



**In re Estate of Ruth Wambui Kirungu (Deceased) (Miscellaneous Application Probate & Administration E001 of 2023) [2023] KEHC 17430 (KLR) (16 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17430 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
MISCELLANEOUS APPLICATION PROBATE & ADMINISTRATION E001 OF 2023  
CM KARIUKI, J  
MAY 16, 2023  
IN THE MATTER OF THE ESTATE OF RUTH WAMBUI KIRUNGU – DECEASED**

**BETWEEN**

**DAVID MBURU MUIRURI ..... 1<sup>ST</sup> OBJECTOR  
SAMMY NJUGUNA MUIRURI ..... 2<sup>ND</sup> OBJECTOR  
PETER MWAURA KIRUNGU MBUTHIA ..... 3<sup>RD</sup> OBJECTOR**

**AND**

**JESSEE KAMAU MACHARIA ..... EXECUTOR**

**AND**

**SAMMY NJUGUNA MUIRURI ..... INTERESTED PARTY  
JANDE DIANA WAHITO ..... INTERESTED PARTY  
RICHARD MUIRURI MUNDIA ..... INTERESTED PARTY  
MILLICENT WAMBUI MUGADI ..... INTERESTED PARTY**

**RULING**

1. By Notice motion dated 14/2/2023. The Advocates for Objectors/Applicant sought orders.
  - a. That the deceased died on 20/7/2020, and since then, no succession proceedings have been taken out in relation to her estate.
  - b. That the Respondent and the interested parties have been intermeddling with the estate, demolishing structures, and taking unlawful possession of the estate without the authority and order of a court of competent jurisdiction



- c. It is in the estate's interest that the accompanying application be heard and determined urgently.
2. Attached is an original summon dated the event date, and a supporting affidavit was sworn by David Mburu Muiruri on 14/2/2023.
3. The Executor /Respondent opposes the same and has lodged a notice of preliminary objection dated 22/3/2023, which is anchored on the following grounds.
  - i. That the subject Summons offend both the procedural and substantive aspects of the Law of Succession Act (the "Act") and the Probate and Administration Rules (P & A Rules") as the movers do not fall under the ambit of "Objectors" as contemplated under Sections 68 and 69 of the Law of Succession Act, Rule 17 of the P&A Rules among other provisions of law relating to Succession.
  - ii. That the instant Summons ought to have been lodged within proceedings for grant of probate/ letters of administration and not as an independent Miscellaneous Cause.
  - iii. That the Objectors' pleadings are premature and incurably defective in law, considering that no citations have been issued against the Executor in line with Rule 21 of the P&A Rules.
  - iv. The Honourable Court has no jurisdiction to grant orders regarding property that was disposed of during the deceased person's lifetime since it does not form part of the deceased's estate.
  - v. At any rate, the Summons lack specificity regarding the precise particulars/registration details/ title numbers of the properties in respect of which injunctive/preservatory orders are sought.
  - vi. That all factors considered, the Objectors' proceedings are frivolous, vexatious, and an abuse of the court process
  - vii. Overall, the present proceedings need to be properly anchored in law warranting dismissal in limine.
4. Interested parties No 1-4 have also filed a replying affidavit to oppose the application aforesaid via an affidavit of Millicent Wambui Mugadi sworn on 13/4/2023.
5. Interested party Sammy Njuguna Muiruri has sworn an affidavit on 21/3/2023 to oppose the Application in issue parties via Advocates agreed to canvass preliminary objection via submissions. For that matter, only Executor had filed the same when drafting an instant ruling.

**Executors written submissions.**

6. Overall, the Executor contends that the present proceedings are not properly anchored in law and applies for dismissal of the same.
7. The "Objectors" very own pleadings, the following facts are easily decipherable. The deceased person died on July 20, 2020. (Refer to certificate of death annexed as "DMMA" in the deponents supporting Affidavit.) The deceased left a Will dated February 3, 2017 appointing Jesse Kamau Macharia as the Executor whereof. Refer to copy that will be annexed as "DMM2" in the deponents' supporting affidavit.) Proceedings for the Grant of probate are yet to be instituted by the Executor. The "Objectors" seek to invalidate the Will (refer to prayers in Originating Summons).



8. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“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 submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, Sir Charles Newbold, P stated:

“Preliminary objection is in the nature of what used to be a 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 if what is sought: is the exercise of judicial discretion. The improper raising of Preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issue, and this improper practice should stop.”

9. It is apt to reiterate from the pleadings on record that a Petition for grant probate is yet to be filed.
10. Who then comprises an "Objector" for purposes of the *Law of Succession Act*?
11. While the *Law of Succession Act* does not expressly define who an Objector is, they can be meaning can be inferred under Section 68 of the Act, which states as follows:

68. Objection to an application

- i. Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.
  - ii. Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.
12. Keenly examining the import of Section 68 of the *Act*, the following inferences can be made respecting Objectors: First, there must be an application for a grant of representation. Second, a Notice of Objection to the application must be lodged in the prescribed form. Third, the Notice of objection should be filed within the specified period.
13. The purported "Objectors" do not have *locus standi* to approach the Honourable court as "objectors" because there is no pending application for a grant of representation.
14. Additionally, the purported "Objectors" have not lodged the attendant notice as contemplated in the Act, which at any rate would be irregular since there is no petition for grant of representation.
15. In support of our submission, we wish to place reliance on the following case law:

*Edema & 2 others v Edema 5 others* (Miscellaneous Succession Cause E00I of 2022) [2022] KEHC 9960 (KLR) (6 July 2022) (Ruling)



16. Like in the present scenario, the applicants in the above case moved the court through an application before filing a substantive petition for the grant of letters of administration. Striking out the suit, the High Court held thus:

“The upshot is that the application dated March 28, 2022 is found to be without merit on the grounds that the applicants had no *locus standi* to file the application for lack of a grant of letters of administration and there being no existing suit. The application is hereby struck out”.

17. [\*In the matter of the Estate of Geoffrey Meitamei Lonina \(Deceased\)\*](#) [2012] eKLR.

18. In the afore-cited case, the applicant sought interlocutory orders in circumstances that were similar to this case, and the learned Judge, Dulu J, held as follows:

“Indeed, under section 45 (1) & (2) of the [\*Law of Succession Act\*](#) (Cap 160), this court has powers to protect the assets of a deceased person. However, in my view, only an administrator or an interested party in an existing administration cause can apply for the protection of the deceased's assets. In the present matter, no application for letters of administration has been filed under sections 51, 53 or 54 of the [\*Law of Succession Act\*](#). Therefore, the provisions of section 45 of the Act cannot be brought into play by the applicant. She has no Legal. standing in law to bring the present application. On that account, I find that the application is misconceived.”

19. On this ground alone, it is submitted that the entire proceedings are nullity *ab initio* and should be dismissed *in limine*.

20. Section 59 of the [\*Law of Succession Act\*](#) stipulates thus:

“A person whom a Will has appointed as an Executor thereof may, either by oral declaration before the court or by writing under his hand, renounce executorship and shall thereafter be finally precluded from applying for Grant of Probate of that Will.”

21. At this juncture, there is no allegation in the "Objectors" pleadings that the Executor herein has renounced his executorship.

22. Section 62 [\*LoS Act\*](#) continues to expound the point and provides thus:

“When a person whom a Will has appointed as an Executor thereof has not renounced the Executorship, Letters of Administration shall not be granted to any other person until a citation has been issued, calling upon the Executor to renounce his Executorship or apply for a Grant of Probate of the Will.”

23. The foregoing implies that before moving the court, the "Objectors" ought to have cited the Executor calling for him to renounce his executorship.

24. Notably, the requirement under section 62 of the [\*Act\*](#) as recapitulated above, is stated in mandatory terms leaving no room for the "Objectors" to approach the Honourable Court otherwise.

25. Court to allow the Executor's Preliminary Objection on this point.

26. From the prayers sought in the "Objectors" application, it is apparent that they are seeking orders of an injunctive nature against the Respondents.



27. However, it is notable that the purported Objectors still need to give the particulars of the specific parcels of land in respect of which interim orders are sought.
28. How, then, can injunctive orders be sought in a blanket manner?
29. The drafted summons needs to be more competent for lack of specificity and warrant striking out.
30. The orders sought in the objector's application cannot issue because they are blanket in nature.
31. But assuming that the injunctive orders sought to relate to the official searches supplied by the "Objectors," an examination of the same depicts that the properties in question are not in the Deceased's name. As such, they don't relate to the Deceased's estate.
32. It is submitted that, a grievance relating to property that is not in the name of a Deceased person is not a matter for succession proceedings. It belongs to the Environment and Land Court, designed under Article 165(5) of the Constitution to ventilate land disputes.
33. Respectfully, therefore, it is contended that the Honourable Court would not have jurisdiction to ventilate over land disputes as sought by the "Objectors."
34. Needless to say, jurisdiction is everything, and without it, a court has no power to make one more step as stated in the celebrated "Lilian S" case.
35. In a related case of Mariam Mathias Mwasi v Rama Adam [2020] eKLR) Musyoka, J had this to say:
 

“Moreover, such a question usually Presents a jurisdictional issue, especially where the property disputed island. Under Kenya Law, not all the courts have jurisdiction over land matters, and, before a court seized of a succession or probate cause proceeds to consider whether an asset placed before it for distribution formed part of the estate of the deceased, it should first ask itself whether it has jurisdiction to determine land questions that revolve around the issue of ownership and related matters.”
36. Properly assessing the documents supplied by the "Objectors," we invite My Lord to agree with us that the dispute sought to be ventilated by the "Objectors" far transcends the ambit of a succession cause.

### **Issues Analysis And Determination**

37. The court has gone through the pleadings and submissions and thus finds issues to be whether the PO has merit. And what is the order as to costs?
38. It is trite law that, A preliminary objection refers to the point of law raised by a defendant, usually at the preliminary stage of a suit. If the court upholds the objection, that renders the rest of the proceedings impossible or unnecessary, and consequently, the case will be dismissed. See 'Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696',
39. In the Mukisa Biscuit case, Justice Newbold cautioned,
 

“A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse the issues. This improper practice should stop.”
40. The grounds in support of PO are that; That the movers of the proceedings have no locus standi as they do not comprise "Objectors" as contemplated under Sections 68 and 69 of the Law of Succession



Act, Rule 17 of the Probate and Administrative Rules (P & A Rules), among other provisions, the proceedings are premature, incurably defective, and bad in law, considering that no citations have been issued against the Executor in line with Rule 21 of the P & A Rules, the court has no jurisdiction over property that does not comprise the Deceased's estate and that, the orders sought in the interlocutory application are blanket in nature and lacking in the specification as to the particulars of the properties in question.

41. The "Objectors" very own pleadings state that the deceased person died on July 20, 2020. (Refer to certificate of death annexed as "DMMA" in the deponents supporting Affidavit.) The deceased left a Will dated February 3, 2017 appointing Jesse Kamau Macharia as the Executor whereof. Refer to copy that will be annexed as "DMM2" in the deponents supporting affidavit.) Proceedings for the Grant of probate are yet to be instituted by the Executor, and the "Objectors" seek to invalidate the Will (refer to prayers in Originating Summons).
42. It is apt to reiterate from the pleadings on record that a Petition for grant probate is yet to be filed. Who then comprises an "Objector" for purposes of the Law of Succession Act?
43. While the Law of Succession Act does not expressly define who an Objector is, the meaning can be inferred under Section 68 of the Act, which states as follows:

Notice of any objection to an application for a grant of representation shall be lodged with the court in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.

Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.
44. Keenly examining the import of Section 68 of the Act, the following inferences can be made respecting Objectors:

First, there must be an application for a grant of representation.

Second, a Notice of Objection to the application must be lodged in the prescribed form.

Third, the Notice of objection should be filed within the specified period.
45. The purported "Objectors" do not have Locus standi to approach the Honourable court as "objectors" because there is no pending application for a grant of representation. Additionally, the purported "Objectors" have not lodged the attendant notice as contemplated in the Act, which at any rate would be irregular since there is no petition for grant of representation. See Edema & 2 others v Edema 5 others (Miscellaneous Succession Cause E00I of 2022) [2022] KEHC 9960 (KLR) (6 July 2022) (Ruling)
46. At this juncture, there is no allegation in the "Objectors" pleadings that the Executor herein has renounced his executorship. Section 62 LoS Act continues to expound the point and provides thus:

“When a person whom a Will has appointed as an Executor thereof has not renounced the Executorship, Letters of Administration shall not be granted to any other person until a citation has been issued, calling upon the Executor to renounce his Executorship or apply for a Grant of Probate of the Will.”
47. The foregoing implies that before moving the court, the "Objectors" ought to have cited the Executor calling for him to renounce his executorship.



48. Notably, the requirement under section 62 of the [Act](#), as recapitulated above, is stated in mandatory terms leaving no room for the "objectors" to approach the honourable court otherwise.
- i. Thus, the court finds merit in the Preliminary Objection and strikes out the entire objectors pleadings with costs to the executor.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 16<sup>TH</sup> DAY OF MAY 2023.**

**CHARLES KARIUKI**

**JUDGE**

