



**In re Estate of Eliud Njoroge Kuria (Deceased) (Succession Cause 2423 of 2010)
[2023] KEHC 24353 (KLR) (Family) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2423 OF 2010
MA ODERO, J
OCTOBER 13, 2023**

IN THE MATTER OF THE ESTATE OF ELIUD NJOROGE KURIA (DECEASED)

BETWEEN

MW 1ST APPLICANT
NN 2ND APPLICANT
GK 3RD APPLICANT
EM 4TH APPLICANT
LW 5TH APPLICANT

AND

PK 1ST RESPONDENT
BN 2ND RESPONDENT
SM 3RD RESPONDENT
PW 4TH RESPONDENT

AND

JOSEPH KURIA INTERESTED PARTY

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated 9th November, 2021 filed by the 1st Respondent PK.



2. The 1st Objector Margaret Wanjiru filed the Replying Affidavit dated 7th December, 2022 in opposition to the Preliminary Objection.
3. The matter was canvassed by way of written Submissions. The 1st Respondent filed the written Submissions dated 3rd January, 2023 and final written Submissions dated 13th April, 2023. The 1st Objector relied upon her written Submissions dated 14th February, 2023.

Background

4. The Succession Cause relates to the Estate of the late Eliud Njoroge Kuria who died intestate on 30th October, 2010. Following the demise of the Deceased Grant of Letters of Administration Intestate were on 10th June, 2011 issued to BN, SM (son) and PW (2nd wife of Deceased).
6. Following protracted litigation Hon. Justice William Musyoka delivered a Judgement dated 24th April, 2019 detailing the mode of distribution of the estate. Consequently, a Certificate of confirmed Grant dated 15th November, 2016 rectified on 27th November, 2017 and Further Rectified on 10th May, 2019 was issued to the Administrators of the estate.
7. Thereafter the 1st Objector Margaret Wanjiru who is the 1st wife of the Deceased and others filed the summons for revocation of Grant dated 27th November, 2020. In response the 1st Respondent filed the Notice of Preliminary Objection dated 9th November, 2021 which is premised on grounds that the summons for revocation of Grant is fatally defective as the same seeks to shift the burden of proving that the confirmed Grant was regularly obtained onto the Respondents.
8. The Respondent in the Preliminary Objection further claims that the summons for revocation of Grant amounts to an abuse of court process is subjudice and is also Res Judicata.
9. As stated earlier the Preliminary Objection was opposed on grounds that the same does not raise pure points of law.

Analysis and Determination

10 I have carefully considered the Preliminary Objection raised by the Interested Party as well as the submissions filed by both parties.

11. 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.”



12. 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.”
13. 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.
14. 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.
15. The issues raised in the Notice of Preliminary Objection cannot be described as pure points of law. The question of whether or not the confirmed Grant was fraudulently obtained is a matter of fact which can only be determined upon hearing evidence from both parties.
16. Similarly, the question of whether shares in Hobsfar Investments Limited were dealt with by Hon. Justice Majanja in Petition No. 003 of 2020 and the question of whether the matrimonial property was distributed in Civil Suit No.451 of 1999 are not points of law but are questions of facts which will require evidence to determine.
17. Accordingly, I find no merits in this Preliminary Objection. The same is dismissed with entirety. Costs are awarded to the Objectors.

DATED IN NAIROBI THIS 13TH DAY OF OCTOBER, 2023.

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MAUREEN A. ODERO

JUDGE

