



REPUBLIC OF KENYA



**In re Estate of Peter Nganga Muchene (Deceased) (Succession Cause  
154 of 2000) [2023] KEHC 24452 (KLR) (Family) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24452 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 154 OF 2000  
MA ODERO, J  
OCTOBER 19, 2023**

**BETWEEN**

**MARGARET WAITHIRA NGANGA ..... 1<sup>ST</sup> ADMINISTRATOR**

**JANE WAIRIMU MBATIA ..... 2<sup>ND</sup> ADMINISTRATOR**

**AND**

**OLKERI WATER PROJECT (SUING THRO DOMIANO PAGRE SHIRA  
KAMAMA & PATRICK KARIUKI) ..... PROTESTOR**

**RULING**

1. Before this Court for determination is the Notice of Preliminary Objection dated 7<sup>th</sup> December 2022 filed by the Administrators Margaret Waithira Nganga and Jane Wairimu Mbatia

2. The Preliminary Objection was opposed.

This matter relates to the estate of the late Peter Nganga Muchene who died intestate on 7<sup>th</sup> March, 1994. Following the demise of the Deceased his widow and daughter sought and were on 22<sup>nd</sup> April 2005 issued with Grant of letters of Administration Intestate. The Grant is yet to be confirmed.

3. The Protestors Olkeri Water Project (suing Thro Domiano Pagre Shira Kamama & Patrick Kariuki) then filed the chamber summons dated 7<sup>th</sup> December 2022 seeking the following orders:-

“ 1. Spent.

2. That this Honourable Court be pleased to issue orders of injunction restraining the Administrators either by themselves and/or their agents, servants or employees from evicting the Applicant from the suit premises i.e. Ngong/Ngong/10992 or encroaching, occupying, developing, selling or in



any way dealing with the same pending the hearing and the determination of the protest herein.

3. That this Honourable Court be pleased to issue orders of injunction restraining the Administrators either by themselves and/or their agents, servants or employees from evicting the Applicant from the suit premises i.e. Ngong/Ngong/10992 or encroaching, occupying, developing, selling or in any way dealing with the same pending the hearing and the determination of this suit.
  4. That this Honourable Court be pleased to issue any other order that may deem just, appropriate and expedient in the interest of justice.
  5. That the costs of this Application be in the cause.”
4. In response to that Protest the Administrators filed the Notice of Preliminary Objection dated 7<sup>th</sup> December 2022 which Preliminary Objection was premised upon the following grounds:-
- “ 1. That the affidavit of protest is premature and ought to be struck out as there is no pending application for confirmation of Grant.
  2. That pursuant thereto, the application dated 7<sup>th</sup> December 2022 has no substratum upon which it is anchored on.
  3. That the application cannot be sustained in law
5. The matter was canvassed by way of written submissions. The Administrators filed the written submissions dated 3<sup>rd</sup> April 2023 whilst the Protestors relied upon their written submissions dated 15<sup>th</sup> May 2022.

### **Analysis and Determination**

6. 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.” [own emphasis]
7. 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.”



8. 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.
9. 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.
10. I have considered the Preliminary Objection raised. The same in my view has no merit. The Protestors have sought orders of injunction. It is not necessary that the Protest await filing of the summons for confirmation of Grant.
11. The Protest dated 7<sup>th</sup> December 2022 raises serious issues which can only be resolved through a hearing.
12. Finally, I dismiss in its entirety the Preliminary Objection dated 7<sup>th</sup> December 2022. Costs to be met by the Administrators.
13. I note that the Grant in this matter was issued in April 2005. To date the Administrator's have not filed a summon for confirmation of Grant. I therefore directed that the Administrators file and serve a summon for confirmation of Grant within thirty (30) days. Thereafter the Protest to be set down for hearing.

**DATED IN NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

.....

**MAUREEN A. ODERO**

**JUDGE**

