



**In re PAA (Deceased) (Succession Cause E1168 of 2021)
[2023] KEHC 18136 (KLR) (Family) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E1168 OF 2021
MA ODERO, J
MAY 19, 2023
IN THE MATTER OF THE ESTATE OF LATE PAA (DECEASED)**

BETWEEN

CWA PETITIONER

AND

**WWA (OBJECTIBG/SUING FOR HERSELF & JMA (MINOR) AS HIS NEXT
FRIEND AND MOTHER OBJECTOR**

RULING

1. Before this court for determination is the notice of preliminary objection dated November 30, 2022 filed by the petitioner CWM. The matter was canvassed by way of written submissions. The Petitioner filed written submissions dated 30th January 2023 whilst the Objector relied upon her written submissions also dated 30th January 2023.

Background

2. This Succession Cause relates to the estate of the late PAA (hereinafter ‘the Deceased’) who passed away on the 18th December 2020.
3. Following the demise of the Deceased the Objector WWA in her capacity as a wife to the Deceased filed a citation directing the Petitioner and others to take out letters of Administration in respect of the Estate of the Deceased.
4. However before the citation could be heard the Petitioner filed a Petition for Grant of Letters of Administration intestate in respect of the estate of the Deceased.
5. In her Petition the Petitioner indicated that the Deceased was survived by the following persons:-



- (a) CWA - Wife
- (b) FWA - Daughter
- (c) CAA - Son
- (d) CWC - Daughter

The following were listed as assets and liabilities of the deceased.

Assets:

- i. LR. No. 3734/515
- ii. Title No. Kakamega/ileho/572
- iii. Motor Vehicle Reg. NO. KCD 393C Toyota fraudulently transferred to WWN.

Liabilities:

- (i) Motor Vehicle Reg. No. KBR 845X sold to Barack Muluka but not yet transferred.
- 6. Following the filing of the Petition for Grant of Letters of Administration intestate the Objector filed a Notice of Objection dated 7th July 2022 to the Petition for Letters of Administration by the Petitioner.
 - 7. The Objector claimed that she was a wife to Deceased and alleged that the Petitioner was attempting to disinherit her and the Deceased's minor son JMA. That the Petition was filed clandestinely without the consent and/or involvement of the objector. The objector further alleged that the Petitioner did not obtain a letter from the Chief of Ileho in Kakamega County where the Deceased hailed from.
 - 8. The Objector states that the Petition is fatally flawed and is marred with material non-disclosure as it failed to list all the true assets belonging to the Deceased.
 - 9. In response to this objection the Petitioner filed this Notice of Preliminary Objection dated 30th November 2022 which is premised on the following grounds:-

- “ 1. That the Notice of Objection dated 7th July 2022 is premature as the Petition for Grant of Letters of Administration has not been published in the Kenya Gazette as required under Rule 7(4) of the Probate and Administration Rules.
- 2. That the Objector has not complied with Rule 17 (5) of the Probate and Administration Rules relating to filing of a petition by way of cross-application.
- 3. That the Deceased and the petitioner were married on 22nd August 1981 under the Marriage Act (Cap 150) laws of Kenya which is a system of marriage which does not permit polygamy and accordingly the Objector WW is not a spouse recognized under the Marriage Act (No.4 of 2014) and accordingly section 3(5) and 40 of the Law Succession Act is not applicable to the Objector.
- 4. That in relation to minor JMA, there is no pending application for provision of dependency under section 26 of the Law Succession Act and accordingly the objection dated 7th July 2022 is premature.



5. That change of name by the Petitioner WWN to WWA through a Deed Poll is by itself not sufficient to confer to the said WW any rights or privileges of a spouse or wife in relation to the Estate of the Deceased.”

Analysis and Determination

10. I have carefully considered the Preliminary Objection filed by the Petitioner as well as the written submissions filed by both parties.
11. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd – vs West End Distributors Ltd* [1969] EA where 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 to the jurisdiction of the court or a plea of limitation or a submissions 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 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.”
12. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court of Kenya stated as follows:-

“a preliminary objection may only be raised on a “pure question of law”. 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.”
13. 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.
14. Therefore a genuine and proper Preliminary Objection can only raise points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.
15. I have considered the grounds raised by the Petitioner in the Preliminary objection. To my mind they are not points of law. The question of whether or not the petition has been gazetted is a matter of fact which will require the calling of evidence to prove.
16. Likewise the question of whether or not the Deceased and the Petitioner were married and the questions of whether the Objector is a spouse of the Deceased are not matters of law. These are issues which can only be determined after the court has heard evidence from both parties.
17. Similarly the question of whether the minor JMA is the biological child of the Deceased is a matter of fact which can only be determined upon calling of evidence.



18. Based on the foregoing I find no merit in the Notice of Preliminary Objection filed by the Petitioner. The same is dismissed in its entirety.
19. The Objector is directed to either file an Answer to the Petition for Grant in line with Rule 17 (b) of the *Probate and Administration Rules* together with a cross-petition or in the alternative the objector may await the issuance of Grant to the Petitioner and file an Objection to the same. Each party to meet their own costs.

DATED IN NAIROBI THIS 19TH DAY OF MAY, 2023.

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MAUREEN A. ODERO

JUDGE

SUCCESSION CAUSE NO. E1168 OF 2021 RULING Page 3

