



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Lincoln Imbugwo Khasakhala (Deceased) (Succession Cause
E008 of 2022) [2023] KEHC 2317 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE E008 OF 2022**

DK KEMEL, J

MARCH 16, 2023

**IN THE MATTER OF THE ESTATE OF LINCOLN IMBUGWO
KHASAKHALA (DECEASED)**

BETWEEN

EBOCHE DAVE KHASAKHALA PETITIONER

AND

CATHERINE MWENDERANI ISIGE 1ST OBJECTOR

ESTHER KAMONYA WAFULA 2ND OBJECTOR

RULING

1. On July 29, 2022, the 1st and 2nd Objectors lodged a Notice of Objection against the issuance of the Letters of Administration in respect of the estate of Lincoln Imbugwo Khasakala (hereinafter referred to as 'the deceased') to Eboche Dave Khasakhala, the deceased's brother and the proposed Administrator to the deceased's estate herein.
2. They averred that the deceased left a sole beneficiary, a minor, namely Blessings LMK, born on January 28, 2014 and his estate cannot therefore be administered by a single administrator.
3. The Objectors averred that in the interest of the sole beneficiary herein, they referred the estate of the deceased to the Office of the Public Trustee vide letters dated April 26, 2022 and that the Office of the Public Trustee subsequently wrote a letter herein to Mr John Ochuka Khasakhala, a brother to the Petitioner to vacate the deceased's house, known as No 617 Kerarapon 6th Drive erected on land reference number Ngong/Ngong/25649 and to restore motor vehicles Toyota Fielder xxxx and Mercedes Benz xxxx. Additionally, the two tenants in occupation of the flats erected on the respective land reference remit to them their monthly rent.



4. They averred that they were awarded interim custody of the minor mentioned above by the Nairobi Children Court in case MCCHCC/E213/2022 which was delivered on October 5, 2022 before Hon CC Oluoch CM.
5. They averred that the property known as LR Ngong/Ngong/25649 was developed and consists of one stand-alone four-bedroom maisonette, three flats of two bedrooms each and a servant quarter.
6. They averred that the property and the vehicles referred to above have a market value is over Kshs 50,000,000/=.
7. They averred that the properties known as LR Bungoma/Kiminini/2159 and Bungoma/Kiminini/2160 also form part of the estate of the deceased and are under developed pieces of land of lower value compared to the properties in Ngong, located within Kajiado County.
8. They averred that owing to the fact that the value of the properties located in Ngong, Kajiado County are of higher value in comparison to the under developed pieces of land located in Kiminini, Bungoma County this Petition ought to be transferred to the High Court in Kajiado.
9. They averred that the letters of Administration should not be granted to the Petitioner as they have invited the Office of the Public Trustee to take over the management of the estate of the deceased herein, a fact that the Petitioner and his family are privy to.
10. In response to the Objection, the Petitioner filed a replying affidavit averring that the deceased was his biological brother and he instituted the Petition for grant of letters administration in his capacity as the brother.
11. He averred that this Court has jurisdiction to hear and determine this matter irrespective of the location of the property.
12. He averred that the deceased hailed from Tongaren, Ndalú Division within Kiminini sub-location in Bungoma County and that is where his body was buried.
13. He averred that at the time of the demise of the deceased, he had only one child, a minor and that she has been included in these proceedings.
14. He averred that the Objection as lodged does not have merit as that Objectors in respect to the line of consanguinity are not closely related to the deceased herein; the Objectors are distantly related to the deceased and that in line of consanguinity, he stands first in priority.
15. He averred that the allegations by the Objectors that he and his siblings are misusing the estate of the deceased are not true and that these are mere allegations to mislead the Court.
16. He averred that his duty as an Administrator was to manage the estate of the deceased on behalf of the surviving minor and his extended immediate relatives who depended on him.
17. He averred that the objection is premature in law, frivolous, scandalous and that that the same ought to be dismissed.
18. He averred that the Objectors are solely interested in the property of the deceased and that they have used the minor as a shield to advance their interest hence the institution of the children's case to have the custody of the deceased.
19. He averred that he and his siblings are capable of taking care of the minor and each of them are well placed to take care of themselves, and that their sole interest is to take care of the estate of the deceased to the benefit of the minor.



20. Vide Court directions dated November 17, 2022, parties were directed to canvass the Objection to the Petition of Grant of Letters of Administration by way of written submissions. Each party filed and exchanged their submissions.
21. The Petitioner vide submissions dated January 25, 2023, and filed on February 13, 2023, submitted that the Petitioner is the biological brother to the deceased herein and that the deceased is survived by one minor. According to him, the Objectors are sister and cousin to the deceased's wife respectively. He relied on Section 38, 41 and 42 of the [Law of Succession Act](#) CAP 160. He urged this Honourable Court to dismiss the Objector's summons to Objection of making of Grant dated July 29, 2022.
22. Vide submissions dated January 10, 2023 and filed in Court on January 11, 2023, the Objectors submitted that they filed an application for Guardianship before Nairobi Children Court vide MCCHCC/E213/2022. On August 5, 2022 the Court appointed the 1st Objector herein who is based in Kenya as the Legal Guardian and was granted actual custody of the minor until she attains the age of 18 years' and that both the Objectors were awarded access during term breaks as they may agree.
23. It was submitted that the Objectors approached the Office of the Public Trustee inviting them to take over the administration of the deceased's estate owing to the fact that the deceased brothers, the Petitioner included were already intermeddling with the estate of the deceased and that this would be a neutral party, considering that a minor is involved and thus avoidance of friction between the maternal and paternal sides of the family.
24. It was submitted that due to the fact that the 1st Objector has the legal custody and is the Court appointed legal guardian of the minor herein, it will be a nullity if the Grant is issued to the Petitioner alone as that would not be in accordance with the law. Counsel placed reliance on section 58 of the [Law of Succession Act](#).
25. It was submitted that the Objectors wished for the estate of the deceased to be managed by the Office of the Public Trustee or by them solely and not together with the Petitioner as the Petitioner will frustrate them if they are appointed as co-administrators. Counsel relied on section 66 of the [Law of Succession Act](#).
26. It was submitted that the Petitioner is already intermeddling with the estate of the deceased and is yet to be granted the requisite grant of letter of administration. The Objectors urged this Court to consider transferring the matter to the High Court of Kajiado and/or should this Court proceed to dispense with the same appoint the Objectors as the Co-administrators of the estate of the deceased or the Office of the Public Trustee but not to make the Petitioners co-administrators as there is a likelihood the Petitioner and his family will frustrate their efforts in administration of the estate of the deceased.
27. I have carefully considered this Preliminary Objection, the affidavit in reply as well as the written submissions filed by both parties. The gist of the application is that the 1st Objector is the sole appointed legal guardian to the minor and was granted custody until the child attains the age of majority and that the 2nd Objector was granted access to the minor during school holidays but the Petitioner has filed a Petition for grant of letters of administration to make him a sole administrator.
28. The procedure of how the Objection to a grant of letters of administration is to be made is given in Rule 17 of the [Probate and Administration Rules](#). It states that: -
 1. Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has already been applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application



has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection.

2. A request by an intending objector for an extension under section 68(1) of the Act of the period specified in the notice under rule 7(4) shall be made to the registry at which the application for a grant was made or by which the notice was issued, as the case may be, by summons supported by an affidavit, if necessary, and upon notice to the applicant for the grant.
 3. There shall be maintained at each registry a register of objections, answers and cross-applications in which the registrar shall enter particulars of every objection, answer and cross-application lodged under this rule in the registry and of every withdrawal of objection and withdrawal and amendment of every answer or cross-application under this rule.
 4. Upon receipt of an objection in triplicate within the period referred to in sub rule (1), or an extension thereof, the registrar shall forthwith file and retain the original thereof and cause an appropriate entry to be made in the register and shall transmit forthwith by registered post a notification in Form 61 of the receipt of the objection, together with a copy thereof, to the person or to each of the persons by whom the application for a grant has been made and also, save where the objection is lodged in the principal registry, transmit a copy of the notice and objection to the principal registrar by whom it shall be filed and retained.
 5. The registrar of the registry in which the objection is lodged shall forthwith upon the lodgement of the objection cause a notice in Form 67 to be sent to the objector, by registered post or otherwise as he may think fit, requiring him to file in the registry within such period as the registrar may specify in the notice an answer in Form 25 to the petition for a grant together with a petition by way of cross-application in Form 84, supported by affidavit, for a grant to the estate of the deceased to be made to the objector.
 6. If within the period specified in sub rule (5) the objector has filed in the registry in the proper form an answer to the petition for a grant, together with a petition by way of cross-application for a grant to himself, the registrar shall refer the matter to the court for directions, and shall notify the petitioner and the objector of the time and place set for the hearing of the petition, answer and cross-application.
29. It is clear from Rule 17(6) of the Probate and Administration Rules that the intervention of the Court will only come in after an objector has filed in the registry in the proper form an answer to the petition for a grant, together with a petition by way of cross-application for a grant to himself. I confirm that an answer and cross-petition that would warrant the Objection being placed before this Court was duly filed. The procedure of placing of the Objection herein before this Court was therefore regular.
30. To determine this issue, I will refer parties to what constitutes a preliminary objection, as set out in the celebrated case of *Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd* [2] where it was held: -

' So far as I am 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'

12. In the words of Sir Charles New Bold, P at page 701, B: -



'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 is the exercise of judicial discretion.'

31. Therefore, a Preliminary objection may only be raised on a pure point of law which if determined would dispose the entire case. The Objectors argued that the Petitioner had petitioned to be appointed as the sole administrator of the estate of the deceased on behalf of the minor.

32. Subject to section 58 of the [Law of Succession Act](#)

(1) Where a continuing trust arises -

(a) No grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation.

(b) No grant of letters of administration with the will annexed shall be made to one person alone except where-

(i) That person is the Public Trustee or a Trust Corporation; or

(ii) In the will the testator has appointed one or more trustees for the continuing trust who are willing and able to act.

(2) Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises the court shall, subject to section 66, appoint as administrators the applicant and not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion.

33. Also, section 66 of the [Law of Succession Act](#)

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference –

(a) Surviving spouse or spouses, with or without association of other beneficiaries;

(b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) The Public Trustee; and

(d) Creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

34. From the foregoing and my perusal of the Petitioner's form P & A 80, it is self-evident that he solely petitioned for the grant of letters of administration contrary to the requisite provisions of the [Law of Succession Act](#) CAP 160.

35. On to the issue of transfer of this matter to the High Court of Kenya at Kajiado, the power of this Court to transfer a matter from one Court to another is donated by section 18 (1) (b) of the [Civil Procedure Act](#). This provision states as follows:



- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage— withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - (a) Transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (b) Withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - (i) Try or dispose of the same; or
 - (ii) Transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (iii) Retransfer the same for trial or disposal to the court from which it was withdrawn
36. Rule 73 of the Probate and Administration Rules which states that:

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.
37. The Objectors in their ground of objection averred that the value of the Properties located in Ngong, Kajiado County are of higher value in comparison to the under developed pieces of land in Kiminini and that the Office of the Public Trustee has been invited to manage the net estate of the deceased. The Petitioner in response, averred that the deceased hailed from Tongaren, Ndalú Division within Kiminini.
38. My understanding of Rule 73 is that a petition may be filed in the Principal Registry or a High Court Registry or a resident magistrate’s registry. The latter registry will be subject to the pecuniary jurisdiction of the magistrate and the last known place of residence of the deceased. In this matter, the value of the estate in Ngong was disclosed by the Objectors to be over 50,000,000 combined, a valuation not backed by any valuation report. The last known place of residence of the deceased was Ngong with Petitioner contending that the deceased hailed from Tongaren, Ndalú Division within Kiminini. My perusal of the Court record shows that the deceased worked and resided in Ngong, Kajiado County. He has a vast portfolio of developed assets subject to this succession matter in Ngong compared to Kiminini, Bungoma County. It is elaborate that the Objectors prefer the matter to be dispensed with at the High Court at Kajiado as the properties that are developed and of immense value as stated are situated in Ngong. They have also sought to have the matter be handled by the Public Trustee. In my view, no prejudice will be suffered by the Petitioner if this matter is referred to Kajiado High Court for final determination.
39. For the foregoing reasons, this matter is hereby transferred to Kajiado High Court for final determination. The same to be mentioned before the Presiding Judge on the April 17, 2023 for directions and further orders.

DATED AND DELIVERED AT BUNGOMA THIS 16TH DAY OF MARCH 2023

D. KEMEI

JUDGE

In the presence of:



Miss Dulo for Objectors

Mr Aribo for Petitioner

Kizito Court Assistant

