



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NUMBER 383 OF 1996**

**IN THE ESTATE OF FRANCIS KINUTHIA NDERU (DECEASED)**

**R U L I N G**

1. This Ruling deals with the Petitioner's Preliminary Objection to the following five (5) applications.

- a. *Summons dated 16<sup>th</sup> September 2013 by Jane Muthoni Nderu and Nelly Wanjiku.*
- b. *Summons dated 17<sup>th</sup> September 2013 by Jane Muthoni Nderu, Francis Kinuthia Nderu and Hellen Njeri Nderu.*
- c. *Summons dated 27<sup>th</sup> October 2014 by Rose Njeri Ndung'u.*
- d. *Summons dated 25<sup>th</sup> February 2015 by Hellen Njeri Nderu.*
- e. *Summons dated 19<sup>th</sup> June 2018 by Patrick Odhiambo Kinuthia, Stephen Kagombe and Jenipher Aliro.*

2. The Petitioner is the widow of Francis Kinuthia Nderu deceased, who died intestate on the 30<sup>th</sup> July 1998.

3. He was predeceased by his son Andrew Nderu Kinuthia.

4. Jane Muthoni Nderu's claim is that she is Andrew's widow, and Francis Kinuthia Nderu & Hellen Njeri Nderu are his children. That the petitioner did not disclose these facts in her petition. In addition Jane also accuses the petitioner of intermeddling with the estate by changing the shareholding in Lake Tanners Limited, a company whose shareholding she claims was held by her husband and his father. Jane seeks the following prayers:

- 1) *That the Grant of Letters of Administration Intestate made to Hellen Njeri Nderu and confirmed on 12<sup>th</sup> September 2012 be revoked.*
- 2) *That in the alternative, the 1st Applicant, Jane Muthoni Nderu, be appointed to administer the Deceased's estate jointly with the said Hellen Njeri Nderu.*
- 3) *That the part of the Deceased's estate that devolves to the estate of Andrew Nderu Kinuthia (deceased's late son) be identified and distributed to the Applicants.*
- 4) *That the deceased's shareholding in respect of Lake Tanners Limited be restored to the status prevailing at the time of the Deceased's death.*
- 5) *That the Administratrix be ordered to provide accounts in respect of the estate from the time of the deceased's death.*

5. These prayers are not very different from those in the application of 16<sup>th</sup> September 2013 filed by Jane Muthoni Nderu and Nelly Wanjiku

- 1) *That Nelly Wanjiku Gichuki be discharged from acting as Administratrix, of the Deceased's' estate*
- 2) *That pending the inter-partes hearing and determination of this application, a temporary injunction do issue restraining the Respondents from further interfering with the shareholding and directorship structure of Lake Tanners Limited.*
- 3) *That a mandatory injunction do issue requiring the Respondents to restore the shareholding and directorship structure of Lake Tanners Limited to the status prevailing at the time of the Deceased's death.*

4) That the Deputy Registrar of the Court be empowered to execute any documents that the Respondents of any of them may: refuse to sign to give effect: the orders of the court.

5) That this Honourable Court be pleased to make any further or other Orders as it may deem fit in the circumstances.

6. Rose Ndung'u on her part claims that the deceased's son one Eric Ngethe Njeru who died after his father was her husband and they had one (1) child. That the Petitioner concealed this from the court. She has the following prayers:

1) THAT the grant of letters of administration intestate made to Hellen Njeri Nderu and confirmed on or about 12<sup>th</sup> September, 2012 be annulled and or revoked.

2) THAT further and or in the alternative, this honorable court be pleased to amend, alter and or review the certificate of confirmation of grant issued herein and part of the deceased's estate herein that devolves to Erick Ngothe Nderu (Now deceased) be identified, quantified and or severed and the same be secured and or be held in trust by the Applicant herein and or be dealt with in any other manner as this honourable court may deem fit and deserving taking into account all the circumstances of this case.

3) THAT the Applicant herein and or her daughter Hellen Njeri Ngethe Nderu do inherit the rightful share of the late Erick Ngethe Nderu in the estate herein and or any other share as this honourable court might deem fit and deserving.

4) THAT the Respondent / Administratrix herein be ordered to provide and or render accounts in respect of any sale, transfer, income and or expenditure made in relation to the estate herein from the time of the deceased's death up to date and or for such other period that this honorable court may deem fit.

5) THAT the Applicant herein be allowed to verify any such accounts that may be rendered by the Respondent herein with a view to ascertain their correctness and or accuracy.

6) THAT this honourable Court be pleased to make any further orders and or directions in the interim and or otherwise as it may deem fit and in the interest of justice taking into account all the circumstances of this case be it in the interim and/or otherwise.

7. Jane and Rose also complain that the petitioner sold off part of the estate namely Kisumu Municipality Block 12/165 and Kisumu Municipality Block 6/327 without the consent of the other beneficiaries of the estate.

8. Hellen Njeru Nderu's claim is that Eric Ngethe Kinuthia (deceased ) was her father. That the petitioner failed to disclose this fact to court. That the Administratrix has already disposed off several estate properties, off loaded some of deceased person's shares and squandered income from the estate herein. She seeks the following:

1) That the grant of letters of Administration intestate made to Hellen Njeri Nderu and confirmed on or about 12<sup>th</sup> September 2012 be reviewed, annulled and or revoked.

2) That the Respondent/administratrix herein be ordered to provide and or render accounts in respect of any sale, transfer, income and or expenditure made in relation to the estate herein from the time of the deceased's death up to date and or for such other period that this Honourable Court may deem fit.

3) That this Honourable Court be pleased to make any further orders and or directions in the interim and or otherwise as it may deem fit and in the interest of justice taking into account all the circumstances of this case before it in the interim and or otherwise.

4) That the costs of this Application be provided be in cause.

9. The Court directed parties to frame issues for determination the Petitioner raised a Preliminary Objection to the five applications and the following points of law.

**a) Whether or not this Honourable Court has Jurisdiction to distribute the estate of the Deceased when the surviving spouse is enjoying her life interest as provided for under section 35 of the Law of Succession Act.**

**b) Whether or not this Honourable Court has jurisdiction under the Probate & Administration rules to determine disputed shareholding in any company in which the deceased held shares.**

10. The petitioner having raised the issue of jurisdiction, it became necessary to determine this issue before proceeding with the hearing of the applications. Why? **In Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989)**: it was held that:

*"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."*

11. On these two issues, Parties filed over a thousand pages in submissions! My legal researcher and I spent a considerable amount of time reading through them and coming up with a summary.

12. The following issues presented themselves for determination:

1. *Whether the submissions by the petitioner on the doctrine of laches are extraneous and should be disregarded.*
2. *Whether the doctrine of laches is applicable in the instant matter.*
3. *Whether the court has jurisdiction to distribute the estate of the Deceased when the surviving spouse is enjoying her life interest in light of Section 35 of The Law of Succession.*
4. *Whether the court has jurisdiction under the Probate and Administration rules to determine the disputed shareholding in Lake Tanners Ltd. Hotel Waterbuck Limited, Fish and Meat K Limited and Victoria Nile Perch Limited in which the Deceased held shares.*
5. *Whether the grounds set out in the Notice of Preliminary Objection are merited and should be allowed.*

13. I have carefully considered all the submissions and the authorities cited by the parties. They went to great detail and cited numerous authorities to argue their positions. I appreciate their effort. I will look at the issue one by one.

**Whether the submissions by the petitioner on the doctrine of laches are extraneous and should be disregarded.**

14. The petitioner submitted that the claims by Rose and Patrick were time barred and the doctrine of laches applied to their applications.

15. Rose Njeri Ndung'u submitted that the doctrine of laches is extraneous as it was not pleaded by the petitioner in her Preliminary Objection and she urged this court to disregard the same.

16. The petitioner on the other hand conceded that in as much the doctrine of laches was unpleaded the same is an important aspect of the whole Preliminary Objection which cannot be ignored on the basis that it was not pleaded. She relied on the Court of Appeal decision in **Odd Jobs vs Mubia (1970) EA 476** where the Court of Appeal held as follows;

*“A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision; On the facts the issue had been left for decision by the court as the advocate for the appellants led evidence and addressed the court on it.”*

17. That decision was cited with approval by the Court of Appeal in the case of **Vyas Industries vs Diocese of Meru [1982] KLR 114.**

18. It is not in dispute that a perusal of the pleadings shows that the said doctrine was unpleaded. It is trite law, that parties are bound by their pleadings see **In Civil Appeal No. 219 of 2013-(Nairobi) Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR** where the Court of Appeal held that: -

*“...that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her.”*

19. See also Malawi Supreme Court of Appeal in **Malawi Railways Limited vs Nyasulu [1998] MWSC 3**, in which the learned judges quoted with approval from an article by **Sir Jack Jacob entitled “The Present Importance of Pleadings.”** The same was published in **[1960] Current Legal problems, at P174** whereof the author had stated;

*“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....*

*In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” ...”*

20. However there are exceptions to this rule see **Joseph Amisi Omukanda vs Independent Elections & Boundaries Commission & 2 others [2014] eKLR** there is however a well-known exception to the general rule when the court can determine an issue even though it was not pleaded. This applies where the parties have raised an unpleaded issue and left it for the decision of the court. The exception will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice. See also **C.K. VS. T.K.M. (2016) eKLR** as follows:-

**“The main issue of custody was squarely before the court and in our view the question of taking the child out of jurisdiction when the respondent had custody was so intertwined with the issue of custody that it was not reasonable to expect separate and distinct pleadings on it. In addition, as the authorities consistently show where evidence is led and it appears from the course followed at trial that an unpleaded issue has been left to the court to decide, the trial court may validly determine the unpleaded issue. ...”**

21. In the instant case the petitioner raised the issue of doctrine of laches extensively in her submissions and left it to court to determine it. The applicants have not demonstrated that they will suffer any prejudice should this court proceeds to determine the same.

**Whether the doctrine of laches is applicable in the instant matter.**

22. Parties submitted extensively on this issue. However it is trite that there is no limitation period under **Section 76 Law of the Law of Succession Act** for the filing of Summons for Revocation of Grant. It states inter alia:

**“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”**

23. Also in the case of **In re Estate of Josephine Magdalena Motion (Deceased) [2016] eKLR** where the court stated as follows;

***“The Limitation of Actions Act prescribes periods for limitations of actions and arbitrations. My reading of the actions to which that statute applies is that it does not include succession causes, or, at any rate, causes or actions governed by the Law of Succession Act. It covers such matters as actions founded on contracts and torts, actions to recover land and rent, actions to recover money, actions in respect of trust property or movable property of a deceased person, and related causes. In short, it envisages ordinary civil suits brought within the framework of the Civil Procedure Act and Rules. It does not envisage the special proceedings governed by such statutes as the Law of Succession Act.”***

24. Further in **Patrick Mwangemi Wanjala & 3 others vs Jackson Ngoda Jumwa [2016] eKLR**, the court held as follows-

***“Although the Summons herein was filed on 12.8.14, six years after the Grant was issued on 28.3.08, and ten years after the demise of the deceased on 24.12.04, the law is clear that a “grant of representation, whether or not confirmed, may AT ANY TIME be revoked or annulled ...” There is therefore no limitation as to the time for filing summons for revocation of Grant. The law does not even provide that a party must explain any delay in seeking revocation of a grant. Consequently, this Court makes nothing of the fact that the Summons herein was filed 8 years after the grant was issued.”***

25. Similarly in **Jane Wambui Wahuga & 4 others vs Ruth Njoki Mwangi [2016] eKLR**, it was held-

***“The said section states that a grant of representation, whether confirmed or not, may at any time be revoked by the court if it was obtained by fraud, or concealment. It may also be revoked if the proceedings were defective in substance and/or it was obtained by means of untrue allegation of facts essential in point of law to justify the grant. An application for revocation of grant cannot therefore be claimed to be time barred. Thus, the Applicants’ grounds for revocation of grant as set out in the summons for the revocation or annulment of the grant cannot be dismissed based only on the ground of limitation. The court has an obligation to determine the application on the basis of the provisions of the law.”***

26. *Hon. Musyoka, J* went further and held thus in **Re Estate of Charles Ngotho Gachunga (Deceased) [2015] eKLR**:

***“It is argued that the application has come in too late. In other words the same was filed after an inordinate delay which has had the effect of rendering it time-barred due to effluxion of time. The answer to this submission is that the office of administrator is for life. He can be called to account at any time so long as he is still alive. Needless to say that section 76 of the Act does not impose any time limitations within which an application for revocation of grant ought to be filed.”***

27. It is clear that the law states that there is no limitation as to when a Summons for revocation of grant may be filed. In this case the cause was filed in 1996. The Summons filed by Rose Njeri Ndung’u are dated 27<sup>th</sup> October 2014. Clearly there has been a delay. However as indicated by the statement of the law and the authorities cited herein above, there is no too late *per se* in these matters until the court has heard the parties and determined the circumstances. I agree with the above authorities as they, in my view state the correct position of the law and I need not say more. Hence it is my finding that the doctrine of laches is inapplicable in Succession Matters.

**Whether the court has jurisdiction to distribute the estate of the Deceased when the SURVIVING spouse is enjoying her life interest in light of Section 35 of The Law of Succession**

28. It was the petitioner’s submissions that in their summons dated 16<sup>th</sup> September 2013 ,17<sup>th</sup> September, 2013, 27<sup>th</sup> October, 2014, 25<sup>th</sup> February, 2015, 21<sup>st</sup> July, 2015, and 19<sup>th</sup> July, 2018 respectively, the Applicants are seeking revocation of the grant issued to her and also the distribution of the estate to those who are beneficially entitled. It is the position of the applicants that the petitioner obtained the grant fraudulently, that she has abused the position granted to her of an administrator of the estate of the deceased, which, according to them, she holds in trust for herself and the other beneficiaries. They argue that the estate ought to be distributed to the rightful heirs and that the Petitioner’s enjoyment of her life interest is not a bar to the same.

29. The Petitioner’s position is that having been granted life interest, the estate of the deceased cannot be distributed for as long as she is

alive.

30. Section 35 of **the Law of Succession Act**, states:

**“35. Where intestate has left one surviving spouse and child or children**

**(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—**

**a. the personal and household effects of the deceased absolutely; and**

**b. a life interest in the whole residue of the net intestate estate:**

**Provided that, if the surviving spouse is a widow that interest shall determine upon her re-marriage to any person.**

**(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.**

**(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.**

**(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—**

***(a) the nature and amount of the deceased’s property;***

***(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;***

***(c) the existing and future means and needs of the applicant and the surviving spouse;***

***(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;***

***(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;***

***(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and***

***(g) the general circumstances of the case including the surviving spouse’s reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.***

**(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”**

31. **Section 37** provides for the powers of the spouse during life interest:

**“37. Powers of spouse during life interest**

**A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:**

**Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.”**

32. Since the widow/petitioner herein is still alive, under **Section 35 of the Act**, she is entitled to the life interest in the whole residue of the net intestate. This position has been upheld by the courts. In the case of **Tau Kakungi vs Margrethe Thorning Katungi & Another [2014] eKLR, Musyoka J** held that the purpose of **Section 35 of the Act** was to prevent a spouse of the deceased from being impoverished after the demise of the other by distributing the entire estate to the children. The court stated:-

***“The effect of section 35 (1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate...The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent or the departed spouse. She would be left without any means of sustenance.”***

33. The Life Interest confers a limited right to the surviving spouse over the estate. He or she does not enjoy absolute ownership over the property. According to **Section 35(1) of the Law of Succession Act** the property of the net estate of the deceased should be preserved for the beneficiaries. Under **section 37 of the Act** the surviving spouse enjoying a life interest over the net residue estate cannot dispose off any property without the consent of all the beneficiaries and the court. *Mativo J* in the case of **Re Estate of Doris Wanjiku John Mwigaruri Alias Doris Wanjiku** confirmed this position when he said;-

***“Life interest confers a limited right to the surviving spouse over the state. He or she does not enjoy absolute ownership over the property. They cannot deal with it as if it was their own. By virtue of Section 37 of the Act, a surviving spouse cannot during life interests dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court. This is meant to safeguard the interest of the children who are the ultimate beneficiaries of the property of the subject of the life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children.”***

34. The issue as to who among the applicants is beneficially entitled to the estate has not been settled. It is also claimed that she in addition to intermeddling with the estate, she did not disclose all the properties that form the estate of the deceased. This is the subject of the Summons for revocation. It however goes without saying that the Petitioner’s position as the administrator of the estate, and the surviving spouse carries with it the responsibility to have the interest of all beneficiaries at heart even as she enjoys her life interest, and to act in the best interests of the estate.

35. It is emergent from **Section 35 of Law of Succession Act** and case law, that the estate of a deceased person in which the surviving spouse has a life interest is not available for distribution. However there exists checks and balances on what is to happen in the meantime as provided for under **Sections 35 & 37 of the Law of Succession Act**.

36. The applicants who seek the distribution of the estate during this time must of necessity be asked to answer the question: **why they did not ask for a share of the estate while the deceased was alive?** The answer speaks for itself: Because it would have been considered taboo in the first place to ask the deceased to distribute his estate in his life time. The law is that they cannot inherit from their living parent unless that parent bequeaths them whatever he or she pleases to them.

37. The fact that they are demanding their inheritance now that it is the widow who survived suggests that they seem to think that they have the same standing with her with respect to the property of her spouse. The fact is that they don’t. They can never have the same standing with her. She is the spouse, they are not. **Section 35 and 66 of the Law of Succession Act** are very clear on this. The law says they must wait their turn. They have no choice but to do so.

38. It is a lack of utter respect for the position of the female spouse which clearly protected by the law from actions such as these.

**Whether the court has jurisdiction under the probate and administration rules to determine the disputed shareholding in Lake Tanners Ltd. Hotel Waterbuck Limited, Fish and Meat K. Limited and Victoria Nile Perch Limited in which the Deceased held shares.**

39. Jane Muthoni Nderu, Francis Kinuthia Nderu & Hellen Njeri Nderu brought up the issue of share holding in Lake Tanners Limited. Jane averred that the Administratrix together with other beneficiaries had intermeddled with both the Deceased's estate and the estate of Andrew by illegally altering the shareholding of Lake Tanners Limited in which both Andrew and the Deceased were the only shareholders at the time of their deaths which acts has led to devaluation of the deceased’s share as well as Andrew’s shares. That *prior* to the said unlawful allotments and/or changes, the *shareholders* of the company were only Andrew and the Deceased with *equal shareholding* of a share each. That the petitioner had changed the shareholding by illegally allotting herself and other beneficiaries shares as follows;

a. Davies Kinyanjui Nderu - 10 shares

b. Hellen Njeri Nderu - 51 shares

c. Eric Ngethe Nderu - 10 shares.

40. The petitioner took the position that this court did not have jurisdiction to grant prayers sought in that regard and that the issues therein should be adjudicated upon by the Commercial Division of this court due to the nature of those issues. She contended that the family court had no power to issue injunctive orders against the company and dictate how it should run its affairs. That further the company was not even part of these proceedings. She stated that it is erroneous to imply that Lake Tanners Limited Assets were the deceased’s assets to be shared during the time the petitioner is enjoying her life interest

41. *That for the court to determine the issue it would have to examine Lake Tanners Limited's Memorandum and Articles of Association to determine how shares are acquired and transferred. That disputes regarding shareholding are canvassed through suits instituted by way of plaint or under the procedure formally contained in Section 118 of the repealed Companies Act.*

42. Rose Njeru Ndung'u on her part submitted that this issue had no bearing since nowhere in her summons did she invite this Honourable court to determine any shareholding dispute in any company. That her claims at all material times have been confined to inheritance of shares that the deceased herein held in the various companies and which shares form part of his estate.

43. Hellen Njeri Nderu, submitted that the jurisdiction of this court is limited to ascertaining that there once lived a person who has since died, the deceased left behind an estate, whether he left liabilities and who his/her beneficiaries and dependants are under **Sections 26 through 42 of the Law of Succession Act**.

44. That once the foregoing is established, this Honourable Court is thereafter mandated to distribute the estate by either adopting the mode proposed by the beneficiaries or by its own discretion upon taking evidence and or as provided by the law and that it is clear that the said shares were listed as properties of the deceased and were available for distribution and that the Petitioner holds the deceased estate in trust for the rightful beneficiaries, the properties do not belong to her.

45. Jane Muthoni on her part submitted that **section 3 of the Law of Succession Act** defines an 'estate' and free property and that the deceased's shares form part of the Estate as when he was alive, he could and was legally competent to freely dispose them. That they therefore fall under free property available for distribution and that the Petitioner's contention that this issue ought to be handled by the Commercial Court should therefore fail *ab initio*.

46. It is imperative to note that the case of **In The Matter of the Estate of Gitere Kahuru (Deceased)** which the petitioner relied on the petitioners therein prayed that the assets and shares of the deceased be distributed without specifying those assets and shares. The court stated;

*“From the material before me, it would appear that whilst some of the assets do not belong to the estates but to the company, there are other assets that could still be in the names of the deceased persons. The administrators ought, in their respective applications, to have separated the assets belonging to the company from those belonging to the deceased persons. Indeed, the assets belonging to the company ought not to have been listed at all, in their stead the applicants ought to have listed only the shares held by the deceased persons in the company alongside the assets registered in the names of the deceased persons. I need not say more on this.”*

47. There is a difference between shares held by a shareholder and assets or property of the company. This was demonstrated in **Salomon vs. A. Salomon & Co Limited (1896) UKHL 1, (1897) AC 32**, that

*“a limited liability company enjoys a separate legal existence apart from its shareholders. It can own property. It can sue and be sued. And it has perpetual existence, which means it can continue to exist despite the demise of its owners, the shareholders.”*

48. The Court in **Estate of Gitere Kahuru (Deceased)** went to say:

*“The relationship between the deceased persons and the company was that they were shareholders in the company by virtue of the two shares they held. The fact of being shareholders did not constitute them owners of the property of the company. That remained property of the company, for their sole interest in the company were the shares. IT IS THE SAID SHARES THAT ARE AVAILABLE FOR DISTRIBUTION HEREIN AMONGST THE SURVIVORS OF THE DECEASED. Should the survivors have no interest in continuing to have the company exist, then it is up to them to wind it up or to liquidate it, so as to have access to its assets. However, that cannot happen until after the shares in the company have been distributed to the beneficiaries. The jurisdiction of the probate court lies with DISTRIBUTION OF THE SHARES, but not the liquidation of the company or the distribution of its assets.”*

49. In the instant case the petitioner listed shareholding in Lake Tanners Ltd. Hotel Waterbuck Limited, Fish and Meat K Limited and Victoria Nile Perch Limited as properties of the deceased in the grant and therefore the shares of the deceased would be available for distribution by this court to the rightful beneficiaries.

50. The issue herein is settled by the case of **Rosemary B. Koinange (suing as legal representative of the Late Dr. Wilfred Koinange and also in her own personal capacity) & 5 others vs Isabella Wanjiku Karanja & 2 others (2017) eKLR** where it was stated as follows;

*“In view of what we shall say shortly, we shall not delve into those findings at any length. The biggest plank of the appellants' argument is that the Succession Court had no business plunging into the affairs of a juristic person since the affairs of such persons belong to Company law and civil courts, it was submitted. The other argument was that the shares of 2nd appellant were donated to Wilfred way back in 1994 as a gift *inter vivos* in tandem with other gifts made to the other children and his former wife. If he validly gifted other beneficiaries of his estate in his lifetime, there is no reason to interfere with the shares, it was urged. The counter argument was, of course, that the trial court was not determining the ownership of the assets of the company and therefore, reference to the juristic personality of the company was not relevant; the only issue before the trial court was the shares held by the deceased in the company; the companies have no business, and are indeed mischievous, in filing this appeal since they were not parties to the Succession Cause; the shares of the deceased were fraudulently and illegally transferred by Wilfred to himself and therefore he could not validly pass any property in the shares to anyone else; and that the administrators were entitled to pursue Wilfred and his estate for recovery of all the losses occasioned by the fraudulent transfer.*

*There can be no argument that the shares of a deceased in a limited liability company are assets which the family has power to distribute in a Succession Cause. The argument is rather that when there is a dispute on ownership of the shares, only a 'Companies Court' has jurisdiction to adjudicate. In this case, there is no dispute that the shares in the 2nd appellant were held by the deceased and Njoki in inception. It is averred that the deceased gifted his shareholding to Wilfred in 1994, but whether so*

*is a matter the Succession court is capable of determining. If the court holds that the shares were gifted to Wilfred, just as other gifts were made to the other beneficiaries that would be the end of the matter. If they were not, then they vest in the administrators who may engage with the company or companies under the relevant Company laws and Articles of Association to wrest them back to the estate. The issue of the shares held by the deceased in the 2nd appellant, and any other limited liability companies, shall, if not agreed, be determined on available evidence during the administration of the estate in accordance with the law". (all emphasis added)*

51. From the foregoing it is evident that as a Probate and Administration Court, this court has the requisite jurisdiction to deal with the shares of the deceased person on available evidence during the administration of the estate.

**Whether the Preliminary Objection has merited**

52. The threshold for a preliminary objection was set out in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors [1969] EA 696**.

*“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 has to be ascertained or if what is sought is the exercise of judicial discretion.”*

53. In **David Karobia Kiiru vs Charles Nderitu Gitoi & another (2016) eKLR** the court held that:

*“A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the locus classicus on preliminary objections in this region, Law JA stated: 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. 12. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.” (all emphasis added)*

54. And in **Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others [2015] eKLR** the court stated;

*“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”*

55. And in **Oraro v Mbaja [2005] eKLR** the court stated as follows:

*“I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified 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, and 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.”*

56. Having considered the foregoing authorities and the foregoing analysis of the points of law on which the Petitioner's Preliminary Objection was founded, can I really say that the Petitioner's Preliminary Objection is merited?

57. First I have found and I hold that even though the doctrine of laches was not pleaded by the Petitioners there is an exception under which the issue could be considered. I have also found and hold that it does not apply to this case or succession matters because under **Succession 76 of the Law of Succession Act** a Summons for Revocation of Grant can be filed any time.

58. I have also found and hold that **Section 35 of the Law of Succession Act** bars the distribution of the deceased's estate because the widow has a life interest in the net residue estate of the deceased. Any distribution would have to come through the appropriate applications not in the manner presented here by the applicants.

59. I have found and hold that this court has the jurisdiction to deal with the shares of the deceased which form part of his estate and these can be distributed by this court as a succession court.

60. It is evident from the above holdings that there are issues that would not be settled even if the Preliminary Objection was allowed. See **Janet Syokau Kaswii vs Kathonzweni Financial Service Association (2014) eKLR**. For example the issue of the shares, the issues of who are beneficially entitled to the estate, the responsibilities of the petitioner in the pendency of her life interest, whether or not there has been intermeddling and the issue of the delay in the filing of Summons for Revocation of Grant all these would have to depend on the evidence to be adduced by the parties. That too goes to other issues as to who the actual beneficiaries of the estate are and what constitutes the estate of the deceased. See also **Doshi Iron Mongers Ltd & Another vs Weights & Measures Department & 4 Others [2006] eKLR** where the court stated;

*“With due respect to counsel the point of law raised is not a proper point of Preliminary Objection. The substance of the plaintiff’s argument ought to have been canvassed in the substantive application. Raising it as a Preliminary Objection is a misconception of what constitutes a true Preliminary Objection, namely a pure point of law which if successfully taken would have the effect of disposing the suit or application entirely”.*

61. The pending issues take away the purity of the points of law raised by the petitioner and the preliminary objection appears to have lost some of its legs, and must fail.

62. The upshot of this is that the Preliminary Objection herein is accordingly dismissed.

63. This being a family matter each party will bear their own costs.

Orders Accordingly.

**DATED, SIGNED, DELIVERED VIA EMAIL THIS 15<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**Mumbua T. Matheka**

**Judge**

Kamau Kuria & Company Advocates

Judy Thongori & Company Advocates

J. Njuguna Ndung’u & Company Advocates (Nakuru)

Waiganjo & Company Advocates (Nakuru)

Mauwa & Company Advocates (Kisumu)