



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION APPEAL NO. 1 OF 2019

IN THE MATTER OF THE ESTATE OF

FREDRICK OTIENO ADUMBO (DECEASED)

BECKY NYANCHAMA ONYANCHAAPPELLANT/APPLICANT

VERSUS

LYDIAN ATIENO OGOLARESPONDENT

RULING

The Appellant has filed a Notice of Motion dated 23rd April 2021.

1. Through the said application, the Appellant sought orders that would lead to the valuation of the immovable assets which constitute the estate of the deceased.
2. Her view was that it is only after the assets had been valued, that it would be possible to compute the 50% share that each of the parties was entitled to.
3. Secondly, the Appellant sought an order that would allow the Respondent to keep the property comprising the matrimonial home, as the Respondent had allegedly declined to have the said matrimonial home divided into 2. The second relief would, if granted, enable the Appellant to obtain a separate property, to compensate her for the share that she would have got if the matrimonial home was divided equally between the 2 parties herein.
4. In the face of the application, the Appellant indicated that the Respondent had refused to leave the matrimonial home.
5. Upon being served, the Respondent filed a Notice of Preliminary Objection, which was couched in the following terms;

“1. This Court lacks jurisdiction to hear and determine the Motion dated 23rd April 2021 as it became functus officio upon determining the appeal herein.

2. The orders sought are entirely within the purview of the subordinate Court which issued and confirmed the Grant, and the High Court lacks first-instance jurisdiction.

3. The Applicant has not exhausted the reliefs available to her in the subordinate Court and is guilty of avoidance.

4. The Motion is at all events fatally and incurably incompetent and ought to be dismissed at the earliest opportunity.”

6. When canvassing the preliminary objection, the Respondent submitted that the pith and marrow of the said preliminary objection was that;

“..... the Appellant/Applicant is seeking a redistribution of the estate, that will necessitate a variation of the Grant.”

7. It is well settled that a preliminary objection is that which raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other party are correct.

8. When any fact has to be ascertained before the issue of law can be determined, then the matter raised cannot be deemed to be a preliminary

objection.

9. In this instance, the Appellant has indicated that it was the Respondent who had refused to have the matrimonial home divided.

10. Therefore, in determining the issue before me, I have got to assume that it is true, that the Respondent has refused to have the matrimonial home divided in equal shares, between the 2 parties herein. In the event, it would imply that it was the Respondent who did not wish to have the estate distributed in line with the judgment of the court.

11. There is absolutely no doubt that, pursuant to the provisions of **Section 23 (1)** of the **Magistrate's Court Act**, a magistrate shall have jurisdiction to entertain any application and to determine any dispute in respect of any estate whose gross value was within the pecuniary jurisdiction of such court.

12. As **Section 50 (1)** of the **Law of Succession Act** confers upon the High Court the mandate to handle appeals arising from any orders or decrees made by a Resident Magistrate, it follows that when a case falls within the jurisdiction of the Magistrate's Court, the High Court would not have first instance jurisdiction in such matters.

13. In the case of **KIBOS DISTILLERS LIMITED & 4 OTHERS Vs BENSON AMBUTI ADEGA & 3 OTHERS [2020] eKLR** the Court of Appeal held as follows;

“A court with original jurisdiction in some matters and appellate jurisdiction in others, cannot by virtue of its appellate jurisdiction usurp the original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.”

14. Jurisdiction is conferred by law. Therefore, when the law has conferred jurisdiction on the magistrate's court, it was not open to the High Court usurp such jurisdiction, on the grounds that it had unlimited original jurisdiction.

15. In this case, the High Court rendered its judgment in an appeal which emanated from the decision of the trial court. In the circumstances, the Respondent has submitted that the High Court became *functus officio*, when it delivered the appeal.

16. As was submitted by the Respondent, on the authority of **TELKOM KENYA LIMITED Vs JOHN OCHANDA [2014]eKLR;**

A court is functus when it has performed all its duties in a particular case

The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

17. In the light of that decision, I hold the considered opinion that it would be inconsistent with the law to ask the Appellant to move the Magistrate's Court, seeking to review or alter the decision made by the High Court.

18. In my understanding, the primary order being sought was that the assets which constitute the estate, should be valued, so that thereafter, the parties can proceed to give effect to the Certificate of Confirmation of the Grant.

19. In the case of **TELKOM KENYA LIMITED Vs JOHN OCHANDA [2014]eKLR** the Court of Appeal said;

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

20. However, the Court of Appeal also made it clear that;

“The doctrine is not to be understood to bar any engagement by a court, with a case that it has already decided or pronounced itself on. What it does bar is merit-based decisional re-engagement with the case once final judgement has been entered and a decree thereon issued.”

21. In my considered opinion an application for the valuation of property, so as to be able to have an informed basis on how to attain the distribution thereof, is not an adjudicative exercise on the rights of the parties.

22. Meanwhile, as regards an application for the re-distribution of assets comprising the estate of the deceased, the Respondent submitted that the same was misconceived and incompetent. It was the Respondent's position that **Section 70, 79 and 80** of the **Law of Succession Act**, (which the Appellant sought to rely upon), were not relevant to the circumstances of this case.

23. The Respondent placed reliance upon the decision of Musyoka J. in **RE: ESTATE OF CHARLES KIBE KARANJA (DECEASED), SUCCESSION CAUSE NO. 339 OF 2001**, to support her contention concerning the incompetence of the application.

24. The learned Judge held as follows;

“If a party wishes to have the assets of the estate redistributed, it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be effected without touching the orders made by the Court at the distribution of the estate.”

25. The Court concluded that the application for rectification of the certificate of confirmation of grant was misconceived. It was therefore dismissed for want of merit.

26. In this case, as I have already held, the primary relief sought is that the assets comprising the estate, be valued. It is not an application for rectification of the certificate of confirmation of grant.

27. But if the Appellant were to seek the rectification of the certificate of confirmation of the grant, the court would undoubtedly tell her to seek such relief before the trial court.

28. In the result, I find no merit in the preliminary objection: It is therefore rejected.

29. The Respondent is ordered to pay to the Appellant the costs of the preliminary objection.

DATED, SIGNED AT DELIVERED AT KISUMU THIS 20TH DAY OF SEPTEMBER 2021

FRED A. OCHIENG

JUDGE