



REPUBLIC OF KENYA



In re Estate of the Late James Chege Ndwaru (Deceased) (Succession Cause 1751 of 1993) [2023] KEHC 18699 (KLR) (Family) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18699 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 1751 OF 1993

PM NYAUNDI, J

MAY 19, 2023

IN THE MATTER OF THE ESTATE OF THE LATE JAMES CHEGE NDWARU (DECEASED)

BETWEEN

JANE WANJIRU CHEGE APPLICANT

AND

MARY WACHUKA CHEGE 1ST RESPONDENT

JAMES WAINAINA CHEGE 2ND RESPONDENT

GEORGE MBUGUA CHEGE 3RD RESPONDENT

ESTHER RUGURU CHEGE 4TH RESPONDENT

ELIZABETH WANJIKU CHEGE 5TH RESPONDENT

RULING

Introduction

1. The 1st respondent herein has filed a notice of preliminary objection on a point of law dated March 2, 2023 in response to the applicants application dated February 16, 2023 on the following grounds:
 - a. The matter in issue in the said application is *res judicata*.
 - b. The application is fatally defective *ab initio* as the respondents are co- administrators and beneficiaries of the above estate and not intermeddles.
 - c. The application is fatally defective *ab initio* as it does not disclose any offence capable of being committed by personal representatives under the law.



- d. The application is an affront to the administrators' statutory powers and duties in relation to the above estate.
2. The matter proceeded by way of oral submissions before court on 25th and April 26, 2023.

1st Respondent's Submissions

3. The 1st respondent urges that the application is defective as it is presented under section 45 that prohibits intermeddling with the estate of a deceased person and is presented against the respondents who are administrators and beneficiaries of the estate.
4. The 1st respondent relies on the following decisions that expound on section 45 of the [Law of Succession Act](#), [Veronica Njoki Wakagoto](#) [2013] eKLR; [Re Estate of Mutongarithi Mutoriti](#) [2017] eKLR; [Re Estate of David Julius N'turibi M'Ithingi](#) [2012] eKLR; [Jane Kagige Geoffrey & Anor v Wallace Ireri Njeru & 20 others](#) [2016] eKLR;
5. The applicant also refers to section 82 and 83 of the [Law Succession Act](#) to demonstrate that administrators are acting within the statutory mandate. The actions of the administrators are not within section 95 of the Act which relates to offences that may be committed by administrators.
6. It is submitted that there is no evidence before the court to demonstrate that the respondents have acted contrary to the confirmed grant. It is argued that the applicant seeks to delay the administration of the estate and that the application is frivolous and an abuse of the court process.
7. It is submitted that the consistent with the decision in [Mukhisa Biscuit Manufacturing Co Ltd v Westend Distributors Ltd](#) 1969 EA 696 as the preliminary objection is on a pure point of law as administrators cannot be accused of intermeddling with an estate.

Applicants Submissions

8. The applicant opposes the preliminary objection and submits that the matter is not *res judicata* and cites the decision in [Re Estate of Nchogu Sagana](#) [2021] eKLR in which Musyoka J. restated the principles of *res judicata*.
9. The applicant further avers that under section 45 it is only the actions of the administrators in consonance with the confirmation of the grant that are protected. In this instance it is contended that the administrators are colouring outside the margins.
10. It is submitted that a grant does not give the administrators free licence to act as they wish. The applicant submits that the application seeks to compel the administrators to act as required by the confirmed grant. It is submitted that with respect to the parcel in contention the 1st, 4th and 5th respondents have begun construction and yet subdivision in accordance with the certificate of confirmation is yet to be done.

Analysis And Determination

11. The issue for determination is whether the preliminary objection as presented satisfies the conditions as set out in [Mukhisa case](#) above.
12. The application is presented under section 45 of the [Law of Succession Act](#) and rule 49 of the [Probate and Administration Rules](#). It is common ground that the 1st, 2nd and 3rd respondents are co administrators of the estate alongside the applicant.
13. The application seeks the following orders



1. Spent
 2. That the respondents in particular the 1st, 4th and 5th respondents be restrained from any further intermeddling of title No Dagoretti/ Riruta/ 9 an asset of the estate until formal subdivision and allocation in compliance with the certificate of confirmation is done.
 3. That the 1st, 2nd and 3rd respondents be ordered to execute forms LR 39 & 42, Mutation Forms, application for Land Control Board Consent, transfer of interest on land or any other documents necessary to effect final distribution of title No Dagoretti/ Riruta/ 9 to the beneficiaries.
 4. That in default/ refusal by the 1st, 2nd and 3rd respondent to execute the documents mentioned in prayer 3 above, the court authorise the Deputy Registrar to execute the said documents.
 5. That the court do restrain the interested party from misleading the beneficiaries by insisting on the use of a sketch plan he prepared in 2016 and which does not comply with the certificate of confirmation
 6. That the OCS Kabete Police Station to supervise the enforcement of the orders herein.
 7. Costs be in the cause
14. It would appear that the gist of the application is that the administrators actions are not in consonance with the certificate of confirmation of grant in so far as the distribution of Dagoretti/ Riruta/ 9 is concerned.
 15. The preliminary objection is hinged on section 45 of the *Law of Succession Act* and challenges whether an administrator can be said to intermeddle. The respondent also raises a preliminary objection that the matter is res judicata.
 16. At the hearing of the application the respondent submitted solely on the first limb of the preliminary objection mainly that the application was defective as it was presented under section 45 of the *Law of Succession Act*.

Section 45 provides

No intermeddling with property of deceased person

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall-
 1. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 2. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration. (emphasis supplied)



17. A careful reading of the above section reveals that what is protected are the actions of the administrator that are in line with the grant of representation.
18. If a charge is made that the administrator is acting contrary to the certificate of grant, those actions will have to be interrogated.
19. In *Independent Electoral and Boundaries Commission v Jane Cheperenger and others* (2015) eKLR, the Supreme Court stated;

[21]...The true preliminary objection serves two purposes of merit: firstly it serves as a shield for the originator of the objection- against the profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword for winning a case otherwise destined to be resolved judicially and on the merits.

20. There are issues of fact that are contested, it is in dispute whether the ongoing distribution on the ground of the subject parcel of land is in accordance with the certificate of confirmation of grant.
21. I find that the preliminary objection as presented does not meet the threshold set out in *Mukhisa case* which is that:

“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 ... 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.”

22. Owing to the foregoing the preliminary objection is dismissed.
23. Application dated February 16, 2023 to proceed for hearing.
24. Each party will bear their costs.

It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF MAY, 2023.

P M NYAUNDI

HIGH COURT JUDGE

In the presence of:

.....

Advocate for Applicant

.....

Advocate for Respondent

Karani Court Assistant

