



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 399 OF 2015

IN THE MATTER OF THE ESTATE OF KIPTOGOM BWALEI alias KIPTOGOM BWALEY (DECEASED)

LABAN KIMUTAI.....APPLICANT

-VERSUS-

VICTOR KIPBICHII CHOGE.....RESPONDENT

RULING

[1] Before the Court for determination is the Preliminary Objection raised herein by the respondent/petitioner, **Victor Kipbichii Choge**, to the applicant's Summons for Revocation of Grant, dated **11 January 2019**. The brief background of the matter is that the respondent filed the instant Petition on **15 October 2015** seeking to be appointed as the administrator in respect of the estate of his deceased father, **Kiptogom Bwalei**. He filed the Petition on behalf of 8 other beneficiaries of the deceased's estate and, as far as the record goes, the requisite consents were duly obtained from those beneficiaries by the respondent to act on their behalf as the administrator.

[2] The Petition was thereafter processed, and Grant of Letters of Administration Intestate issued on **3 May 2017** to the respondent. That Grant was confirmed and a Certificate of Confirmation issued on **7 September 2018**, again with the consent of all the beneficiaries. Thereafter, on **16 January 2019**, the applicant filed an application dated **11 January 2019** for revocation of the grant, contending that, in **2002**, he purchased a piece of the suit property, **No. SERGOIT/KARUNA BLOCK 4 (KIRISWA)/2**, measuring 7.5 acres from two of the deceased's beneficiaries, namely, **Kipsanga Togom** and **Mariko Kipkoech Togom**; and that his interest was not taken into account by the respondent. For this reason, the applicant contended that the grant was obtained fraudulently by concealment from the court of the fact that he had purchased a portion of the property comprising the deceased's estate; and that there were pending cases before the Eldoret Environment and Land Court over the transaction.

[3] It was in response to that application that the respondent filed the Notice of Preliminary Objection dated **9 April 2019**, on the following grounds:

- [a] The applicant identifies himself as a purchaser and is not a beneficiary of the estate by way of inheritance;
- [b] This is a succession matter and the succession court cannot determine contracts relating to sale of land;
- [c] The agreement in issue is disputed;
- [d] The succession court is *functus officio* and has no jurisdiction over land matters;

[4] The preliminary objection was canvassed by way of written submissions, pursuant to the directions given herein on **16 September 2019**. In his written submissions dated **28 October 2019**, **Dr. Chebii** for the respondent placed reliance on **Sections 45(1) and 55** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya** to underscore his argument that the applicant is an intermeddler and that his claim for land in a succession matter is entirely misplaced. He urged the Court to note that the sale agreement occurred after the death of the deceased and therefore was done in disregard of the applicable law. Moreover, it was the contention of **Dr. Chebii** that the Court is *functus officio* as the grant has been confirmed and the estate distributed. He posited that if the applicant has any claim at all then the same is purely a civil matter that ought to be pursued before the civil courts. He accordingly prayed that the preliminary objection be upheld and the application dated **11 January 2019** be struck out with costs.

[5] On behalf of the applicant, **Mr. Tororei** took the view that this court does have the requisite jurisdiction to entertain the application by dint of **Section 76(b)** of the **Law of Succession Act** and **Rule 44** of the **Probate and Administration Rules**, which give any person with an interest in the assets of a deceased person to seek revocation of grant in the situations envisaged by those provisions, including fraud.

Counsel also relied on **Sections 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules** which recognize the inherent jurisdiction of the Court to hear all manner of applications preferred in succession causes in so far as they meet the ends of justice in those matters. He relied on **Re Estate of Francis Muriuki Muchira alias Francis Muriuki Muchera** [2018] eKLR, **Re Estate of Hemed Abdalla Kaniki** (deceased), Nairobi HCSC No. 1831 of 1996 and **Re Estate of Murathe Mwarira** (deceased), Nairobi HCSC No. 825 of 2003, to demonstrate that the applicant is an interested person for purposes of **Section 66** of the **Law of Succession Act**.

[6] Although, in his written submissions dated **12 November 2019**, Counsel for the applicant dwelt at length on the merits of the revocation application, the scope of this ruling is circumscribed by and therefore limited to the issues raised in the Notice of Preliminary Objection dated **9 April 2019**, namely, jurisdiction and whether the applicant qualifies as an interested person for purposes of **Sections 66 and 76(b)** of the Law of Succession Act, bearing in mind the principle laid down in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696** as to matters that form the proper subject of a preliminary objection. It was held therein 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. 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] Moreover, as was opined by Sir Charles Newbold, P. in the **Mukisa Biscuits Manufacturing Co. Ltd Case**:

"...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] The same position was adopted by **Hon. Ojwang, J.** (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141**, thus:

"...The principle is abundantly clear. 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, 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...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

[9] Hence, having raised the question of jurisdiction, there can be no doubt that Petitioner's preliminary objection is well founded. The issue of jurisdiction is germane because, as was pointed out by the Court of Appeal in the **Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd [1989] KLR 1**:

"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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[10] Hence, where the jurisdiction of the Court is impugned, the Court must take time to hear the parties and make a determination as to whether it does have the powers to entertain the dispute. And as expounded by the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others** [2012] eKLR:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

[11] Thus, whereas **Article 165(3)(a) and (5)** of the **Constitution** gives the High Court unlimited original jurisdiction to handle civil and criminal matters, **Sub-Article (5)** is explicit that that jurisdiction does not extend to matters reserved for the exclusive jurisdiction of the Supreme Court or matters falling within the jurisdiction of the Employment and Labour Relations Court and the Environment and Land Court. For purposes of ascertaining matters falling within the jurisdiction of the Environment and Land Court, **Section 13** of the **Environment and Land Court Act** provides that:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries,

rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

[12] What is in issue in the subject application is not a simple contract of sale of land between two individuals capable of suing and being sued in their own right, but a claim to a portion of land belonging to a deceased person whose estate is the subject of this particular succession cause. As a purchaser, the applicant contends that his interest ought to have been taken into account; and therefore that in obtaining the grant, the respondent concealed information from the Court. As pointed out herein, the purpose of this ruling does not extend to the merits of the revocation application, which has undoubtedly been brought pursuant to the Law of Succession Act. Accordingly, by dint of **Section 47 of the Law of Succession Act**, the Court has the right to entertain the matter. It stipulates that:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient...”

[13] In the same vein, **Rule 73 of the Probate and Administration Rules** provides that:

"A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a Summons supported if necessary by an affidavit."

[14] I find succor in **Re Estate of Esau Matias Chamwada** (supra) wherein a preliminary objection was similarly raised on the jurisdiction of the High Court. It was held that:

“the handling of the property after the deceased died in 2001 was in violation of the Law of Succession Act, yet the property in question was estate property. It falls within the jurisdiction of the High Court so long as the High Court is exercising the jurisdiction conferred upon it by the Law of Succession Act. The court has jurisdiction to protect and preserve it in keeping with section 45 of the Act. Consequently, there can be no merit in the preliminary objection raised by the respondents.”

[15] Likewise, in **Re Estate of Mutugi Mbutii** (supra) it was held that:

“The court has power to make orders as in this case where there was intermeddling with the estate, make orders to preserve the estate and to restore the estate where it has been sold or transferred fraudulently where the court is seized of the matter.”

[16] It is in the light of the foregoing that I find no merit at all in the argument that Court lacks jurisdiction to hear and determine the application dated **11 January 2019**, Key to the disputation between the parties is the assertion by the Petitioner himself that the applicant is an intermeddler, having allegedly bought a portion of the estate property after the death of the land owner. Clearly therefore, the issues fall squarely within the provisions of the **Law of Succession Act** and therefore within the jurisdiction of this Court.

[17] The second angle to the issue of jurisdiction is the assertion by the Petitioner that having confirmed the grant, the Court is *functus officio*, in respect of which the Court of Appeal had the following to say in **Telkom Kenya Limited vs. John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR:**

"... *functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of **CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);**

“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division...”

[18] Hence, the question to pose is whether the order issued on **3 September 2018** confirming the grant “cannot be re-opened”; The answer to that question is to be found in **Section 76 of the Law of Succession Act**, which recognizes that:

"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-

(a) That the proceedings to obtain the grant were defective in substance;

(b) That the grant was obtained fraudulently by the making of a false statement or concealment from the court of something material to the case;

(c) That the grant was obtained by means of an untrue allegation of a fact, essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii). To proceed diligently with the administration of the estate; or

(iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in material particular; or

(e) That the grant has become useless and inoperative through subsequent circumstances."

[19] Clearly therefore, a grant, even though confirmed can still be revoked so long as a good case for such revocation has been made within the ambit of **Section 76** of the **Law of Succession Act**. The applicant, having approached the Court under **Sections 76** of the **Law of Succession Act** and **Rule 44** of the **Probate and Administration Rules**, is entitled to a hearing, no matter the merits of his application. It is also noteworthy that, since the preliminary objection is premised on allegations of intermeddling, it cannot be gainsaid that it entails an inquiry into the facts and a scrutiny of documents. This then puts the matter outside the purview of a preliminary objection into the realm of the application itself. This is another reason why the applicant's application merits a hearing.

[20] Other than the question of jurisdiction, the Petitioner was of the posturing that the applicant, having acknowledged that he is a purchaser, is not a beneficiary or dependant of the deceased for purposes of **Section 26** of the **Law of Succession Act**; and therefore that his application is a nonstarter. However, in **Musa Nyaribari Gekone & 2 others vs. Peter Miyienda & another** [2015] eKLR, the Court of Appeal sitting in Kisumu held as follows while interpreting **Section 76** of the **Law of Succession Act**:

"The expression "*any interested party*" as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr. Oguttu urged, that that expression is limited by or should be construed against the provisions of sections 66 and 39 of the Law of Succession Act. Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate. Section 39 provides for the order of priority of persons to whom the net intestate estate shall devolve where the deceased left no surviving spouse or children. Those provisions do not in our view have a bearing on the question of who may be an 'interested party' for purposes of an application for revocation or annulment of grant of letters of administration under section 76 of the Law of Succession Act. There is therefore no merit in the complaint that the learned judge paid undue premium or undue regard to section 76 of the Law of Succession Act when he held that the 1st respondent has the *locus standi* to present the application for revocation of the grant. We agree with the learned Judge that the 1st respondent's interest as a purchaser of the property of the deceased qualifies him as an 'interested party' with standing to challenge the grant."

[21] It is in the light of the foregoing that I find no merit at all in the Petitioner's preliminary objection. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF MAY 2020

OLGA SEWE

JUDGE