



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Kassim Hassan Malambu (Deceased) (Succession Cause
238 of 1986) [2023] KEHC 17933 (KLR) (Family) (15 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17933 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 238 OF 1986

MA ODERO, J

MAY 15, 2023

IN THE MATTER OF THE ESTATE OF KASSIM

HASSAN MALAMBU (DECEASED)

BETWEEN

JEDIDAH NGINA KIBUNA APPLICANT

AND

LUCY KASSIM MALAMBU 1ST RESPONDENT

FATUMA KASSIM MALAMBU 2ND RESPONDENT

MARIAM KASSIM MALAMBU 3RD RESPONDENT

HASSAN KINEIYA MALAMBU 4TH RESPONDENT

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated September 17, 2020. The Respondent opposed the Preliminary Objection through their reply dated April 15, 2021. The matter was canvassed by way of written submissions. The Applicants /interested Party filed the written submissions dated February 15, 2021 whilst the Respondent filed the written submission dated April 13, 2021.

Background

2. This Succession Cause relates to the estate of the late Kassim Hassan Mulambu (hereinafter ‘the Deceased’) who died intestate on October 9, 1983. Following the demise of the Deceased a certificate of confirmed Grant was on September 25, 1987 issued to Miriam Kassim (the 3rd Respondent.)



3. The Applicant herein Jedida Ngina Kibuna filed a summons dated November 27, 2020 seeking the following orders:-

“ 1. Spent

2. That pending the hearing and determination of this application, this Honourable court do issue an order of temporary injunction restraining all the Respondents, their agents, servants, nominees and any such persons from subdividing, selling, charging, leasing and or in any manner whatsoever interfering with the following parcels of land, being the subject matter of the judgement made by Honourable Justice R E Ougo in favour of the 1st and 2nd Respondents herein and delivered on February 21, 2019.

A. Ngong/ngong 44288

B. Ngong/ngong/62326

3. That this court do issue an order of temporary injunction restraining all the Respondents, their agents, servants, nominees and any such persons from subdividing, selling, charging, leasing and or in any manner whatsoever interfering with the suit properties listed in prayer 2 above.

4. That this honourable court be pleased to set aside the orders emanating from the said judgement, certificate of confirmation of grant issued thereon be cancelled and all or any transactions carried out in its strength be nullified.

5. That the honourable court be pleased to issue such orders as it may deem fit to meet the ends of justice.

6. That the costs of this application be provided for.

5. The Applicant sought orders to restrain the Respondents (who are the beneficiaries of the estate of the Deceased) from subdividing, selling, charging, farming, leasing or in any other manner whatsoever interfering with the parcels of land known as LR NGong/ngong/44288 And Lr Ngong/ngong/62326 (hereinafter jointly referred to as ‘the suit property’)

6. In response to the summons filed by the Applicant, the Respondents filed the Notice of Preliminary Objection dated September 17, 2020 which Notice was premised on the following grounds:-

1 The application as filed relates to land ownership and as such should have been filed at the Environment and Land Court ab initio.

2 This Honourable court lacks jurisdiction to adjudicate upon this matter.

3 The applicant herein has no locus standi for she is neither a party in, nor does she have leave to be joined as an interested party to the succession cause.

4 Therefore, the application herein ought to be struck out in toto with costs.”

7. The Applicant filed a Replying Affidavit dated February 15, 2021 opposing the Notice of Preliminary Objection.



Analysis and Determination

8. I have considered the Preliminary Objection raised by the Respondent the Reply filed by the Applicant as well as the written submissions filed by both parties. The only issue for determination is whether the Preliminary Objection has merit and should be allowed.
9. The definition of what constitutes a Preliminary Objection was provided in the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] E A 696 where it was held as follows:-

“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 the pleadings and which if argued as a Preliminary point may dispose of the suit”.
10. Similarly in the case of *Oraro vs Mbaja* [2005] KLR Hon Justice Ojwang (as he then was) stated as follow:-

“A preliminary objection is in 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop. The principle is abundantly clear. The “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.” [own emphasis]
11. The issues which have been raised by the Preliminary Objection being issues of jurisdiction and *locus standi* are in my view issues which upon determination may dispose of the application. I therefore find that the Preliminary Objection dated September 17, 2020 raise pure points of law and is a proper Preliminary Objection.

Jurisdiction

12. The Respondents contend that the issues which have been raised by the Applicant in the summons dated November 27, 2020 are matters which touch on the question ownership and occupation of land and as such ought to be litigated in the Environment and Land Court.
13. A clear reading of the prayers on the summons dated November 27, 2020 reveals that the Applicant are infact seeking conservatory orders in respect of the two properties cited in the summons pending the hearing and determination of summons seeking revocation/cancellation of Grant.
14. This is a family court and this matter was filed as a Succession Cause. The duty of a Probate Court is to oversee the transmission of the estate of the Deceased to the genuine and recognized beneficiaries.



The purpose of a succession cause is to ascertain the assets and liabilities of the estate, the identity of the beneficiaries and the mode of distribution of the estate.

15. Vide a judgement delivered on February 21, 2019, Hon Lady Justice Rose Ougo declined an application to revoke the Grant and distributed the suit properties equally to the 1st Respondent Lucy Kassim Malambu And The 2Nd Respondent Fatuma Kassim Malambu.
16. The applicant claims that she entered into a sale agreement with the 3rd Respondent Miriam Kassim Malambu with respect to L R No Ngong/Ngong/44288. The Applicant therefore claims to have a proprietary interest in the suit properties.
17. The Respondents position is that this court lacks jurisdiction over the matter as the Applicant claim revolves around ownership of the suit properties. That also at time did the 3rd Respondent ever inform the court that she had entered into a Sale Agreement with the Applicant before the Grant was confirmed. The Respondents argued that the Applicant's claim to the suit properties could only be determined by the Environment and Land Court.
18. The question of whether the two (2) parcels of land belonged to the Applicant or to the estate of the Deceased is not one which this court sitting as a Probate Court has jurisdiction to determine.
19. Matters relating to the ownership use and occupation of land have now under Article 162 of the Constitution of Kenya 2010 been mandated to be determined by a specialized court being the Environment and Land Court ('ELC').
20. Section 13 of the Environment and Land Court Act provides for the jurisdiction of that court as follows:-
 13. Jurisdiction of the Court
 - 1 The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - 2 In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes——
 - a relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b relating to compulsory acquisition of land;
 - c relating to land administration and management;
 - d relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e any other dispute relating to environment and land. [Rev 2012] No 19 of 2011 Environment and Land Court 9 [Issue 1]
21. Therefore, the correct and proper forum before which the parties ought to ventilate their claim to the suit land is the ELC. The Environment and Land Court is the only court exclusively mandated by law to determine the question of 'ownership' of the suit properties.



22. *In Re Estate Of Stone Kathubi Muinde (Deceased)* [2016] eKLR Hon Justice William Musyoka held that:-

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.” [own emphasis]

23. It is only once the ELC has determined who is the rightful owner of the suit land that the Decree may be pronounced to this court for implementation.

24. The Applicant is not a beneficiary to the estate of the Deceased. She is one who claims to be a ‘purchaser’ of part of the estate. The Applicant’s claim to estate land has not as yet ‘crystallized’ and as such cannot be enforced by this Probate Court.

25. In *Alexander Mbaka – vs Royford Muriuki Rauni & 7 others* [2016] eKLR, it was held thus:-

“It is only where one has established claim against the estate that has already crystalised that he can litigate it before a Family Court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystalised. The right must be shown to have crystalised before the Family Court can entertain it.” [own emphasis]

26. It is only when and if the Applicant’s claim to the suit properties is upheld by the ELC that she can bring the decree to this court for implementation. At the present time the Applicant as a purchaser does not have locus standi in the Succession Cause.

27. Finally I uphold the Preliminary Objection dated September 17, 2020. The summons dated November 27, 2020 is hereby struck out. Each party to bear their own costs.

DATED IN NAIROBI THIS 15TH DAY OF MAY, 2023.

MAUREEN A ODERO

JUDGE

