



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1546 OF 2019

IN THE MATTER OF THE ESTATE OF TOB CHICHO COHEN (DECEASED)

BETWEEN

SARAH WAIRIMU KAMOTHO COHEN.....APPLICANT

AND

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE REGISTRAR OF BIRTHS AND DEATHS

DEPARTMENT OF CIVIL REGISTRATION NAIROBI.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. This ruling relates to a Preliminary Objection dated 10th January, 2020 raised by the 1st and 2nd Respondents in respect to the main application on the grounds that the application is fatally defective for wrongful joinder of the Respondents. That the application is incurably incompetent against each of the Respondents, reasons for which it ought to be struck out as against each of them.
2. The Applicant had on 17th December, 2019 filed an application by way of Chamber Summons dated 16th December, 2019. The application is brought under **Article 40** of the **Constitution**, **sections 45, 46 and 47** of the **Law of Succession Act CAP 160** and **rule 59 and 73** of the **Probate and Administration Rules**. In it, the Applicant seeks orders to restrain the 1st and 2nd Respondents by themselves, their officers, counsels, friends, agents, servants, employees, contractors, proxies or any purported executors, executrix or beneficiaries of the Estate from howsoever selling, transferring or in any manner dealing with the deceased's assets within the jurisdiction of this court.
3. The Applicant accuses the 1st and 2nd Respondents of illegal seizure, detention and continued possession of the property known as L.R. No. 2951/449, an act she says amounts to intermeddling in the deceased's property.
4. The Preliminary Objection came up for hearing on 10th February, 2020 during which time learned Counsel M/s Mwaniki submitted on behalf of the 1st and 2nd Respondents that the Chamber Summons filed by the Applicant is fatally defective for wrong joinder.
5. It is Ms. Mwaniki's statement that the 1st and 2nd Respondents have no legal capacity to sell, transfer or act in any other manner regarding the intestate or testamentary succession in the estate of any deceased person.
6. The 1st Respondent, the Directorate of Criminal Investigations (DCI), is a directorate which falls under the Police Service and is established under **section 28** of the **National Police Service Act No. 11A of 2011** whereas the 2nd Respondent is the Office of the Director of Public Prosecutions (ODPP), an independent office established under **Article 157** of the **Constitution**.
7. Ms. Mwaniki noted that under the **National Police Service Act**, the 1st Respondent is tasked with maintaining law and order and conducting forensic investigations. That none of the powers of the 1st and 2nd Respondents fall under the **Law of Succession Act** to enable

the Respondents deal with testamentary and intestate properties.

8. According to Ms. Mwaniki, the joinder of the 1st and 2nd Respondents to the proceedings herein is a mere attempt by the Applicant to link the Respondents to this succession matter concerning the property known as L.R. No. 295/449 along Farasi Lane in Mugomoini Close Nairobi.

9. The 1st and 2nd Respondents, acting on their mandate, had caused the Applicant to be arrested and charged with murder under **section 204** of the **Penal Code**. On 11th October, 2019 Mutuku J, sitting in the Criminal Division of the High Court, while granting bail to the Applicant, directed that the Applicant shall not go anywhere near the property except with leave of that court. It is Ms. Mwaniki's statement that the Applicant cannot therefore appeal to this court against that ruling. That her only reprieve would be to return to that court or go on appeal.

10. On their part, the 3rd and 4th Respondents through learned Counsel Mr. Munene representing the Attorney General, expressed their support of the Preliminary Objection.

11. In opposition, learned Counsel Mr. Murgor submitting on behalf of the Applicant stated that the Preliminary Objection must fail because it is impossible to deal with this matter on a pure point of law yet the facts have been denied. He also took issue with Mr. Munene's submissions, stating that the Attorney General, the 4th Respondent herein, had not filed any documents hereto, to belatedly and collusively support the preliminary objections.

12. Mr. Murgor contended that the mandate of the 1st and 2nd Respondent does not extend to holding, possessing and intermeddling in the property of a deceased person. Counsel asserted that under the **Law of Succession Act**, the property of a deceased is sacred and the Respondents are no exception. He stated that the Respondents have nonetheless taken possession of the deceased's property for a period of five (5) months now without the direct order of this court or the criminal court. He urged that the Respondents have continued to act in an unaccountable manner by failing to provide an inventory of what they hold and that this leads to suspicion of intermeddling.

13. It was Mr. Murgor's averment that the 1st and 2nd Respondent did not seek any positive order of court prior to taking possession of the suit property. Counsel asserted that all the Respondents did was make an application before the Chief Magistrate's Court at Kiambu seeking to secure the property as a scene of crime, but that they did not state that they were in possession thereof. On 2nd September, 2019 Hon. P. Gichohi, Chief Magistrate, delivered a ruling stating that the police did not need an order of the court to declare a place as a scene of crime.

14. Mr. Murgor pointed out that whereas one of the conditions given by the court in granting bail to the Applicant was not to go near the suit property, it did not in any way give possession positively to the 1st and 2nd Respondent. He however stated that the Respondents should stay at the property until they can account.

15. In rebuttal Ms. Mwaniki submitted that whereas the pleadings filed hereto point to possession, no evidence has been tendered to show that the property is in the possession of the 1st and 2nd Respondent. She asserted that the Respondents do not have the title deed to the property nor has the Applicant placed any caveat on the title.

16. Ms. Mwaniki asserted that the Applicant cannot direct the 1st and 2nd Respondents on how fast the scene should be investigated. That in any case, this is an issue within the purview of the Criminal Court.

17. Ms. Mwaniki invited the court to take judicial notice of the fact that the 1st Respondent under **Chapter 9** of the **Constitution** falls under the Executive arm of government and the 4th Respondent the Attorney General is the principal advisor to the government. She stated that the court should therefore direct that the 1st and 2nd Respondent be removed from these proceedings, since they have no mandate to deal with succession matters or the issuance of death certificates. Further that the Applicant had failed to prove a connection between the 1st and 2nd Respondent to the proceedings hereto.

18. The law pertaining to a Preliminary Objection is settled. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Co. Ltd [1969] EA 696** Law JA rendered himself thus on the question of Preliminary Objection:

“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.”

19. Similarly Sir Charles Newbold in the above cited case of **Mukisa Biscuit** 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.”

20. In **Oraro vs. Mbaja [2005] KLR 141** Ojwang J (as he then was) cited the **Mukisa Biscuits case (supra)** and went on to state thus:

“A ‘Preliminary Objection’ correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion

which claims to be a Preliminary Objection, 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...”

21. From the cited cases, it is clear that a Preliminary Objection should be a straight forward point of law which will not need probing of evidence in order to prove. Any point which is blurred with factual matters does not therefore qualify as a Preliminary Objection in law. In **John Musakali vs. Speaker County of Bungoma & 4 Others [2015] eKLR**, Mwita J espoused the legal principle as follows:

The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised, the Preliminary Objection should have the potential of disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.

22. Under **Article 157(10)** of the **Constitution**, the Director of Public Prosecutions, the 2nd Respondent herein, is independent and cannot be subject to any person or authority for the exercise of the powers of his office except as stipulated under **Article 157(11)**. Further, **Article 157(4)** grants the 2nd Respondent the power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such direction. The 1st Respondent the Directorate of Criminal Investigations, is under the direction, command and control of the Inspector-General. The decisions of the Inspector General with regard to the directorate are implemented by the Director of Criminal Investigations.

23. At the centre of these proceedings is the property known as L.R. No. 2951/449. The record demonstrates that it is not a disputed fact that the 1st and 2nd Respondents secured the property as a scene of crime. The Applicant however alleges that the 1st and 2nd Respondents have taken over possession of the property an act she says amounts to intermeddling.

24. The **Black’s Law Dictionary 10th Edition** at **page 1351** defines possession as follows:

“1. The fact of having or holding property in one’s power; the exercise of dominion over property.

2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object.

The legal consequences which flow from the acquisition and loss of possession are many and serious. Possession, for example, is evidence of ownership; the possessor of a thing is presumed to be the owner of it, and may put all other claimants to proof of their title.”

25. The basis for which the Applicant enjoined the 1st and 2nd Respondents to these proceedings is that the Respondents are in possession of the suit property. Ms. Mwaniki contended on behalf of the 1st and 2nd Respondent that the sole purpose of securing the suit property is to collect forensic evidence since the property is a scene of crime.

26. The Applicant states that the Criminal Court stated, and rightly so, that it is not clothed with the jurisdiction to determine who owns and who does not own the property and what is in the property. This is evinced in a ruling dated 14th January, 2020 and delivered on 16th January, 2020 following an application by the Applicant in **Criminal Case No. 60 of 2019** in which she is named as the Accused person. In the ruling, Mutuku J further stated thus:

“In respect of prayer 3 it is the understanding of this court that the presence of the police at the premises in issue is for purposes of preserving the scene of crime and this state of affairs is not a perpetuity. Once the forensic examination (is done) it is my belief that it may not be necessary to have the police at the premises unless for some reasonable cause this becomes necessary with the authority of the court. This court is not able to grant this prayer until it is satisfied itself that doing so will not compromise fair trial in this matter or infringe on rights of other parties...”

27. The Applicant had in prayer three (3) of her application filed in the criminal proceedings, as reproduced in the ruling, sought an order that the 2nd Respondent and or the Inspector General of Police remove their officers stationed at the Applicant’s home situate on L.R. No. 2951/449 at Farasi Lane, Mugomoini Close, Lower Kabete.

28. In my considered view, securing a property as a scene of crime does not constitute possession. In any event, **section 35** of the **National Police Service Act** mandates the 1st Respondent under the direction of the 2nd Respondent to *inter alia* undertake investigations on serious crimes including homicides, and conduct forensic analysis. This section does not however confer ownership of the property to the Respondents who have rightfully not laid any claim of ownership thereto.

29. From the ruling of Mutuku J sitting in the **Criminal Court** it is evident that as at the date of the ruling, the suit property was still secured as a scene of crime. While this court is clothed with jurisdiction with regard to property constituting the estates of a deceased person in testate and intestate succession, the jurisdiction does not extend to the manner in which the 1st and 2nd Respondent, in the conduct of their investigative powers conferred by law, should deal with the property of a deceased person. As stated by Mutuku J, the forensic examination of the scene of crime is not in perpetuity. Once the Respondents have concluded their investigations, the property will revert to the person entitled to it under the law of succession.

30. In the persuasive decision in **Hassan Ali Joho vs. Inspector General of Police & 3 Others [2017] eKLR**, Ogola J while deliberating on

the functions of the Offices of the DPP and DCI opined thus:

“The Kenyan Constitution upholds, and is based on principles of separation of powers, roles and functions for various constitutional actors. The office of the Director of Public Prosecution is an independent office with clear defined functions. In principle, it is not the work of court to interfere with other State organs unless it can be shown that they violate the constitution: each State organ must be allowed to function without interference. It is the duty of this court to protect not only the functional administrative independence of the office of the Director of Public Prosecution but also to protect the applicant and ensure that in exercise of these functions, the DPP must have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

In this context, functional, administrative and operational independence entails that the Offices of DPP and DCI in exercising their autonomy and carrying out their functions they do so without receiving any instructions or orders from other State organs or bodies and have regard to *inter alia* public interest and not to abuse the legal process. The office of DPP must also adhere to the national values in Article 10 of the Constitution and in the context of this application principles of good governance, transparency and accountability in exercise of its functions.”

31. From the foregoing, it is evident that the 1st and 2nd Respondent are not in possession of the property as to deal with it in any manner as suggested by the Applicant. Theirs is only to conduct forensic examinations in furtherance of criminal proceedings before the Criminal Court since the property is an alleged scene of crime. Being that this is a mandate conferred by law, the 1st and 2nd Respondent cannot be enjoined as parties in a Succession Court when they have no beneficial interest whatsoever in the deceased’s estate. The Respondents are neither dependants nor beneficiaries of the deceased’s estate within the meaning of the **Law of Succession Act** which constitutes the law of Kenya in respect of intestate and testamentary succession.

32. I have carefully considered the pleadings filed hereto and the oral submissions of the Counsels on record for the parties. I find that enjoining the 1st and 2nd Respondent to these proceedings, as the Applicant has done in the application objected to, is misguided.

33. The upshot of the above is that the Preliminary Objection raised by the 1st and 2nd Respondent is found to be meritorious. I find that the application filed by way of Chamber Summons dated 16th December, 2019 is incompetent as against the 1st and 2nd Respondent and is hereby struck out as against them.

DATED SIGNED AND DELIVERED IN OPEN COURT THIS 2ND DAY OF MARCH, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicants.

In the presence ofAdvocate for the Respondents.