



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**SUCCESSION CAUSE NO.50 OF 2019**

**IN THE MATTER OF THE ESTATE OF JULIUS KIRAGU**

**GITHUTHA ALIAS JULIUS KIRAGU MWANGI (DECEASED)**

**STEPHEN MWANGI KARUKU**

**MARY WANJIRU KARUKU**

**JAMES NJENGA KARUKU.....APPLICANTS**

**VERSUS**

**HANNAH NJERI KIRAGU**

**JOHN MWANGI KIRAGU**

**MARGARET NYAMBURA KIRAGU**

**GACHUGI KIRAGU**

**KIMANI KIRAGU**

**MUTHONI KIRAGU.....RESPONDENTS**

**RULING**

1. Before me is a preliminary objection filed on 20<sup>th</sup> September, 2019 against the Applicants' petition dated 5<sup>th</sup> April, 2019. The Applicants' petition seeks to have **Hannah Njeri Kiragu** or any other beneficiary of the deceased herein issued with a grant of letters of administration limited for purposes of litigation with regard to the land parcel LR. NO. KIAMBAA/KANUNGA/1038 (hereinafter the suit property) wherein the remains of the deceased were interred, and which land parcel is registered in the name of the Applicants.

2. The preliminary objection is premised on among other grounds that the Applicants' petition is incurably defective, bad in law and does not lie as the petition is contradictory in substance, is misconceived, and incompetent, as the Petitioners do not seek to obtain a grant in their own name, contrary to the averments in the petition.

3. The preliminary objection was canvassed by way of written submissions. Only the Respondents filed their written submissions. It was the Respondents' submission that the Applicants filed a claim at Karuri Land Dispute Tribunal under the then Land Dispute Tribunal Act. The tribunal in its award given on 13/06/2010 found the deceased herein to be a trespasser on the suit property and was ordered to vacate to occupy another parcel, namely, LR.No. KIAMBAA/KANUNGA/1040. The deceased appealed to the then Provincial Land Appeals Committee and the appeal was allowed. However, the Applicants subsequently appealed to the High Court at Nairobi which appeal was later transferred to the Environment and Land Court (ELC) at Thika for hearing and determination. Unfortunately, the deceased who was the Respondent therein passed away on 9<sup>th</sup> January 2016.

4. The Respondents submit that the application is incurably defective as the Applicants are not seeking a grant contrary to the averments in their petition. Further the Respondents submitted that the petition by the Applicants is an abuse of the court process since their initial claim against the deceased herein was for the tort of trespass which could not survive the deceased. Reliance was placed on the case of **Stella**

**Kiumbi Mcharo (Suing in her capacity as personal representative of the estate of Evans Kafusi Mcharo (deceased) v Joseph Rua & another [2019] eKLR** where it was stated that a trespasser is sued as an individual and a claim of trespass determines upon the death of the alleged trespasser. The Respondents urged the court to dismiss the Applicant's petition with costs.

5. The court has considered the grounds of the preliminary objection (PO) and submissions by the Respondents. The petitioners apparently did not file any submissions in this regard. The key objection taken by the Respondents is that the petitioners have not stated with precision what orders they are seeking from the court; that the orders sought contradict the petition and cannot issue because the claim to be pursued, namely trespass, did not survive the deceased in respect of whose estate the limited grant is sought; that the application is an attempt by the petitioners to defeat the legitimate defence that their claim is statutorily barred; and further that the petitioners have not laid a basis to justify the issuance of the orders sought. The Respondents ask therefore that the application be dismissed and/or struck out as it is incurably defective and bad in law.

6. As to the nature of a preliminary objection, the law is settled. In **Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors (1969) EA 696, Law J. A.** stated:"

**"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, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter 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 the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop."**

7. In the case of **Oraro v Mbaja (2005) KLR 141, Ojwang J** (as he then was) reiterated the foregoing by stating that:

**"A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.**

**Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."**

8. On the foregoing tests, it is apparent that the question whether the petitioners intend to pursue a claim of trespass, or a claim in respect of which there exists a statutory bar and whether the petition is merited do not qualify as pure points of law. Given the history of the dispute between the deceased **Julius Kiragu Githutha** and the petitioners, and especially the contents of the ruling in the **ELC Case no. 272 of 2017** delivered on 13th July, 2018, this court cannot speculate on the nature of legal action or litigation intended by the petitioners and whether such claim survived the deceased or is statutorily barred. The Respondents' preliminary point appears to invite such speculation on the part of the court. Equally, the question of the merits of the petition for limited grant cannot be canvassed as a preliminary point of law.

9. The mere fact that the petition prayers are imprecise and contradictory, even if objectionable, does not render the petition defective or bad in law. The petitioners' prayers are to the effect that:

**"WE STEPHEN MWANGIKARUKU, MARY WANJIRU KARUKU AND JAMES NJENGA KARUKU of P. O. Box..... Nairobi HEREBY PETITION this Honourable court for grant of letters of administration of the estate of the above-named JULIUS KARAGU GUTHUTHA who died domiciled in Kenya on 9th day of January, 2016, at St. Teresa Hospital Kiambu, be issued to:**

**Hannah Njeri Kiragu the wife of the deceased, limited, or**

**A nominee of the petitioners on refusal or failure of the said Hannah Njeri Kiragu to act as administrator limited for the purposes of only litigation concerning KIAMBAA/KINUNGA/1038 and until further representation be granted". (sic).**

10. The key ground upon which the prayers are sought is stated in the face of the petition and affidavit of the petitioners to be that the deceased's widow had failed to take out letters of administration and that the suit **ELC No. 272 of 2017 Thika**, cannot proceed without a representative of the deceased **Julius Kiragu Githutha** who was the Respondent in the matter. The petition may not be elegantly drafted but the prayers sought are discernable despite the vagueness as to the purpose of the limited grant sought. Such vagueness can be resolved through a supplementary filing. Vagueness cannot be a basis for striking out the petition and is best canvassed at the full hearing of the matter as a substantive issue. The petition herein is brought inter alia under paragraph 14 of the Fifth Schedule to the Law of Succession Act which states that:

**"When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may commence in the same or in any other court between parties, or any other parties, touching the matter at issue in the cause**

**or suit, and until a final decree shall be made therein, and caused into complete execution.”**

11. Under Section 54 of the Law of Succession Act, the court is empowered, according to the circumstances of each case to limit any grant of representation which it has jurisdiction to make. In the case of **Agripina Mary Aya v Nyambura (widow of the deceased John Njuguna Kigaragari) Nairobi Civil Appeal No. 11 of 1981** the Court of Appeal while considering the provisions of Section 38 of the Probate and Administration Act (now repealed) whose current equivalent is paragraph 14 of the Fifth Schedule to the Law of Succession act, held that the widow who had been shown to have intermeddled with the estate of the deceased therein was by that reason an administrator *de son tort* and stated that the powers of the court under the section were wide. Superior Courts have demonstrated similar latitude in subsequent decisions, finding for instance that, where a party to proceedings relies on a type of limited grant which despite its title is worded in a manner that allows him to step into the place of a deceased person as his representative, the court will consider the said grant to be valid for the stated purpose. See **Morjarila v Abdallah (1984) KLR 490; Peter Owade Ogwang v Jared Obiero Ouya(2014) eKLR; and Martha Ndivo Otero (suing as the administrator and personal representative of the estate of Willy Patrick Ochieng Ndivo (deceased)) v Comecons Africa Ltd [2015] eKLR.**

12. This court upon hearing the parties on the instant petition will decide on the merits of the petition, and if persuaded, craft the most appropriate grant to fit the circumstances of the case. I think I have said enough to demonstrate that the preliminary objection by the Respondents has no merit and is for dismissal. The court hereby dismisses the preliminary objection. For the purpose of expediting the canvassing of the petition, the court directs that an early date be taken for directions. In the meantime, the Respondents are at liberty to file any response or process as they may deem fit and appropriate. Parties will bear own costs.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 13TH DAY OF MAY 2021.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Applicants: N/A.**

**For the Respondents: N/A.**

**C/A : Kevin Ndege.**