



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 632 OF 2012

IN THE MATTER OF THE ESTATE OF GLADYS WAIHERA KIMANI (DECEASED)

LAWRENCE G. NJENGA.....APPLICANT/OBJECTOR

VERSUS

SAMWEL KIMANI.....1ST RESPONDENT/PETITIONER

GRACE NUNGARI NJOROGE.....2ND RESPONDENT/PETITIONER

RULING

1. This a ruling on a Preliminary Objection dated **29th September 2020**, filed by the **2nd Respondent/Petitioner** herein **Grace Nungari Njoro**, one of the administrators of the estate of the deceased seeking the following orders: -

i. This Honourable Court does not have Jurisdiction to entertain the Application which is premised on a Claim for Land which ought to be litigated before the Environment and Land Court as per Article 162 of the Constitution and Section 13 of the Environment and Land Court Act.

ii. The Applicant/Objector herein is a busy body having filed a similar Application dated 17th November 2017, obtained interim orders issued on the 30th November 2017 and subsequently withdrawing the same Application on 11th June 2018.

iii. The Applicant/Objector has filed a NAKURU CMCC NO. 222 OF 2018 -LAWRENCE G. NJENGA -VS- SAMWEL KIMANI & GRACE NUNGARI NJOROGE touching on the same issues and involving the same parties.

iv. The Respondent prays that the entire Application be dismissed with costs

2. A brief background of this matter is that the petitioners herein **Grace Nungari Njoro** and **Samwel Kimani** jointly petitioned for letters of administration intestate on **18th September 2012** in respect of the estate of **Gladys Waithera Kimani** being beneficiaries in their capacities as daughter in-law and son respectively. A grant of letters of administration intestate was issued to the two petitioners on **30th November 2012** and confirmed on **30th June 2017**, as per their proposed mode of distribution where the two administrators were to hold all the properties in trust for themselves.

3. By application dated **17th November 2017**, Lawrence G. Njenga sought to stay grant of letters of administration and an order to restrain the respondents/petitioners from interfering with Plot No.50 H/C situated at Githioro Centre on ground that the applicant is the absolute owner of the said plot having purchased it from the deceased and attached a copy of sale agreement dated **23rd April 2007** and that he risks losing the property to the beneficiaries of the estate of the deceased herein.

4. The respondents filed preliminary objection dated **14th February 2018** challenging jurisdiction of this court to entertain the application.

5. Parties agreed to proceed with the preliminary objection by way of written submissions.

2ND RESPONDENT/PETITIONER'S SUBMISSIONS

6. The **2nd Respondent/Petitioner** submitted that as held in the case **Mumo Matemu v Trusted Society of Human Rights Alliance and Others** the Court of Appeal observed that the jurisdiction of any court provides the foundation for its exercise of judicial authority and as a general principle where a court has no jurisdiction, it has no basis for judicial proceedings much less judicial decision or order.

7. And further, in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited** the court held that Jurisdiction is everything and without it, a court has no power to make one more step and where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. That court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

8. The Respondent submitted that the Applicant is claiming ownership Plot **No. 50 H/C** Situated in Githiora Trading Centre which forms part of the Estate of **Gladys Waithera Kimani** in which in Grant of Letters of Administration was already issued to the 1st and 2nd Respondent legally.

9. Respondent submitted that jurisdiction of courts flows from the expressly laid out law and **Article 165(5) (b)** of the **Constitution of Kenya** expressly excludes matters falling within the jurisdiction of the courts contemplated in **Article 162 (2)** from the High Court's jurisdiction and the high court (Probate division) does not have jurisdiction to entertain an application premised on a claim for land and argued that assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, statute law and principles laid out in judicial precedent; and the application herein is outside the jurisdiction of the High Court and the same should have been filled in the Environment and Land Court which has the jurisdiction to hear and determine land matters. And added that the application can only be brought through settlement or a suit against the administrators of the estate and not through an objection.

10. Further, that the claim by an applicant as against the Estate of the deceased cannot give rise to automatic right to have the distribution of the property stayed in a Succession Cause as the applicant has to disclose a legitimate claim which ought to be determined by the Environment and Land Court and the law provides for an avenue for an objector to access conservatory orders at the Environment and Land Court.

11. The respondent cited the case of **The Estate of Solomon Mwangi Waweru (2012) and Estate of Matthew Mbugua Karanja (Deceased) (2020)** where the court relied on **H.C Succession Cause No.864 of 1998 (2015)** where the court it had no jurisdiction to resolve the proprietary interest based on an alleged trust and the appropriate forum was the Environment and Land Court and urged the court to find that the application herein lacks jurisdiction and dismiss it with costs to the Respondent.

APPLICANT/OBJECTOR SUBMISSIONS

12. In response, the applicant/objector submitted that this **court has the requisite jurisdiction to hear and determine the objector's application dated 7th September, 2020**. He submitted that the said application is premised on **section 76 of the Law of Succession Act (Cap 160 Laws of Kenya)** which provides that a grant of representation, whether or not confirmed may at any time be revoked or annulled if the court decides either on application by any interested party or of its own motion.

13. He cited the case of **Musa Nyaribari Gekone & 2 Others v Peter Miyienda & Another [2015] eKLR**, where the court held that the expression "any interested party" in its plain and ordinary meaning is wide enough to accommodate any person with a right or expectancy in the estate and vide a sale agreement dated 23rd April, 2007, the applicant had demonstrated that the late **Gladys Waithera Kimani** (deceased) agreed to sell to him the suit property, **Plot No.50 H/C** situated at Githora Trading Centre for a consideration of Kshs. 170,000/= and upon execution of the said agreement, he paid the deceased herein a total sum of Kshs. 56,000/= in cash but they could not complete the transaction, the deceased succumbed to breast cancer.

14. The applicant submitted that he has placed before this court sufficient evidence to show that the 1st Petitioner/ Respondent, being the only son to the deceased and the sole beneficiary of her estate, voluntarily agreed to proceed and complete the said transaction. That he had annexed copies of sale agreement dated 4th August, 2009 and payment vouchers as **L.G.N.V** and **VI** in support of the same.

15. That in utter disregard of the terms of the agreements herein and through concealment from this court of material facts concerning the said transaction, the petitioners proceeded to fraudulently obtain the impugned grant of letters of administration thereby including the suit property as part of the estate of the deceased.

16. The applicant/objector submitted that he has an interest over the estate of the deceased and is properly before this court to challenge the fraudulently obtained letters of administration quoted **section 2** of the **Law of Succession Act (Cap 160 Laws of Kenya)** which defines "estate" and "free property" of a deceased person as follows: -

**"estate" means the free property of deceased person.
"free property", in relation to a deceased person means the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death"**

17. The applicant/objector submitted that the petitioners' replying affidavit sworn on the 9th October, 2020, reveals that the petitioners herein do not deny that the objector has an interest over the suit property and on the contrary, the 2nd Petitioner insists that she is the rightful owner of the suit property by dint of the impugned letters of administration.

18. The Applicant submitted that in **Re Estate of Julius Ndubi Javan (deceased) 2018 eKLR** the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries and as of necessity, the estate property must be identified and where issues on ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed and **rule 43 (3)** of the **Probate and Administration Rules** was enacted so that claims which have prima facie case should be determined before confirmation.

19. The Applicant further cited the case of **Re Estate of Asitia Mabeya Mogaka (deceased) [2020] eKLR** where the court held that the applicant having established, he has an interest over the estate of the deceased and having demonstrated that the certificate of confirmation of grant of the said estate was fraudulently obtained through concealment of material facts, he was therefore properly before this court and was

entitled to the prayers sought.

20. The applicant further submitted that the evidence on record show that the property in dispute is still registered in the name of the late **Gladys Waithera Kimani**, the deceased herein and this court is therefore clothed with the requisite jurisdiction to hear and determine the Objector/ Applicant's summons for revocation of grant dated 7th September, 2020.

21. The Applicant further submitted that a preliminary objection argued as a preliminary point, may dispose of the suit and thus the issue which this court ought to determine is whether grounds (2) and (3) herein may dispose the application should they be argued as preliminary points.

22. On the **issue** that the Applicant herein had filed a similar application dated 17th November, 2017 and subsequently withdrew the same on 11th June, 2018, the applicant/objector relied on **Order 25 rule 1** of the **Civil Procedure Rules, 2010** which allows a party to withdraw his suit and or application and stated that withdrawal and/or discontinuance of a suit shall not be a defence to any subsequent action as the Petitioners allege and cited the case of **Rose Juma Ogola & Others vs Paustina Anyango & Another [2020] eKLR**.

23. On the issue of Applicant filing Nakuru **CMCC No.222 of 2018-Lawrence G. Njenga-vs-Samwel Kimani & Grace Nungari Njoroge** touching on the same issues the Applicant submitted that the petitioners failed to address this court on the status of the alleged suit and/or on whether the alleged suit had been heard and determined within the meaning of **Section 7** of the **Civil Procedure Act**.

24. The Applicant submitted that this court is required to ascertain the facts concerning the above-mentioned suit and should the court find that there is a pending suit in the nature and manner described in the preliminary objection, it should stay the latter. The Applicant cited the case of **Kanubhai Somabhai Patel & Another vs Rapid Communications Limited [2015] eKLR** and **Section 6 of the Civil Procedure Act (Cap 21 Laws of Kenya)** provides on stay of suit as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

25. The applicant submitted that the preliminary objection raised does not meet the legal standards of a preliminary objection; the prayers sought therein are legally untenable and cannot issue and urged the court to so find and hold the same with costs in his favor.

ANALYSIS AND DETERMINATION

26. The legal position is that a preliminary objection must raise a pure point of law and is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct and preliminary objection cannot stand if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, Law JA stated as follows:

“So far as I’m 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.”

27. The preliminary objection raised herein is that this court has no jurisdiction to entertain the Application as it is premised on a Claim for Land. The application dated 7th September, 2021 which gave rise to the preliminary objection herein seeks revocation of grant. The applicant is seeking annulment of Grant on ground that is the legal owner of Plot No.50 H/C situated at Githiro Centre. The applicant’s argument is that the property should not be included in the estate of the deceased.

28. Respondent’s argument is that the applicant should pursue his claim before Environment and Land Court (ELC).

29. From the averments herein the applicant has filed a claim for the land before the magistrate’s court being **Nakuru CMCC No. 222 of 2018 -Lawrence G. Njenga -Vs- Samwel Kimani & Grace Nungari Njoroge**. From the averments herein the applicant’s claim touching on ownership of the land he is claiming herein.

30. From the foregoing, I see no merit; notice of preliminary objection dated 29th September, 2020 is without merit and I would therefore dismiss it with costs to be paid by the 2nd Respondent. There is no dispute the applicant is seeking ownership of land which form part of the estate of the deceased. Claim of ownership of land is the preserve of ELC Court. The Applicant should either pursue in suit filed in the Chief Magistrate’s court or institute a claim against administrators of the estate in ELC court. I see merit in the preliminary objection raised and uphold it.

FINAL ORDERS

1. Preliminary objection dated 29th September 2020 is hereby upheld.

2. Application dated 17th November 2017 is hereby dismissed.

3. Costs to the Respondent.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 8TH DAY OF JULY, 2021.

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Mr. Ouma for the applicant