



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**SUCCESSION CAUSE (PROBATE AND ADMINISTRATION) DIVISION**

**SUCCESSION CAUSE NO. 404 OF 2013**

**IN THE MATTER OF ESTATE OF THE LATE MICHAEL JOHN KIPLIMO SANG alias MICHAEL KIPLIMO SANG**

**BETWEEN**

**BETTY SANG ..... APPLICANT**

**AND**

**PHILIP MOSBEI..... 1<sup>ST</sup> RESPONDENT**

**KENNETH KATAM ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**PETER KIPTANUI SANG**

**JOSEPH KIPRONO SANG**

**LUCY JEPTEPKENY SANG**

**HILLARY KIPKORIR SANG**

**JAMES KEELI SANG**

**PAUL KIPCHIRCHIR SANG**

**NOLEEEN SANG CHEEBET..... BENEFICIARIES**

**AND**

**THE LATE BISHOP C. KORIR ..... 1<sup>ST</sup> ADMINISTRATOR**

**THE LATE PAUL K. BIRECH ..... 2<sup>ND</sup> ADMINISTRATOR**

**RULING**

Before me is the Applicant’s Notice of Preliminary Objection dated 6<sup>th</sup> May, 2021 based on the following grounds:

1. The Summons dated 8<sup>th</sup> April, 2021 brought by PETER KIPTANUI SANG, JOE MICHAEL KIPRONO SANG and JAMES KIMELI SANG, and filed by counsel T. Tum, Advocate through the firm of Birech Rutto & Co. Advocates offends the provisions of the Advocates Act Cap 16 Laws of Kenya in general and in particular Rule 8 of the Advocates (Practice) Rules, 1966 made pursuant to the provisions of *Section 81* of the said *Advocates Act*.

2. The aforementioned Summons dated 8<sup>th</sup> April, 2021 brought by PETER KIPTANUI SANG, JOE MICHAEL KIPRONO SANG

and JAMES KIMELI SANG, offends the provisions of the *Law of Succession Act, Cap 160* in general and in particular *Rule 60* and *63* of the *Probate and Administration Rules 1980* made under the *Law of Succession Act* as read together with *Rule 5* and *6* of *Order 9* of the *Civil Procedure Rules 2010*.

### **ANALYSIS AND DETERMINATION**

I have carefully considered the Notice of Preliminary Objection by Betty Sang and the rival submissions and do find that the materials placed before me are not sufficient to enable the court determine whether there is a likelihood that the firm of BIRECH RUTO & CO. ADVOCATES will be called as witnesses in this matter. The court finds that the application of this nature ought to have been brought by way of a formal application supported by affidavits. The issue cannot be properly raised as a preliminary objection as it is not a general provision that an advocate cannot act for a party in a matter where he drew a Will concerning the deceased's estate and that his firm was privy to information on the contested issues and is in essence a potential witness. Probable witnesses in a suit are informed by the contested issues.

The party seeking to debar an advocate from appearing in a matter on the said ground, ought to avail sufficient evidence to that effect by way of a formal application but not by raising a preliminary objection.

In the case of *Garden Square Ltd –v- Kogo & Anor 2000 (KLR) 1695*, Ringera J (as he then was) stated that, what constitutes a true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application. This was in line with the decisions of the then Court of Appeal for East Africa in the case of *Mukisa Biscuit Manufacturing Co. Ltd –v-West End Distributors Ltd (1969) EA 696* in which Sir Charles Newbold, the President of that court, stated;-

***“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”***

I therefore do find that the raised preliminary objection does not fall within the ambit of preliminary objection's as correctly expressed by Sir Charles Newbold, and that the issue should have been properly addressed by way of a formal application. The upshot of this is that the preliminary objection fails with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 1<sup>ST</sup> DAY OF JULY, 2021.**

**S.M GITHINJI**

**JUDGE**

In the absence of:-

Mr. Wafula and Mr. Odende for the respondents

Mr. Nabasenge for the applicant

Ms Gladys – Court assistant