



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. E564 OF 2020

IN THE MATTER OF THE ESTATE OF HARILAL MULJI BHOVAN CHUDASAMA (DECEASED)

SHASHIKANT HARILAL CHUDASAMA.....APPLICANT

VERSUS

JASWANT HARILAL CHUDASAMA.....1ST RESPONDENT

RAMESH HARILAL CHUDASAMA.....2ND RESPONDENT

HASMUKH HARILAL CHUDASAMA.....3RD RESPONDENT

RULING

1. This ruling is in respect of two Preliminary Objections. The first Notice of Preliminary Objection is dated 7th September, 2020 and was filed by the 1st Respondent whilst the second Notice of Preliminary Objection is dated 22nd March, 2021 and was filed by the 2nd and 3rd Respondents. Both Preliminary Objections variously seek to expunge from the record the Applicant's Petition and Summons application filed contemporaneously on 11th August, 2020, in which he seeks orders *inter alia* for grant of administration *ad Colligenda bona* of the estate of the deceased.

2. The Notice of Preliminary Objection dated 7th September, 2020 is predicated on six grounds the gist of which is that:

a. *The Applicant has no locus to bring the application for grant ad colligenda bona as his application contravenes the provisions of sections 79 and 83 of the Law of Succession Act which provide the powers and duties of an administrator of an estate.*

b. *The issues canvassed in support of the said Petition are res judicata the same having been directly and substantially in issue between, inter alia, the same parties herein in Nairobi High Court Succession No. 89 of 2018 wherein a legal representative was appointed to protect the interest if any of the deceased in L.R. No. 209/3383.*

c. *The Petition does not conform with the mandatory provisions of Rule 36 of the Probate and Administration Rules which stipulates that an application for such a grant shall be by petition in form 35 signed by the applicant in the presence of **not less than two adult witnesses**. Therefore, that since the petition has been signed by one, it is defective.*

3. The second Preliminary Objection, dated 18th March, 2021, is predicated on the grounds that:

a. *The Petition and Application before Court offend the provisions of Rule 36 of the Probate and Administration Rules.*

b. *No special circumstances have been shown to necessitate the grant Administration ad colligenda bona.*

c. *The Petition introduces issues of argumentative, substantive and contentious nature by involving property which does not belong to the deceased's estate.*

d. *Most of the properties cited by the Petitioner are subject to ongoing litigation before other courts.*

e. *The Petition seeks to involve assets which do not belong to the deceased's estate and whose ownership are in the names of other persons.*

f. *The grant of administration ad colligenda bona is limited for the purposes of collecting, getting in, receiving and preserving the*

estate and not what the Petitioner seeks as disclosed in the Supporting Affidavit.

4. The Court directed that the Preliminary Objections be heard contemporaneously and further that both Objections be disposed of by way of written submissions.
5. Learned Counsel Ms. Njeri Mucheru filed written submissions dated 7th April, 2021 on behalf of the 1st Respondent in support of the first Preliminary Objection. Counsel delineated three issues for determination: whether the Applicant has *locus standi*; whether the issues canvassed in support of the Petition are *res judicata* and whether the Petition contravenes the mandatory provisions of **rule 36** of the **Probate and Administration Rules**.
6. Ms. Mucheru submitted that the duty of preservation of a deceased's estate can only be that of an administrator, in his capacity as the personal representative of the deceased and in whom the deceased's estate vests by dint of **sections 79 and 83** of the **Law of Succession Act**. To this end, Counsel cited the decision in **Re Estate of David Kyuli Kaindi (deceased) [2016] eKLR** in which the court set out the role of a personal representative. Counsel urged that a litigant in intestate succession is therefore clothed with *locus standi* upon obtaining a limited or full grant of letters of administration as was the holding of the Court of Appeal in **Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama [2014] eKLR**. That since the Applicant had not obtained a limited or full grant of letters of administration, he was not clothed with the requisite *locus standi* and the summons application and petition were therefore incompetent *ab initio* and bad in law and the orders sought therein unsustainable and unavailable to the Applicant.
7. To further buttress the 1st Respondent's case, Counsel cited the decisions in **Re Estate of James George Maruti (deceased) [2021] eKLR**; **Charles Kyathe Ndeke vs. Dancan Mutunga & 2 others [2015] eKLR** and **Estate of Musyoki Sila Musei (deceased) [2016] eKLR**.
8. On *res judicata*, it was Ms. Mucheru's contention that the issues canvassed in support of the Petition were directly and substantially in issue between, *inter alia*, the same parties herein in **Nairobi High Court Succession Cause No. 89 of 2018**. That the Applicant had in that cause sought for a grant *ad litem* but the court had declined his prayers and instead appointed one Nilaben Kartic Shah as the legal representative of the deceased in ELC Suit No. 249 of 2019 (*formerly ELC Suit No. 1394 of 2016*) to protect the interest, if any, of the deceased in L.R. No. 209/3383. According to Counsel, the instant petition and summons application are therefore a bid by the Applicant to circumvent that appointment. To this end, Counsel made reference to paragraphs 50 and 51 of the affidavit sworn by the Applicant in support of the petition.
9. On the third issue, Ms. Mucheru submitted that the Petition before court is defective as it does not conform to the provisions of **rule 36(3)** of the **Probate and Administration Rules** which is couched in mandatory terms that the petition for grant *ad colligenda bona* must be in the presence of not less than two adult witnesses. Counsel invited the court to examine the petition dated 11th August, 2020 stating that upon so doing, it would emerge that it has been signed by one witness instead of two. She urged that the mandatory requirement is not a mere technicality that can be remedied by **Article 159** of the **Constitution**. That the provisions of **Article 159** do not render all procedural requirements obsolete as was the holding in **Republic vs. Chairman Matungu Land Disputes Tribunal Ex Parte Electina Wang'ona [2012] eKLR**.
10. On their part, the 2nd and 3rd Respondents filed written submissions dated 3rd May, 2021 through learned Counsel Ms. Ng'etich in which they urged the court to find merit in the Preliminary Objection dated 18th March, 2021. They fully associated themselves with both the Preliminary Objection dated 7th September, 2020 and the 1st Respondent's written submissions dated 7th April, 2021.
11. Ms. Ng'etich contended that whereas the Petition was premised on grounds that there exist special circumstances which render the matter urgent and hence impossible for the court to issue a full grant to the person who is by law entitled, there were in fact no special circumstances or urgency that had arisen to compel the court to issue a partial grant. That in order to obtain the orders sought in the Petition and the Summons application, the Applicant was required to demonstrate special circumstances or urgency in line with **rule 36(1)** of the **Probate and Administration Rules**. Counsel asserted that since the deceased died on 11th October, 2002, the Petition and Summons had been filed 19 years late. She urged that this duration was a clear indication that the Applicant had moved the court with an ulterior motive. Further that no other family member had sworn an affidavit in support of the petition or alluding to the urgent circumstances which would warrant the issuance of the grant *ad colligenda bona*.
12. Counsel cited the decisions in **Julian Adoyo Ongunga & Another vs. Francis Kiberenge Bondeva (suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR** and **Morjarila vs. Abdallah [1984] KLR 490** and submitted that since the Applicant had not, with the requisite specificity, demonstrated the perishable or precarious nature of the deceased's estate, the Petition was ripe for dismissal at the interim stage.
13. Ms. Ng'etich further contended that the Petition offends the provisions of **sections 6 and 7** of the **Civil Procedure Act**. She asserted that the properties sought to be administered, namely L.R. No. 209/40/11; 209/40/12 and 209/3383, were actively in dispute before other courts of competent jurisdiction. Therefore, that the orders sought in those suits may be adversely affected by the orders sought herein, resulting in an embarrassing situation where one court's order becomes unenforceable. Counsel urged that on this basis, the court ought to down its tools and await the outcome of the disputes before the other courts on the actual ownership of the properties.
14. In opposition, learned Senior Counsel Dr. Kamau Kuria filed written submissions dated 28th April, 2021 on behalf of the Applicant in which he asked the Court to overrule both Preliminary Objections with costs. According to Senior Counsel, the Preliminary Objections are identical to those which Matheka, J had dismissed on 25th January, 2021 in a ruling delivered in **Re Estate of Late Philip Njoka Kamau (deceased) [2021] eKLR**, with particular reference to paragraphs 35 to 38 of the ruling.
15. Dr. Kamau Kuria SC asserted that the Preliminary Objections are not valid legal objections because they invite the court to ascertain facts

contrary to the definition of a Preliminary Objection given by Justice Newbold in **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors [1969] E.A 696**. That by taking up invalid objections, the Respondents want to escape the ascertainment of facts because they cannot defend their actions of intermeddling in the deceased's estate for years. Senior Counsel urged that the Objections can only be proper if the Respondents had accepted as correct the facts as stated by the Applicant.

16. It was the submission of Dr. Kamau Kuria SC that **section 66** of the **Law of Succession Act** demonstrates that in all petitions for a grant of representation, the court exercises discretion whether to issue a grant or not. Further that this court has jurisdiction under **section 47** of the **Act** to preserve an estate so that it may be shared in an orderly and fair manner. On this basis, Senior Counsel urged the court to overrule the objections and order the Respondents to file responses to the application to show why they should continue to enjoy the deceased's assets in total disregard of the law and why they should not account for all the money which they have collected. Senior Counsel cited the decision in **Bull vs. Bull (1955) 1 QB 232** where the court described the right of co-owners and contended that the Respondents simply did not want to recognize the estate of the deceased as a co-owner of the subject properties.

17. On *res judicata*, Dr. Kamau Kuria SC submitted that the issues which were adjudicated upon by the court in Nairobi High Court Succession Cause No. 89 of 2018 and the issues which are for adjudication in the instant cause are different and as such, the plea of *res judicata* cannot be invoked. That whereas the cause of action in Succession Cause No. 89 of 2018 sought a limited grant to pursue litigation on behalf of the estate of the deceased in a suit filed in the Environment and Land Court, the instant cause seeks to have the estate of the deceased preserved and administered legally by a competent administrator. Senior Counsel urged that the existence of a limited grant does not prevent one from seeking another limited grant as was enunciated in **Re Estate of Antony Shem Otieno Odhiambo (deceased) [2015] eKLR**.

18. To further buttress his arguments, Senior Counsel cited the decisions in: **George W. M. Omondi and another vs. National Bank of Kenya Limited and 2 others [2001] eKLR**; **Nabro Properties Limited vs. Sky Structures Limited [2002] 2 KLR 299**; **Succession Cause No. 111 of 2004 Francis Kamau Mbugua & Another vs. James Kinyanjui Mbugua; Saleh Bin Kombo Bin Faki vs. Administrator General [1957] EA 191**; **Re Estate of Antony Shem Otieno Odhiambo (deceased) [2015] eKLR**; **Henry Wanyama Khaemba vs. Standard Chartered Bank Ltd & Another [2014] eKLR**; **George Kamau Kimani & 4 others vs. County Government of Trans Nzoia & Another [2014] eKLR**; **Muhu Holdings Ltd vs. James Muhu Kangari [2017] eKLR**; **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd [2017] eKLR** and **State of Maharashtra and Another vs. National Construction Company, Bombay**.

19. Upon carefully considering the pleadings on record and the written submissions filed by the Parties in respect of the Preliminary Objections, three issues emerge for determination:

- a. Whether the Preliminary Objections dated 7th September, 2020 and 18th March, 2021 respectively meet the threshold of a Preliminary Objection.
- b. Whether the Petition and Summons filed contemporaneously on 11th August, 2020 are *res judicata*.
- c. Whether the Petition and Summons application are misconceived and bad in law in light of the provisions of **rule 36(1)** of the **Probate and Administration Rules**.

Whether the Preliminary Objections dated 7th September, 2020 and 18th March, 2021 respectively meet the threshold of a Preliminary Objection.

20. The circumstances in which a Preliminary Objection can be raised were laid out in the celebrated **Mukisa Biscuits Case** where Law, JA opined thus:

“So far as I am 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 plead of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

21. Adding to this, Sir Charles Newbold in the said **Mukisa Biscuits Case** observed thus:

“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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

22. A Preliminary Objection was further defined in **Oraro vs. Mbaja [2005] KLR 141**, where the Court held:

“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, 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...where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”

23. The instant Preliminary Objections challenge the Petition dated 11th August, 2020 and the summons application of even date. In the Petition, the Applicant seeks a grant of letters of administration *ad colligenda bona* of the estate of the deceased, while in the summons the

Applicant seeks that the Petition be allowed; the 1st Respondent deposit in court monthly two-thirds of the market rent of L.R. No. 209/3383; the 2nd and 3rd Respondents do deposit in court the monthly rent fetched by the flats on L.R. No. 209/40/12; the 2nd Respondent do deposit in court or in an account in the name of the estate of the deceased monthly one-third market value of the rent from L.R. No. 209/40/11; the 2nd and 3rd Respondents do account to the estate of the deceased all the rent received from L.R. No. 209/40/12 since December 2002 and be restrained from evicting Hinish Chudasama from his flat on L.R. No. 209/40/12 pending the hearing and determination of the Petition.

24. The Objections challenge the *locus standi* of the Applicant to file a suit seeking a grant *ad colligenda* on the basis that he is not the administrator of the deceased's estate; there are pending disputes in respect of the properties over which he seeks to have the grant issued; the matter is *res judicata* since the court had previously denied an application filed by the Applicant seeking a grant *ad litem* and further that he has not satisfied the requirements needed for the issuance of a grant *ad colligenda bona*.

25. Notably, while the Applicant contended that the facts in both the Petition and the Summons application are contested, an examination of the record reveals that the Applicant had in both the Petition and Summons application conceded that the assets over which he seeks a grant *ad colligenda bona* are either registered in the names of other persons or are the subject of litigation before other Courts. Additionally, it is without a doubt that the Applicant did in fact file an application seeking for a grant of letters of administration *ad litem* in Succession Cause 89 of 2018 wherein the Court issued the grant *ad litem* to one Nilaben Kartic Shah. Therefore, in my view, both preliminary objections are based on a commonly accepted set of facts and do qualify as proper Preliminary Objections, the circumstances surrounding the existence of these facts notwithstanding.

Whether the Petition and Summons filed contemporaneously on 11th August, 2020 are *res judicata*.

26. It is my considered view that the doctrine of *res judicata* ought not to be invoked in these circumstances. Whereas it is uncontroverted that the Applicant filed an application for a grant *ad litem* of the deceased's estate, it is noteworthy that a limited grant of letters administration *ad litem* which falls under **section 54** of the **Law of Succession Act** differs from a grant of letters of administration *ad colligenda bona* which falls under **section 67** of the **Act**. Despite the fact that both grants are categorized as grants for special purposes, they serve different purposes and the nature of succession causes is such that such grants can be made and cancelled at any time pending the making of a full grant.

27. The doctrine of *res judicata* is set out under **section 7** of the **Civil Procedure Act, CAP 21** as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

28. Since there is no nexus between the previous application and the instant Petition and Summons application which seeks a grant of letters of administration *ad colligenda bona* the doctrine of *res judicata* cannot be invoked. The arguments raised by the Respondents to this end fail the test of *res judicata* as laid down in numerous case law to wit **Henderson vs. Henderson (1843) 3 Hare 100** and **John Florence Maritime Services Limited & another vs. Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR** (Supreme Court of Kenya).

Whether the Petition and Summons application are misconceived and bad in law in light of the provisions of rule 36(1) of the Probate and Administration Rules.

29. One of the arguments advanced in this respect was whether the Applicant has *locus standi* to bring a suit for a grant of administration *ad colligenda bona*. On this, I find guidance in **rule 36(1)** of the **Probate and Administration Rules** which provides that any person can make such an application. The circumstances under which a grant *ad colligenda bona* can be issued are also stipulated under the said **rule 36(1)** as follows:

“Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration *ad colligenda bona defuncti* of the estate of the deceased.”

30. The import of **rule 36(1)** is that a grant *ad colligenda bona* can only issue in respect of the estate of the deceased. **Section 3** of the **Law of Succession Act** defines an 'estate' as the free property of a deceased person and 'free property', in relation to a deceased person, as 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 on death.

31. There is on record a transfer dated 24th September, 1996 which was registered in the Land Titles Registry on 29th September, 2003 as I.R. 8159/7. In it, the transferor Harilal Mulji Chudasama, transferred to the transferee Jaswant Harilal Chudasama, the 1st Respondent herein, his undivided one-third right title and interest in and to the piece of land being L.R. No. 209/3383 together with the buildings and improvements thereon. There is also on record a Transfer dated 12th October, 1995 registered in the Land Titles Registry on 17th March, 2004 as I.R. 77/07/2 & I.R. 77/08/2. In it, the transferor Harilal Mulji Chudasama, transfers his undivided one-third right title and interest in the pieces of land being Land References Numbers 209/40/11 and 209/40/12 together with the buildings and improvements thereon to the transferee Ramesh Harilal Chudasama, who is the 2nd Respondent herein.

32. It is apparent that the transfers, though executed during the deceased's lifetime, were registered after the deceased's death. This is however an issue outside the purview of the Probate Court whose jurisdiction is in respect of administration of that which comprised the free

property of the deceased as at the date of his death. It appears that the parties are also cognizant of this as there are pending proceedings in ELC Suit No. 249 of 2019 (formerly ELC Suit No. 1394 of 2016) in respect of the property known as L.R. No. 209/3383. Indeed, the Environment and Land Court is vested with jurisdiction to determine disputes relating to environment and land including disputes relating to instruments granting enforceable interests in land as provided under **section 13(2)** of the **Environment and Land Court Act**.

33. Notably, the Applicant had in his supporting affidavit also stated that in addition to the interests in the suit properties, the deceased also had shares in a company known as Azad Cushion Makers Ltd. Further that there is pending a Civil Suit No. E239 of 2020 in the Commercial Division of the High Court at Nairobi.

34. **Rule 36(2)** is categorical that a grant of administration *ad colligenda bona* shall be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made. Therefore, a grant *ad colligenda bona* ought not to be sought in circumstances where the court may be called upon to determine weighty and contentious issues regarding the estate of a deceased. (See – **Ad Colligenda Cause 11’a’ of 2011, Mary Waithera vs. Ann Ndegwa & another [2014] eKLR**). I wish to echo **section 79** of the **Law of Succession Act** that what vests in a personal representative is the property of a deceased.

35. An applicant is also required to comply with the provisions of **rule 36(3)** which provides *inter alia* that an application for a grant *ad colligenda bona* shall be by petition in Form 85 signed by the applicant in the presence of not less than two adult witnesses supported by an affidavit containing the material facts together with the reasons for the application and showing the urgency of the matter. It is imperative to state that the use of the word ‘shall’ makes this a mandatory provision.

36. At a cursory glance, it appears that not only is the petition not attested to by at least two adult witnesses but it also fails to disclose any urgency. At the section where the witnesses were required to have signed it appears that all there is is a stamp of the Applicant’s Advocate on record. On urgency, all the Applicant has done is state in his supporting affidavit that it is unlikely that a full grant will be issued soon after he applies for it and further that his siblings have rejected the suggestion to resolve the disputes touching on the subject properties amicably. In my considered view, these sentiments do not demonstrate any urgency. All they do is confirm that there is a contention in respect of the ownership of the subject properties and thereby support the Respondents’ argument that the application is misconceived.

37. It is now almost 19 years since the deceased’s demise and by now the beneficiaries ought to have petitioned for a grant of letters of administration intestate. Any failure on their part in this respect is no reason for this court to entertain an application for a grant of administration *ad colligenda bona* after such a lapse of time especially since the issuance of such a grant is pegged on urgency. The word urgency is a derivative of the word urgent which is defined at p. 1592 of the **Concise Oxford English Dictionary** as ‘*requiring immediate action or attention*’. As such, to state that there is an urgency which is 19 years late in time, not only defeats the meaning of the word urgency but also the purpose of a grant of administration *ad colligenda bona de functi*.

38. Interestingly, the Applicant had in his affidavit sworn in support of the Petition stated that if the application was allowed, it would enable him enjoin and make witness statements in a suit on behalf of the deceased’s estate and further that there was a need to appoint a legal representative in respect of the deceased’s interest in LR. No. 209/3383. These depositions appear to have been made not to seek a grant of administration *ad litem* as alleged by the Respondents but in support of the Applicant’s prayer for a grant *ad colligenda bona*. I wish to reiterate that a grant *ad colligenda bona* does not grant the holder any other power, other than to collect and preserve the estate of a deceased.

39. Therefore, until the pending suits are determined, and the interests of the deceased in the subject properties ascertained, this court cannot purport to issue a grant of administration, limited or otherwise, in respect of those properties. Prudence dictates that the succession court awaits the outcome of the pending suits in order to ascertain which of the assets comprise the deceased’s estate. This does not however estop any of the deceased’s beneficiaries to move the court appropriately to seek a full grant of the deceased’s estate in respect of properties which can be ascertained to comprise the deceased’s estate. It is this court’s belief that any matters pertaining to the administration of the estate of the deceased herein, in view of the apparent contentions, would only be adequately addressed through an application for a full grant.

40. In view of the foregoing, I find that the Petition and Summons application are misconceived, bad in law, and an abuse of court process. The application for collection and preservation of the deceased’s estate herein is not only filed almost two decades after the deceased’s demise but is also in relation to properties whose ownership are either the subject of proceedings before other courts or did not vest in the deceased at the date of his death.

41. Accordingly, I find the Preliminary Objections to be meritorious and hereby allow them. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 5TH DAY OF OCTOBER, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant.

In the presence ofAdvocate for the 1st Respondent.

In the presence ofAdvocate for the 2nd and 3rd Respondents.