



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kungu v Ndekele (Miscellaneous Succession Cause E005 of 2021)  
[2023] KEHC 17834 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17834 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
MISCELLANEOUS SUCCESSION CAUSE E005 OF 2021**

**GL NZIOKA, J**

**MAY 8, 2023**

**BETWEEN**

**ANDREW MWAURA KUNGU ..... APPLICANT**

**AND**

**ERASTUS GEORGE MANYAGI NDEKELE ..... RESPONDENT**

**RULING**

1. The applicant filed an application dated September 21, 2021, brought under sections 47, and 76 (a) (b) and (c) of the *Law of Succession Act* (Cap 160) Laws of Kenya (herein “the Act”), and Rules 17 (2), 44(1) and 73 of the *Probate and Administration Rules* seeking for orders: -
  - a. Spent
  - b. That this Honourable court be pleased to suspend all other or further actions of implementation of the grant of letters of administration as litem issued on December 7, 2018, in Naivasha Chief Magistrates Succession Case No 271 of 2018, in the matter of the Estate of Daniel Mugo Ole Kimelok and Tentemu Ole Kimelok.
  - c. That this Honourable court be pleased to exercise its supervisory powers by calling the entire file Naivasha Chief Magistrates Succession Case No 271 of 2018, in the matter of the Estate of Daniel Mugo Ole Kimelok and Tentemu Ole Kimelok for purposes of verifying and ascertaining its contents, correctness or otherwise.
  - d. That this Honourable court be pleased to nullify the grant of letters of administration given to the respondent on December 7, 2018, in the matter of the Estate of Daniel Mugo Ole Kimelok and Tentemu Ole Kimelok.
  - e. That the costs of this application be borne by the respondent.



2. The respondent opposed the application vide a notice of preliminary objection dated February 22, 2022 on the ground that, this Honourable court lacks jurisdiction to review the decision in Naivasha Succession No 271 of 2018, pursuant to Act.
3. The application was disposed of by way of written submissions. The applicant filed submissions dated September 5, 2022 and argued that the respondent did not indicate the section of law he relies upon in bringing the preliminary objection. Further, section 76 of the Act provides the circumstances when an annulment can be sought, while Rule 44 of the *Probate and Administration Rules* states that a party seeking to have a grant revoked or annulled shall apply to the High Court.
4. That the application herein seeks to nullify a grant and that it is not a review as alleged by the respondent and therefore can be filed in the High Court or Lower court. Further, the applicant has the necessary locus and therefore the application is valid and the preliminary objection should be dismissed with costs.
5. The respondent did not file his submissions. Be that as it may, the jurisdiction of the High Court is provided for under Article 165 (3) of the *Constitution of Kenya* which states as follows:

- "(3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
  - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
  - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
    - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
    - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
    - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
    - (iv) a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation."

6. It is also noteworthy jurisdiction is everything and where it raised as an issue for determination, it must be determined at the earliest, for if the court were to find that, it has no jurisdiction, then it has no



other option but to down its tools, as held by; Nyarangi JA in the case of; *Owners of the Motor Vessel Lillian "ss" versus Caltex Oil (Kenya) Ltd* [1989] KLR, that: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

7. Pursuant to the aforesaid it suffices to note that jurisdiction flows from either the *Constitution* or Legislation or both. The court cannot arrogate itself jurisdiction as held by the Supreme Court in the case of; *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR that:

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

8. Be that as it may, the question that arises is whether the issue raised herein is appropriate issue to be raised as preliminary objection. The meaning of a preliminary objection was discussed in the case of; *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696 by D-F Law JA 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 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.”

9. The issue of jurisdiction is a pure issue of law as by the Supreme Court of Kenya in *Mary Wambui Munene v Peter Gichuki King'ara & 2 others* [2014] eKLR therefore, the preliminary objection is properly before the court.

10. To revert back to the matter herein, under article 165 (3) referred herein this court has unlimited original, appellate constitutional and supervisory jurisdiction. The applicant has not indicated which of the afore jurisdiction is invoked herein. Therefore, the jurisdiction is not properly invoked.

11. In fact, the applicant conceded that this matter can still be heard in the lower court. That is the correct position. If the lower court can annul the grant on the grounds alluded to then this matter cannot be entertained herein.

12. Therefore, the preliminary objection is upheld. The summons for annulment of grant dated September 2, 2022 is struck out with costs.

**DATED, DELIVERED AND SIGNED THIS 8<sup>TH</sup> DAY OF MAY 2023.**

**GRACE L. NZIOKA**

**JUDGE**

**In presence of:**

**N/A for the applicant**



**N/A for the respondent**  
**Ms. Ogutu court assistant**

