



In re Estate of Benedict Wakaba Kihui (Deceased) (Succession Cause E2080 of 2021) [2023] KEHC 22389 (KLR) (Family) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 22389 (KLR)

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

FAMILY

SUCCESSION CAUSE E2080 OF 2021

MA ODERO, J

JULY 21, 2023

BETWEEN

MARY NJAHIRA WAKABA APPLICANT

AND

DAVID KIHUI WAKABA RESPONDENT

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated April 27, 2022 which was filed by the Applicant David Kihui Wakaba. The Objector Mary Njahira Wakaba opposed the Preliminary Objection.
2. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated September 21, 2022 whilst the Respondent relied upon his written submissions dated August 3, 2022.

Background

3. This Succession Cause relates to the estate of the late Benedict Wakaba Kihui who died intestate on April 9, 2021. A copy of the Death Certificate serial number xxxx is annexed to the Petition for Grant of letters of Administration dated September 13, 2021. The Deceased was said to have been survived by the following persons:-
 - a) Lucy Wanjiru Wakaba Kihui - Widow (deceased)
 - b) Mary Njahira Wakaba - Widow
 - c) David Kihui Wakaba - son
 - d) Mathew Njoroge Wakaba - Son



- e) Ruth Muthoni Wakaba - Daughter
 - f) Naomi Njoki Wakaba - Daughter
4. The estate of the deceased was said to be comprised of the following assets:-
- a) Nairobi Block 105/12434
 - b) Nairobi Block 105/12439
 - c) Nairobi Block 105/387
 - d) Nairobi Block 105/5358
 - e) Nairobi Block 105/5359
 - f) Nairobi Block 105/4473
 - g) Nairobi Block 136/6771
 - h) Nairobi Block 136/6778
 - i) Nairobi Block 136/6779
 - j) Nairobi Block 136/18809
 - k) Ngubiri/Thigio/934
 - l) Ndumberi/Riabai/2273 (1/8 share)
 - m) Shares in Mboi-i-Kamiti Farmers
 - n) A/C NO 00201XXXXXXXXX – Equity Bank Branch
5. Following the demise of the Deceased his son David Kihui Wakaba petitioned the court for Grant of letters of Administration. The Grant was duly issued to him on March 18, 2022. That Grant is yet to be confirmed.
6. The Objector herein who is the second wife of the Deceased filed a summons for revocation of Grant dated April 27, 2022. The Objector alleged that the Grant was obtained by non-disclosure of material facts and that some of the beneficiaries of the estate had been excluded. The Objector further alleged that she had been forced to sign a document whose contents she was unaware of.
7. In response to the summons for revocation of Grant the Petitioner filed this Notice of Preliminary Objection which was premised upon the following grounds:-
- ' 1. The application is frivolous, vexatious and is an abuse of the process of the honourable court given that the applicant executed/signed all the documents pertaining to the petition leading to the issuance of the grant herein.
 - 2. The matters raised in the application are speculative and prematurely raised and only serve to impede the confirmation of the grant in issue.
 - 3. The application should be dismissed in limin for lack of merits to allow the matter move forward.'
8. On her part the Objector prayed that the Preliminary Objection be dismissed in its entirety.



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 – 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.'
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. The Preliminary Objection in my view raises issues which are not pure points of law. The question of whether having signed documents relating to the Petition, the objector can later apply to revoke the Grant is a matter of fact and not a point of law.
15. Likewise question of whether the matters raised in the summons for revocation of Grant are purely speculative is not a point to law but is a matter of fact which can only be determined once evidence is heard from the parties.
16. Based on the foregoing I find no merit in the Notice of Preliminary Objection dated April 27, 2022. The same is dismissed in its entirety. Cost will be born by the Applicant/Petitioner.

DATED IN NAIROBI THIS 21ST DAY OF JULY, 2023.

MAUREEN A. ODERO

JUDGE

