



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. E067 OF 2021

IN THE MATTER OF THE ESTATE OF LUCY MUTHONI OBAT (DECEASED)

JOHN GICHIA.....1ST APPLICANT/1ST PETITIONER

JANE NJOKI MUTHONI.....2ND APPLICANT/2ND PETITIONER

VERSUS

BARACK OBAT BLASTO.....OBJECTOR/RESPONDENT

RULING

1. The deceased Lucy Muthoni Obat died intestate on 24th July 2018. The petitioners/applicants Jane Njoki Muthoni and John Gichia filed a petition dated 18th January 2021 seeking the grant of letters of administration intestate in respect of the estate of the deceased. Their case was that they (and David Ngugi Obat, Mary Wanjiku, Peres Achieng, Moses Kanyuira and Erick Karanja) were the children of the deceased. They indicated the estate to comprise:-

- (a) Komarock Phase 5B Door 23;
- (b) Dandora Phase 5 Pot No. E1903;
- (c) Plot No. 94 Umoja Phase II Zone 8;
- (d) Ploat No. B1 – 268 Kayole Site and Service Scheme;
- (e) Motor vehicle KCJ 315Z;
- (f) Ruiru/Kiu Block 13/942 Mwiki Certificate No. 1090;
- (g) Mathare Slums Upgrading H1 Door No. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13; and
- (h) Mathare North Area 3 Plot 116B.

2. Along with the petition was a chamber application dated 19th January 2021 seeking that the objector/respondent Barack Obat Blasto be restrained from intermeddling with, interfering with, disposing of, selling, transferring or in any other way wasting or diminishing the above properties which were said to belong to the estate of the deceased. They asked that pending the issuance of the grant and the confirmation of the same, there be stay of proceedings in **CM ELC No. E047 of 2021** at Milimani Commercial Court in Nairobi. Lastly, they sought that the respondent be directed to provide a full and accurate inventory of all the assets and liabilities, known or unknown, of the deceased and a full and accurate account of all dealings with the property, including the rent collected and income derived from the estate from the time the deceased died to date.

3. In the supporting affidavit by John Gichia, it was alleged that the respondent had full custody and possession of most of the deceased's property from which he was deriving rent and other income; he had refused to grant the applicants access to the properties, including their title documents; he was using police to intimidate, harass and threaten the applicants; he had instituted the above suit; that the applicants

father (deceased's husband) had died in 1978 when the respondent was his tenant in the premises, but that the respondent had in 1985 begun cohabiting with the deceased as man and wife until the deceased died; that since then the respondent was laying claim to the deceased's estate.

4. In response to the application, the respondent filed a notice of preliminary objection whose grounds were that the suit was an abuse of the process of the court in view of **CM ELC No. E047 of 2021**; the applicants had no *locus standi* at all; the entire petition offended **rules 7 and 29** of the **Probate and Administration Rules**; and that the entire summons and petition were fundamentally and incurably defective.

5. The applicants were represented by Dr. Miyawa and the respondent by Mr. Kirimi. I asked them to address me by way of written submissions on the preliminary objection. I further asked the applicants to file a further affidavit annexing the pleadings of the case before the subordinate court. This was going to give the court a full impression of the matter to enable it deal with the objection.

6. I have looked at the pleadings and interlocutory orders in **CM ELC No. E047 of 2021**. The respondent laid claim of Ruiru/Kiu Block 13/942 and Amani Housing Trust, Mathare 4A Development Programme Structure No. H001, Rooms 1, 2, 3, 16 and 17, Structure No. 118 Room 2, Structure No. F 182 Rooms 2 and 4 and Structure No. G106 Room 3. He said they were his but which applicants were interfering with. He stated that the 1st applicant had been his caretaker over Ruiru/Kiu Block 13/942 and collecting rent for him but he together with others were now laying claim to it. He was no longer remitting the collected rent. Further, that the applicants and others were laying claim to the Mathare Slums and Mathare North properties which they were destroying.

7. The response by the applicants was that these and more properties were acquired either by their late father or their late mother. They stated that they have grown up on these properties. Their case was that when their father died, in 1985 the respondent began to live with their mother (the deceased) and this went on until 2018 when she died. The 1st applicant stated that it was the deceased who put him in possession of Ruiru/Kiu Block 13/942 over 24 years ago.

8. It is material that throughout the case in the subordinate court and in the present succession proceedings the respondent has completely avoided to make reference to the allegation that he lived with the deceased for 33 years, or at all, after her husband died. I suspect that the reason he avoided to make reference to the deceased (yet she somehow carried the name "Obat") was because, if he conceded that the property in question was hers, his suit in the subordinate court would fail because the respondents do not have a grant in respect of the deceased.

9. A preliminary objection proceeds on the basis that all the pleaded facts 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 (**Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Ltd [1969] EA 696**).

10. Secondly, under **section 3** of the **Law of Succession Act (Cap 160)** upon the death of a deceased person his estate means his free property when he was living. His free property refers to the property that the deceased was legally competent freely to dispose of it and in respect of which his interest has not been terminated by his death. Where administrators of the estate of the deceased say that a certain property belonged to the deceased and there is a third party laying claim to it, such dispute has to be determined by the Environment and Land Court under **section 13** of the **Environment and Land Court** and **Article 162(2)(b)** of the Constitution.

11. Thirdly, it is not in dispute that upon the death of the deceased it was incumbent upon her beneficiaries to petition a succession court. This is what led to the filing of the present cause. Now that the respondent earlier sued the applicants at the subordinate court claiming Ruiru/Kiu Block 3/942 and the Mathare Slums and Mathare North properties, which the applicants claim are part of the deceased's property, in terms of **section 47** of the **Act** and **rule 73** of the **Probate and Administration Rules** and also under **sections 1A** and **1B** of the **Civil Procedure Act** and **Article 159** of the Constitution, I direct that the parties shall proceed with the subordinate court case over the three properties. In the meantime, the present succession cause shall proceed but without reference to those three properties. I consider that under the **Law of Succession Act**, partial confirmation is allowed. If the subordinate court eventually decides that the three sets of properties belong to the deceased, they shall become available for distribution to the beneficiaries of the deceased.

12. It is notable that the respondent has not laid claim to the other properties in this succession cause. If that is the case, then the chamber summons dated 19th January 2021 is not necessary. I direct the Deputy Registrar to proceed and gazette this petition so that whoever wants to object to it can be at liberty to do so. That will include the respondent.

13. I hope that these directions have finally dealt with both the chamber application and the preliminary objection.

14. I make no orders as to costs.

DATED and DELIVERED at NAIROBI this 15TH JUNE 2021.

A.O. MUCHELULE

JUDGE