall await the outcome of the application.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 18TH DAY OF JULY 2024.

H K CHEMITEI

JUDGE

