



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT ELDORET**

**SUCCESSION CAUSE NO. 368 OF 2012**

**IN THE MATTER OF THE ESTATE OF STEPHEN KIPLAGAT MUTAI (DECEASED)**

**PATROBA J MUTAI.....PETITIONER**

**VERSUS**

**ZENAH CHEPKEMBOI.....RESPONDENT**

**RULING**

The Petitioner herein in response to the Summons for Revocation of Grant filed on 8<sup>th</sup> December, 2020 filed a Notice of Preliminary Objection dated 22<sup>nd</sup> December, 2020.

The Notice of Preliminary Objection is premised on the following grounds;

1. That the application dated 7<sup>th</sup> December 2020 and filed on 18<sup>th</sup> December 2020 offends the provisions of *Section 79 of the Law of Succession Act Laws of Kenya*.
2. That the application dated 7<sup>th</sup> December 2020 and filed on 18<sup>th</sup> December 2020 offends the provisions of *Section 29 of the Law of Succession Act Laws of Kenya*.
3. That the application dated 7<sup>th</sup> December 2020 and filed on 18<sup>th</sup> December 2020 offends the provisions of *Section 67 of the Law of Succession Act Laws of Kenya*.
4. That the application dated 7<sup>th</sup> December 2020 and filed on 18<sup>th</sup> December 2020 offends the provisions of *Section 69 of the Law of Succession Act Laws of Kenya*.
5. That the application dated 7<sup>th</sup> December 2020 and filed on 18<sup>th</sup> December 2020 offends the provisions of *Section 80(2) of the Law of Succession Act Laws of Kenya*.
6. That the application dated 7<sup>th</sup> December 2020 and filed on 18<sup>th</sup> December 2020 offends the provisions of *Section 82 (a) of the Law of Succession Act Laws of Kenya*.
7. That the application dated 7<sup>th</sup> December 2020 and filed on 18<sup>th</sup> December 2020 is not grounded in law, lacks merit and is an abuse of Court process.
8. That the application dated 7<sup>th</sup> December 2020 and filed on 18<sup>th</sup> December 2020 is therefore frivolous, vexatious, scandalous, misconceived, and bad in law and an abuse of Court process and therefore should be dismissed with costs.

The Preliminary Objection was argued by way of written submissions; both parties filed their written submissions.

**ANALYSIS AND DETERMINATION**

I have carefully considered the pleadings, evidence and submissions by the respective parties. The issues to be determined by this Court are;

**a) Whether the grounds set out in the notice of Preliminary Objection are points of law?**

The definition of a preliminary objection is well set out in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.*

*"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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."*

Ojwang, J (as he then was) expressed himself as follows in *Oraro vs. Mbaja [2005] 1 KLR 141* in relation to the same:-

*"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.... 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....The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes 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 information, which stands to be tested by normal rules of evidence. ...."*

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> grounds as set out in the Notice of Preliminary Objection touches on issues of the administration of the deceased's estate which can only be ascertained at the hearing of the case and after evaluation of evidence adduced; and as such the grounds do not amount to points of law and falls short of the threshold set out in the *Mukhisa Biscuit* case.

Therefore, this Court holds and finds that what has been raised by the Petitioner does not amount to a Preliminary Objection.

Consequently, the application must fail. The said Preliminary Objection dated 22<sup>nd</sup> December, 2020 is therefore dismissed with costs to the Respondent.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED** at **ELDORET** this 6<sup>th</sup> day of July, 2021.

In the presence of:-

Ms Kemei for the respondent

Mr. Lemaiyan holding brief for Ms Chesio for the applicant

Ms Gladys – Court assistant