



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. E029 OF 2021**

**BETWEEN**

**FGM.....PLAINTIFF**

**AND**

**BANK OF BARODA KENYA LIMITED.....DEFENDANT**

**RULING**

1. Section 79 (3) of the Land Act, Section 12(5) of the Matrimonial Property Act and Section 93 (3) and 4 of the Land Registration Act provide for transactions that require spousal consent and they include charges which is the subject matter of this case.
2. The Plaintiff's case is that she did not give consent to her late husband DGM to charge LR. NTIMA/IGOKI/9446 which she pleads is matrimonial property and prays for cancellation of the charge among other prayers.
3. Defendant through its counsel Mr. Kiruai has raised a Preliminary Objection on the ground that the Plaintiff has not obtained letters of administration to the estate of her late husband.
4. Plaintiff through her counsel Ms. Kiome urged the court to find letters of administration are unnecessary for the reason that the suit is brought for the benefit of the Plaintiff and not for the benefit of her late husband's estate.
5. I have considered oral submissions by counsel and the issue in question is whether the P.O is merited.
6. A preliminary objection is a point of law when if taken would dispose of the suit. It is what was formerly called a "demurrer". The *locus classicus* on Preliminary Objection is the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**, where Law J.A. stated:

**“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 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.”**

7. Sir Charles Newbold, President stated in the same judgment as follows: -

**“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.”**

8. A reading of the pleadings discloses that that Plaintiff's claim against the Defendant is brought on her own behalf as spouse of the chargor and not for the benefit of the estate of the chargor.

9. Whereas there is no dispute that the Defendant has raised a pure point of law, **Isaya Masira Momanyi v Daniel Omwoyo & Another [2017] eKLR** is distinguishable for the reason that Plaintiff does not require to obtain letters of administration to bring this suit for her own benefit.

10. In the end, I find that the P.O has no merit and it is overruled

**DATED AND DATED IN MERU THIS 2<sup>ND</sup> DAY OF DECEMBER 2021**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Kinoti**

**For the Plaintiff - Ms. Kiome for Charles Kariuki & Kiome Advocates**

**For the Defendant - Mr.Kiruai for Kiautha Arithi & Co Advocates**