



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**ELC CASE NO. 2 OF 2021**

AGNES WANGARI RIANO.....1<sup>ST</sup> APPELLANT/ OBJECTOR

DANIEL WAWERU RIANO.....2<sup>ND</sup> APPELLANT/ OBJECTOR

{Suing as the personal/legal representatives of Samuel Riano Mwangi (Deceased)}

**-VERSUS-**

STEPHEN KIMEMIA WAINAINA.....1<sup>ST</sup> RESPONDENT

WAINAINA KIMEMIA.....2<sup>ND</sup> RESPONDENT

LAND REGISTRAR MURANG'A.....3<sup>RD</sup> RESPONDENT

**RULING**

By a Notice of Preliminary Objection dated 30<sup>th</sup> August 2021, brought by the Appellants/ Objectors on the grounds that;

- 1. The 1<sup>st</sup> Respondent is deceased and no letters of administration have been obtained to enable the estate of the deceased to give instructions to the advocates of the 1<sup>st</sup> Defendant to file a Bill of Costs.**
- 2. That the Bill of costs filed herein is an abuse of the process of Court as the death of the Client terminates an Advocate's authority to act and should be struck out in limine.**

The **Notice of Preliminary Objection** was canvassed by way of written submissions and the Appellants/Objectors through the **Law Firm**

**of Maguta Kimemia & Associates Advocates**, filed their submissions dated **12<sup>th</sup> September, 2021**, and submitted that the law on Preliminary objections was well settled and that a Preliminary Objection should be on a pure point of law. The Appellants /objectors relied on the case of **Muhu Holdings Limited vs. James Muhu Kangari (2019) EKLK**. They submitted further that Advocates are agents of Clients and when the principal (the Client) dies, the Advocates client relationship dies.

It was the Appellants/Objectors' submissions that although each Advocate has a duty to contend with zeal, the rights of his client, he owes an affirmative duty of candour and frankness to the court when such a major event as death to the client takes place.

That the death of a client terminates the Advocate's authority to act and without authority from the deceased client's administrator, the said advocate is without authority to act. That in the instant case, the 1<sup>st</sup> Respondent was sued as the legal representative of his deceased mother concerning the suit land which is the subject matter of the Appeal herein. That the said suit property vested in the 1<sup>st</sup> Respondent, who was the instructing client relating to matters of the suit property and the 2<sup>nd</sup> Respondent had only been sued as trespasser on the suit premises. That upon the death of the 1<sup>st</sup> Respondent, his Advocates could only receive instructions from substituted administrators which was yet to be done. It was the Appellants/Objectors submission that without letters of administration, the 1<sup>st</sup> Respondents Advocate lacked authority to file the Bill of Costs dated **11<sup>th</sup> August 2021**.

The Appellants/Objectors relied on **Section 79 of the Succession Act, Cap 160 Laws of Kenya and the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, June 2016**. They also relied on the cases of **Sarah Gathoni Muiruri and Another vs. Wanjiru Kiguru (2019) Eklr**, and the case of **Keziah Gathoni Supeyo vs. Yano & Co. Advocates (2019) Eklr**, and urged the

Court to strike out the Bill of Costs dated 11<sup>th</sup> August 2021.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents through the **Law Firm of Kirubi, Mwangi Ben & Company Advocates**, filed then submissions dated **1<sup>st</sup> September 2021** on **21<sup>st</sup> September, 2021**, and submitted that the Eulogy was not a Death Certificate and it was therefore not per se evidence admissible to prove death of the 1<sup>st</sup> Respondent. That, notwithstanding, the subject Appeal was against two Respondents **Stephen Kimemia Wainaina** (said to be deceased) and **Wainaina Kimemia**, who was alive. That the said Respondents were sued jointly and severally. In support of their submissions the 1<sup>st</sup> and 2<sup>nd</sup> Respondent relied on the cases of **Cecilia Karuru Ngayu vs. Barclays Bank of Kenya and another (2016) Eklr** and **William Mukui Nyaga vs. Joseph Kimemia Muthodu & 2 Others (2020) Eklr**, and urged the Court to dismiss the **Preliminary Objection** and issue and Order allowing the **Bill of Costs** dated **11<sup>th</sup> August 2021**, to proceed to taxation.

The Court has now carefully read and considered the **Notice of Preliminary Objection**, the written submissions and the Pleadings in general and finds that the issue for determination is *whether the Notice of Preliminary Objection is merited*

A Preliminary Objection was described in the ***Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696*** to mean:-

**“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 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.”**

Further Sir ***Charles Nebbold, JA*** stated that:-

**“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 the facts pleaded by the other side are correct. It cannot be raised if any fact had 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”**

The above being the description of Preliminary Objection, it is evident that a **Preliminary Objection**, raises a pure point of law, which is premised on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or where the court is called upon to exercise judicial discretion.

In determining a *Preliminary Objection*, the Court will take into account that a **Preliminary Objection** must stem from the pleadings and that it raises pure point of law. See the case of ***Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004***, where the court held that:-

**“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”**

In the instant case, the Appellants/Objectors have invited the Court to dismiss the Bill of Costs dated **11<sup>th</sup> August, 2021** on the account that the 1<sup>st</sup> Respondent is deceased and no letters of Administration have been obtained. The Appellants/ Objectors went ahead to annex to their **Preliminary Objection** a Eulogy of the **Late Stephen Kimemia Wainaina**, as evidence to these allegations. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their submissions did not confirm or deny the death of the 1<sup>st</sup> Respondent. However, they submitted that a Eulogy is not in itself conclusive evidence of prove of death.

The Question before the Court therefore is whether the Notice of Preliminary Objection as raised herein satisfy the ingredients of a *Preliminary Objection*? The Court will be persuaded by the findings in the case of ***Oraro...Vs...Mbaja (2005) 1KLR 141***, where the Court held that:-

**“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”**

The Court finds that for it to ascertain whether the 1<sup>st</sup> Respondent is deceased, it will have to ascertain and probe evidence. Further, the Court will have to probe the Eulogy placed before it to ascertain its

authenticity and its evidentiary weight. In the case of ***Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC***

***No. 22 of 1999***, the Court held that: -

**“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”**

See also the case of ***United Insurance Co. Ltd...Vs...Scholastica A. Odera, Kisumu HCCA No.6 of 2005***, where the court held that: -

**“A Preliminary Objection must be based on a point of law which is clear and beyond doubt and Preliminary Objection**

**which is premised on facts which are disputed cannot be used to determine the whole matter as facts must be precise and clear to enable the court to say the facts are not contested or disputed.”**

From the above analysis, it is not in doubt that for the Court to ascertain whether the instant Preliminary Objection is merited, the Court will have to ascertain and probe evidence. Therefore, this Court finds and holds that grounds **No.1 and 2 of the Notice of Preliminary objection dated 11<sup>th</sup> August 2021**, are not pure points of law as they are not capable of disposing off the matter preliminarily without calling for evidence, probing the same and the Court ascertaining facts from elsewhere and thus the same are not properly raised in the Preliminary Objection

Consequently, the Court finds and holds that the **Notice of Preliminary Objection is not merited** and the same is dismissed entirely with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2021**

**L. GACHERU**

**JUDGE**

**In the presence of;**

**Kuiyaki & Alex.....Court Assistants**

**No Appearance.....for the 1<sup>st</sup> Appellants/Objectors**

**No Appearance.....for the Respondents**

**L. GACHERU**

**JUDGE**