



REPUBLIC OF THE KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. P & A APPLICATION NO. 87 OF 2013

IN THE MATTER OF THE ESTATE OF KABUTHI KITHITU.....DECEASED

AND

BENARD MUCHANGI.....APPLICANT

VERSUS

JUDITH WAMARUA.....RESPONDENT

RULING

1. The petitioner Judith Wamarua Kabuthi was issued with letters of administration in the estate of Kabuthi Kithitu who was her husband on 26/07/2005. Thereafter the court confirmed the grant on 23/08/2007 whereby the deceased estate **Land Parcel No. Inoi/Thaita/122** was to be shared equally between the following;

- 1. Judith Wamarua Kabuthi - widow**
- 2. Joseph Kathanji Kabuthi - son**
- 3. Peter Ngari Kabuthi - son**
- 4. Bernard Muchangi Kabuthi- son**
- 5. Nancy Nyawira Kabuthi – daughter in law**
- 6. Agnes Kathigia Kabuthi - widow**
- 7. Richard Muriithi Kabuthi - son**
- 8. Joseph Murimi Kabuthi - son**
- 9. Jeffitha K. Kabuthi - son**
- 10. Peter M. Kabuthi - son**
- 11. Justin K. Kabuthi - son**

2. On 19/07/2011, Peter Ngari Kabuthi, Bernard Muchangi Kabuthi, Murimi Kabuthi and Richard Muriithi Kabuthi applied for revocation of grant on ground that it was obtained by means of untrue allegation of fact, they were not notified when the succession was filed and they are not signatories of **Form P&A 38**.

3. The petitioner/respondent has now raised a Preliminary Objection opposing the application on the following grounds;

- 1) The applicant participated in the succession proceedings and are estopped from making the application.**
- 2) Unfairness of distribution is not a ground for revocation of grant.**

3) **Failure to sign Form P&A 38 is not fatal according to Rule 27 of Probate and Administration Rules.**

4) **Unsubstantiated extraneous facts that were not raised in the trial cannot be relied on as grounds for revocation of grant.**

The parties filed submissions.

4. For the respondents it was submitted that the applicants who were aware of proceedings did no protest against the application for confirmation of grant. The only person who protested was Simon Munene Kabati, a grandson but the protest was dismissed. He filed an appeal against the dismissal vide **Embu High Court, Court Appeal No. 91/2007** but the appeal was dismissed.

5. It is further submitted that the applicants misapprehended form **P & A 38**. The form is made pursuant to Rule 26(2) of probate and administration rules which requires that the form be signed by persons entitled in same degree or priority to apply for the grant.

6. That the respondent being the widow of the deceased ranks higher in priority to the applicants and did not need to issue any notice to them. She did not need the applicants to sign form **P & A 38**. That Rule 27 states:-

“ nothing in rule 26 shall operate to prevent a grant being made to any person to whom a grant may be made, to be made required to be made under the Act”

7. On jurisdiction, it is submitted that the forms P & A 38 indicated that the value of the estate at the time of filing was Ksh.100,000/= and so the Lower Court had jurisdiction as provided under **Section 48 (1) of the Law of Succession Act Cap 160**. That the suggested value of Ksh. 1,000,000/= is an extraneous matter which was not raised before the trial court.

8. It is submitted that the distribution was above fairly as the estate was shared equally amongst all the beneficiaries.

9. For the applicants it is submitted that the respondent filed the succession secretly and failed to disclose that deceased had other wives.

10. That the distribution was unfair as the estate was not distributed as per the provisions of **Section 40 (1) of the Law of Succession Act** which provides for distribution under any system permitting polygamy. That the daughters of the deceased were never included. That adult children should sign Form **P & A 38**.

11. It is also submitted that the value of the land was Ksh. 1,000,000 and as such the Senior Resident Magistrate had no jurisdiction.

Issues arising:-

1. Whether the applicants participated in the proceedings.

According to the respondent the applicants were included as beneficiaries in the application for confirmation of grant.

The respondent has filed affidavit of service showing that the applicants were served. The record of the trial court shows that the cause was gazette.

The applicants were included as beneficiaries. The applicants were also served.

12. However the applicants have disputed this allegation and countered that they were not notified when the succession cause was filed.

13. These are facts and are in dispute and can only be resolved after evidence is tendered to prove whether or not the applicants participated in the proceedings. A preliminary objection is raised on the presumption that facts are not in dispute. This was so held in the case of **Mukisa Bisquit Manufacturing Company Ltd -V- West End Distributors Ltd (1969) E. A 696** where the court stated:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the 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”

14. A preliminary objection will not be raised where facts are in dispute and is not raised on a clear point of law. I adopt the above proposition.

1. Can a Preliminary Objection be raised in a contested fact?

Republic –V- Attorney General [sued for and on behalf of the Ministry of Lands] & 2 others Ex parte South and Central [Thika] Investments Limited & another [2016] eKLR

G V Odunga, J addressing on the same issue stated as follows:

In my view, preliminary objections which have the effect of inviting the Court to make a determination on conflicting factual averments ought not to be entertained. Where a party intends to rely on certain documents, he can only be permitted to do so in arguing the preliminary objection where the factual contents of the said documents are not in dispute. However where the same are disputed, the application or the suit ought to be allowed to proceed in the usual manner as to raise a preliminary objection based thereon not only leads to confusion.

Lemitei Ole Koros & another v Attorney General & 3 others [2016] eKLR

Munyao Sila, J also stated on the same issue as follows:

Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection.

A K N v J N M [2014] eKLR

W. Musyoka, J also stated:

This court is of the considered view that the issues raised in the Preliminary Objection herein are of a nature that would apparently require calling of evidence, it raises questions of fact and law in regard to which both the Applicant and Respondent are in several respects in disagreement.....

A party, who raises a Preliminary Objection, must do so only on a pure point of law and nothing else.

15. These decisions are persuasive and they show the correct position on Preliminary Objection.

16. It is only points of law and in undisputed facts that can be determined by a preliminary objection. However, if facts are disputed, as is the case here then evidence needs to be adduced and this calls for the matter to proceed for hearing.

2. Application for revocation of grant

Section 76 of the Law of Succession Act Cap 160 states;

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 by the 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

17. The protestors have alleged that the petitioner failed to disclose that the deceased had 5 wives and the daughters were not included. That the grant was obtained by means of untrue allegation of fact, they were not notified when the succession was filed and they are not signatories of **Form P&A 38**. **Form P&A 38** is a consent to the making of grant of administration intestate to person of equal or lesser priority and the same only lists Joseph Kathanji, Agnes Kathigia and Nancy Nyawira.

18. Whether or not failure by some of the beneficiaries to sign the form should result in the revocation of grant is mater to be determined after considering the evidence in support of the application. What is evident is that there are facts which are in dispute and calls for the application to be heard and determined on merits.

19. In conclusion I find that the preliminary objection lacks merits. I dismiss it with costs.

Dated at Kerugoya this 15th this February 2019.

L.W. GITARI

JUDGE