



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO. 24 OF 2018**

**IN THE MATTER OF THE ESTATE OF MICHAEL KIPKUTO CHEBII (DECEASED)**

**CLEMENT KIBET KUTOH.....PETITIONER**

**-VERSUS-**

**KENNETH KIPYEGO KUTO *alias* KENNETH KIPYEGO KITTOH.....1<sup>ST</sup> RESPONDENT**

**LANDS REGISTRAR, ELGEYO MARAKWET COUNTY.....2<sup>ND</sup> RESPONDENT**

**RULING**

[1] **Clement Kibet Kutoh**, the Petitioner herein, filed this cause on **10 July 2018** in respect of the Estate of **Michael Kipkuto Chebii**, the deceased herein, with the consent of his siblings. He averred in the said Petition that both his parents are deceased and that he filed the Petition in his capacity as the firstborn son of the deceased. Along with the Petition, the Petitioner filed a Consent Form, Form 38, duly signed by some of his siblings, along with a letter from the area chief, dated **29 May 2018**, to demonstrate that the family was agreeable to him being the sole administrator of the estate of their deceased father.

[2] A perusal of the court record shows that the Petition was duly processed and a Grant of Letters of Administration Intestate issued to the Petitioner on **5 October 2018**. Thereafter, on the **15 November 2018**, an application was filed herein the Petitioner's behalf, by the law firm of **M/s Angu Kitigin & Company Advocates**, seeking various orders against the Respondents; the 1<sup>st</sup> of whom is one of his brothers and therefore a beneficiary of the estate of the deceased, namely, **Kenneth Kipyego Kuto *alias* Kenneth Kipyego Kuttoh**. The orders sought include conservatory orders, inhibition, account, and cancellation of titles.

[3] It was in response to that application that the 1<sup>st</sup> Respondent filed the Notice of Preliminary Objection, dated **19 July 2019**, contending that this Court has no jurisdiction to cancel title to land as this is the preserve of the Environment and Land Court. It was further averred that the application is fatally defective because the orders sought are substantive in nature and therefore cannot be canvassed by way of an application. Thus, the contention of the 1<sup>st</sup> Respondent was that the application is not only incompetent but is also untenable in law. That Preliminary Objection is the subject of this ruling.

[4] Pursuant to the directions given herein on **22 July 2019**, the Preliminary Objection was disposed of by way of written submissions. Thus, in his written submissions filed herein on **27 September 2019**, Counsel for the 1<sup>st</sup> Respondent urged the Court to find that it lacks the jurisdiction to make orders for cancellation of title, which is one of the orders sought by the Petitioner. Counsel relied on **Re Estate of Makai Kaluti Ndunda (deceased)** [2018] eKLR to support the argument that the issue of cancellation of title ought to have been taken by way of a substantive suit, as opposed to an application as has been done herein.

[5] In response to the Preliminary Objection, **Ms. Chesoo**, learned Counsel for the Petitioner, cited **Article 165(3)(a)** of the **Constitution** that gives this Court unlimited original jurisdiction in criminal and civil matters, as well as **Section 47** of the **Law of Succession Act, Chapter 160** of the Laws of Kenya, as read with **Rule 73** of the **Probate and Administration Rules**. Her argument was that, the High Court, sitting as a Family Court, has the requisite jurisdiction to entertain disputes over land, in so far as the land forms part of the estate of a deceased person within the context of the **Law of Succession Act**. Counsel relied on **Re Estate of Esau Matias Chamwada (Deceased)** [2019] eKLR; **Re Estate of Mutugi Mbutii (Deceased)** [2018] eKLR; **Re Estate of Veronica Njoki Wakagoto (Deceased)** [2013] eKLR and **Re Estate of Paul M'Maria (Deceased)** [2017] eKLR to support her submission that the jurisdiction to prevent intermeddling as envisaged by **Section 45** of the **Law of Succession Act**, can only be exercised by the High Court and not the Environment and Land Court.

[6] Lastly, Counsel for the Petitioner urged the Court to eschew technicalities by discounting the Respondent's argument that the subject application ought to have been brought by way of a substantive action, as opposed to an application. She relied on **Article 159(2)(d)** of the

**Constitution** and the cases of Lucy Wanjiru Kibaba vs. Lucy Wanjira Muchene [2013] eKLR and Re Estate of Isaka Muthembwa Kithome [2008] eKLR to support her proposition that the proceedings under the **Law of Succession Act** are, by design, governed by less stringent rules of procedure; and therefore that the Preliminary Objection as to the form taken by the Petitioner's application should not be entertained.

[7] The case of Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696 remains the touchstone for purposes of determining what is 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."**

[8] 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..."**

[9] 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..."**

[10] With the foregoing principles in mind, I have given due consideration to the grounds set out by the Respondent in the Notice of Preliminary Objection dated **19 July 2019**. Two issues emerge therefrom for consideration; the issue of jurisdiction; and the manner of approach to the seat of justice by the Petitioner. The issue of jurisdiction is pertinent 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."**

[11] Accordingly, in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR, the Supreme Court explained that:

**"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."**

[12] Thus, while **Article 165(3)(a)** of the **Constitution** gives the High Court unlimited original jurisdiction to handle civil and criminal matters, **Sub-Article (5)** thereof 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 appellant 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.

[13] A consideration of the Petitioner's application does show that the dispute herein is not over title to land. It is plainly an application for the preservation of the estate of a deceased person pending distribution to the rightful beneficiaries under the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**. To this end **Section 47** of the **Law of Succession Act** leaves no doubt that the Court with jurisdiction in such matters is the High Court. 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...”**

[14] 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."**

[15] Clearly therefore, the mere fact that one of the orders sought is cancellation of title is no reason to divest this Court of the jurisdiction given it under the **Law of Succession Act**; and authorities abound to underscore this posturing. For instance, in **Re Estate of Esau Matias Chamwada** (supra) wherein a preliminary objection was similarly raised on the jurisdiction of the High Court to cancel title, 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.”**

[16] 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, 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.”**

[17] It is in the light of the foregoing that I find no merit at all in the Preliminary Objection raised herein by the Respondent. Even his argument that the dispute ought to have been brought by way of a substantive suit is devoid of merit granted the special procedure set out in **Rule 73** of the **Probate and Administration Rules**, for purposes of the **Law of Succession Act**. I therefore entirely agree with the viewpoint taken in **Lucy Wanjiru Kibaba & Another vs. Lucy Wanjira Muchene** (supra) that:

**“...The stringent rules applicable in civil matters governed by the Civil Procedure Rules do not apply to succession matter governed by the provisions of the Law of Succession Act and the Probate and Administration Rules...Indeed rule 63(1) of the Probate and Administration Rules imports only a limited number of rules from the Civil Procedure Rules. It is clear that it was never the intention of the Legislature that proceedings under the Law of Succession Act should be governed by stringent rules the way proceedings under the Civil Procedure Act are. In short, technicalities of procedure in succession matters are treated less seriously than in civil matters because of the nature of succession proceedings and the great need to focus on substance with a view to do justice to the parties.”**

[18] It is noteworthy too that, on account of the serious nature of the allegations made in the subject application, directions have already been made, at the instance of the parties, that the application be disposed of by way of *viva voce* evidence. Clearly therefore, the Respondent's Preliminary Objection is completely devoid of merit and is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 12<sup>TH</sup> DAY OF MAY 2020**

**OLGA SEWE**

**JUDGE**