



In re Estate of Abdulkadir Musse Farah (Deceased) (Succession Cause 691 of 2019) [2023] KEHC 19010 (KLR) (Family) (12 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19010 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 691 OF 2019
MA ODERO, J
JUNE 12, 2023
IN THE MATTER OF THE ESTATE OF ABDULKADIR MUSSE FARAH (DECEASED)
BETWEEN
SAHRO MAHDI ABDI 1ST APPLICANT
MARYAN ABDULKADIR MUSSE 2ND APPLICANT
AND
FADUMA MOHAMED RESPONDENT

RULING

1. Before this Court for determination is the notice of preliminary objection dated January 26, 2023 filed by the Petitioner/Respondent Faduma Mohamed. The Applicants Sahro Mahdi AbdI and Maryan Abdulkadir Musse opposed the Preliminary Objection
2. The matter was canvassed by way of written submissions. The Respondents filed the written submissions dated February 7, 2023 which the Applicant filed the written submissions dated February 3, 2023.

Background

3. This Succession Cause relates to the estate of the late Abdulkadir Musse Farah (hereinafter ‘the Deceased’) who died intestate November 17, 2016. The original copy of the Death Certificate Serial Number xxx issued in Ontario Canada is annexed to the Petition for Grant of letters Administration. Intestate dated October 16, 2019.
4. According to the Chief’s letter dated January 25, 2019 the Deceased was survived only by his widow Faduma Mohamed and no children.



5. Following the demise of the Deceased the Respondent, sought and obtained a Grant of letters of Administration Intestate dated October 30, 2020. Thereafter the certificate of confirmed Grant dated June 22, 2021 was issued to the Respondent which indicated that the entire estate of the Deceased would devolve to the Respondent.
6. On 7th March 2022 the 1st and 2nd Applicants filed a summons seeking revocation of the Grant issued to the Respondent. The Applicants claimed that they are the surviving wife and daughter respectively of the Deceased. They claim that the Respondent secretly and without giving any notice to the Applicants proceeded to apply for a Grant and to have the said Grant confirmed. The Applicants deny that the Respondent is the sole beneficiary of the estate.
7. Aside from the 1st and 2nd Applicants one Ali Muse Farah who states that he is a half-brother of the Deceased has filed various applications in this matter.
8. The Respondent then filed this Notice of Preliminary Objection opposing the various applications filed by the said Ali Muse Farah. The Preliminary Objection was premised upon the following grounds:-
 - 1) Ali Farah lacks the *locus standi* and/or the capacity to represent the named/alleged Applicants herein (i.e. Sahra Mahdi Abdi & Maryan Abdulkadir Musse) in this matter and/or Succession Cause and is an absolute stranger to this court.
 - 2) The Applications dated March 7, 2022, March 8, 2022, July 28, 2022, September 15, 2022 and November 14, 2022 offend section 29 of the *Law of Succession Act* cap 160 of the Laws of Kenya; offend section 4 & 9 of the *Registration of Documents Act*, cap 285 and are a nullity *ab initio*; are grossly incompetent and a blatant abuse of this Hon. Court. The same ought to be struck out forthwith.
 - 3) The Powers of Attorney allegedly issued by Sahra Mahdi Abdi and Maryan Abdulkadir Musse on July 28, 2018 offend section 4 & 9 of the *Registration of Documents Act*, cap 285 are a nullity *ab initio* and ought to be struck out.
 - 4) Ali Muse Farah continued possession of all assets to the deceased estate in toto defiance of all existing court orders, including the certificate of grant herein, amounts to intermeddling and offend section 45 of the *Law of Succession Act* and section 45(1) and (2) (a) of the *Penal Code*, penal action should be taken against Ali Mussa Farah .”

Analysis and Determination

9. I have carefully considered the preliminary objection filed by the Petitioner as well as the written submissions filed by both parties.
10. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd v 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.”

11. 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.”

12. 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.
13. 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.
14. By this Preliminary Objection the Respondent asserts that Ali Muse Farah has no *locus standi* in this matter and cannot purport to be acting on behalf of the 1st and 2nd Applicants who claim to be the widow and daughter of the Deceased.
15. ‘Locus standi’ is a Latin term which literally means “place of standing” and refers to the capacity of a party to participate in a suit. It is trite law that without requisite locus standi one cannot participate in a suit or action. Therefore I am satisfied that this is a genuine preliminary point which has the potential to determine the entire matter.
16. The said Ali Muse Farah is purporting to act in the matter on behalf Sahro Mahdi Abdi (1st Applicant) and Maryan Abdulkadir Musse (the 2nd Applicant). The Respondent challenges the validity of the power Attorney issued to Ali Muse Farah by the Applicants on which the latter relies to file applications in this matter.
17. Annexed to the Supporting Affidavit dated November 14, 2022 sworn by Ali Muse Farah is a Representative Authorization dated 27th July 2018. (Annexure AMF ‘1’) This is the power of Attorney which was issued by the 1st Respondent in Toronto, Canada granting to her brother-in-law authority to “undertake all necessary legal and other administrative steps to deal with the properties and assets” of the Deceased, and granting to the said Ali Muse Farah authority to administer the estate of the Deceased.
18. *Black’s law Dictionary* Tenth Edition defines a power of Attorney as :-
- “an instrument granting someone authority to act as agent or attorney-in-fact for the grantor’[donee]
19. A look at the Representative Authorization produced by Ali Muse Farah reveals that the same was properly executed by the 1st and 2nd Applicants in Toronto, Canada on July 27, 2018 and the same was properly executed and witnessed before a Notary Public. It is therefore a legal document.



20. Section 9 of the Registration of Documents Act Cap 285, Law of Kenya provides as follows:-

“Every document the registration whereof is compulsory shall be registered within two months after its execution and if executed outside Kenya it shall be registered within two months after its arrival in Kenya.” [own emphasis]

21. In the present case there is no evidence that this Representative Authorization issued by the Applicants in favour of the Ali Muse Farah was ever registered at all in Kenya. What then is the effect of non-registration of the document?

22. In Sanjay Varma & 2 others v Jackson Eshiwani Likoye & 7 others [2020] eKLR a case similar to the present one Hon. Justice Ombwayo held as follows:-

“The Powers of attorney that the 1st Plaintiff sought to produce were executed in the United Kingdom and not registered in Kenya as required under section 44 (4) of the Land Registration Act, therefore he lacked the capacity to be enjoined in the suit and the evidence he tendered ought to be disregarded.....”

23. Likewise in the case of Kenneth Omollo Simbiri & another v Daniel Ongor [2020] eKLR Hon Justice Dr Odeny stated as follows:-

“Further, section 9 of the Registration of Documents Act cap 285 provides that every document the registration whereof is compulsory shall be registered within two months after its execution, and if executed outside Kenya it shall be registered within two months after its arrival in Kenya. There is further no evidence that this provision was complied with.

Section 4 of the Registration of Documents Act provides that:-

“All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:.....

A power of Attorney being one of the said documents that confers rights, it then follows that as the instant Power of Attorney in issue herein was dealing with immovable property hence it needed to be registered before it could be used. [own emphasis]

24. The document which Ali Muse Farah seeks to rely upon to act on behalf of the Applicants has not been registered in Kenya as required by section 9 of the Registration of Documents Act. Therefore the Power of Attorney purportedly issued to Ali Muse Farah is null and void. Accordingly the said Ali Muse Farah lacks legal capacity to act in this matter.

25. Finally I find that the said Ali Muse Farah is not being a beneficiary to the estate of Deceased has no ‘*locus standi*’ in this matter. Accordingly I find merit in the Preliminary Objection dated January 26, 2023. The Applications dated March 7, 2022, March 8, 2022, July 28, 2022, September 15, 2022 and November 14, 2022 having been filed by a person who has no *locus standi* are fatally defective and cannot be entertained by this court. The said applications are hereby struck out. Costs will be met by Ali Muse Farah.

DATED IN NAIROBI THIS 12TH DAY OF JUNE, 2023.

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MAUREEN A. ODERO
JUDGE

