



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.45 OF 2017

IN THE MATTER OF THE ESTATE OF:

JECKONIA ODIETO OKELLODECEASED

AND

LUCIA ADEYA ANJELINAAPPLICANT

VERSUS

MILKA JUMA OMOLLO.....1ST RESPONDENT

JANET AYOO OCHIENG 2ND RESPONDENT

RULING

[1] The application dated 23rd March 2019 is for revocation of the grant issued to the two respondents/petitioners, **Milka Juma Omollo** (now deceased) and **Janet Ayoo Ochieng** on the 23rd September 2003, in **Migori PMCC Succession Cause No.96 of 2003**.

The applicant, **Lucia Adeya Angelina**, essentially invokes Section 76 of the Law of Succession Act in making the application which is based on the grounds set out in the appropriate summons for revocation of grant as fortified by the averments contained in her supporting affidavit dated 23rd March 2019.

It is instructive to note that on that 23rd March 2019, the applicant made a notice of withdrawal of summons for revocation of grant dated 3rd October 2013 and filed the same herein on 1st April 2019.

Accordingly, the said summons was formally withdrawn in this court's proceedings of the 30th April 2019.

[2] The present application was effectively filed herein on 1st April 2019 and was listed for directions on 24th July 2019 when the court's attention was drawn to a notice of preliminary objection dated 20th July 2019 and filed herein by the respondents on 22nd July 2019.

The notice contains four grounds:-

[1] **That, the substantive application dated 3rd October 2013, which founded the proceedings herein having been withdrawn the cause herein stood spent and cannot predicate and/or be pedestal for further proceedings.**

[2] **That, the court herein become functus officio, upon adoption of the withdrawal notice and no further orders can issue in the cause herein and the application dated the 23rd March 2019, is misplaced, ill-advised and misconceived.**

[3] **That, the cause having been withdrawn, the matter stood terminated and sneaking in of another application with similar prayers constitute an abuse of court and otherwise bad in law.**

[4] **That, the only issue outstanding and for consideration is the costs.**

[3] On 15th October 2019, directions were given that the preliminary objection be heard by way of written submissions.

In that regard, the second objector/respondent filed her submissions on 5th December 2019, through **M/s O.M. Otieno & Co. Advocates**,

while the applicant filed hers on 9th December 2019, through **M/s Oguttu, Ochwangi, Ochwal & Co. Advocates**.

This court duly considered the preliminary objection on the basis of the supporting grounds and the rival submissions and is of the opinion that all the four grounds on which the objection is anchored are essentially matters of fact as opposed to matters of law as the court would invariably consider the entire process and proceedings, as depicted in the record to determine whether or not the application dated 3rd October 2013 was regularly withdrawn and if so, whether it stood withdrawn as at the time the present application dated 23rd March 2019, was filed.

[4] In the famous case of **Mukisa Biscuit Manufacturing Co. Limited –vs- West End Distributors Limited [1969] EA 696**, it was stated that 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.

On the basis of this principle, the grounds for the preliminary objection are unsustainable.

In any event, this matter remains active inasmuch as no final judgment or ruling has been rendered on it by the court. Besides, the intended withdrawal and indeed the withdrawal of the application dated 3rd October 2013, was not a bar to the applicant bringing in a fresh application based on the same facts or different facts.

The question of this court being “functus officio” does not apply in the present circumstances. Indeed, the objector conceded as much when she says in her ground four (4) of the objection that the only outstanding issue in this matter is to do with the costs. This ground is a complete contradiction of ground two (2).

[5] From the record, it is evident that the present application was filed on 1st April 2019, before the court formally made or issued the withdrawal order on 30th April 2019, while the application dated 3rd October 2013, had already commenced with the evidence of the applicant herein and her witnesses. She had one more witness to call before closing her case. The respondents were yet to commence their case. So, the withdrawal came when the matter had progressed almost half way such that no opportunity was presented to the court to make a final determination and probably become “functus officio”.

However, the filing of the present application was pre-mature inasmuch as it was done prior to the issuance of the withdrawal order by the court. In the circumstances, the application ought to be amended accordingly or be withdrawn altogether to pave way for yet another fresh application.

In the upshot, the preliminary objection is overruled and dismissed in its entirety. Each party shall bear own costs of the objection.

Ordered accordingly.

J.R. KARANJAH

JUDGE

13.02.2020

[Delivered and signed this **13th** day of **February, 2020**].