



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NUMBER 148 OF 1997

IN THE MATTER OF THE ESTATE OF MUSAU MWANIA alias MOSES MUSAU MWANIA (DECEASED)

CHRISTOPHER MUSYOKA MUSAU

CHARLES MUINDE MUSAU

MICHAEL MUNUVE MUSAU.....RESPONDENTS

VERSUS

RUTH KALAU MUSAU.....1ST INTERESTED PARTY

ERICK K MUSAU.....2ND INTERESTED PARTY

HARRISON MUTUA NDUNGU.....3RD INTERESTED PARTY

ROBERT MUTYANGO MUSAU.....4TH INTERESTED PARTY

PETER MUTUA MUSAU.....5TH INTERESTED PARTY

DAVID MUIA MUSAU.....6TH INTERESTED PARTY

CHOICE HOMES HOLDINGS LTD.....7TH INTERESTED PARTY/APPLICANT

RULING

1. On 6.2.19, when this matter came up for hearing of the confirmation of grant and the protests, Ochieng, counsel for the 7th interested party indicated to court that there is an issue of jurisdiction.

2. Mbindyo, counsel for the 1st and 2nd Petitioners indicated to court that it has no jurisdiction to hear the application for confirmation of grant in relation to the following properties :-

a) Mavoko Town Block 3/7359 for it is registered in the names of Kioko Musau;

b) Mavoko Town Block 3/7360 for it is registered in the names of the 7th interested party;

c) Mavoko Town Block 3/1369 for it is registered in the names of Benjamin Musau Kisu.

3. He submitted that the above mentioned properties are not in the names of the deceased and therefore the properties are not part of the estate of the deceased. It is his submission that the proper court to determine the ownership of the aforementioned properties is the ELC Court. He cited the cases of **R v Karisa Chengo and 2 Others, Petition 5 of 2017; LSK Nairobi Branch v Malindi Law Society and 6 Others, Civil Appeal 287 of 2016** where it was held that where specialized courts are provided for then they ought to deal with those matters they are mandated to handle. Further that the succession court does not handle ownership or registration of land matters and it will not be within the jurisdiction of the court to proceed with the confirmation without isolating the three properties which are not the three properties of the deceased.

4. F.M. Mulwa for the 2nd Administrator supported the preliminary objection.

5. Ochieng for the 7th interested party supported the objection arguing that court should not delve into the issue of the 3 properties for they already have titles in the names of persons other than the deceased which is conclusive evidence of ownership and thus are not free for distribution.

6. Mrs Nzei for the 1st administrator opposed the preliminary objection on grounds that the law of Succession Act governs the distribution of the estate of the deceased to the rightful heirs and punishment of those found intermeddling with those properties. Secondly, that under Section 47 of the said Act, the court has the mandate to handle the issues placed for it hence has the requisite jurisdiction. Thirdly, that there is a pending protest and the protestors should come and give evidence with regard to their protest, and specifically the claim of having been given the land as a gift *inter vivos* can only be established by way of evidence during the hearing of the protest. Fourthly, the cited cases are not relevant to the instant proceedings and in any event this court already pronounced itself vide orders for preservation of the said properties and the orders are still valid and in force and as such the court should proceed with the confirmation. She submitted that the preliminary objection should be dismissed.

7. I find it necessary to define what constitutes a preliminary objection on a point of law. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

8. It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence. Understanding the nature and scope of preliminary objections is very important for practicing lawyers. Knowing how to raise a properly formulated preliminary objection, and when to raise it, can save a lot of time and costs.

9. Discussing what constitutes a preliminary objection, Law JA in **Mukisa Biscuit Manufacturers Ltd vs. Westend Distributors Ltd**(1969) E.A 696 at Page 700 said:-

"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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."

10. In the words of **Sir Charles Newbold P** at page 701, B:-

"...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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."(Emphasis added)

11. In **Omondi vs. National Bank of Kenya Ltd & Others (2001) KLR 579** it was held that:-

"...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts..."

12. Having looked at the definition of a preliminary objection, I deemed it necessary to examine the issue of jurisdiction before addressing the substance of the objection.

13. The guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine the suit, then the suit would be deemed a nullity as per the decision of Nyarangi J A in the case of **Owners Of Motor Vessel "Lilian S" Vs Caltex Oil (K) Ltd [1989] KLR 1** that:-

"Jurisdiction is everything without which a court of law has no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction."

14. According to the pleadings before the court, the crux of this matter is the distribution of the estate of the deceased. There are a number of protests that have been filed that challenge the distribution and these are yet to be determined. Therefore in challenging the jurisdiction of the court and yet the court has not reached the stage of ownership of the properties that were listed in the objection is tantamount to putting the cart before the horse. I am satisfied that the court has jurisdiction to handle the confirmation and hearing of the protests that are before it.

15. Having satisfied myself on the issue of jurisdiction, the other issue for my determination is whether the grounds raised in this objection are pure points of law. The grounds as I understood it is *"that the subject properties do not belong to the deceased as they are registered in the names of other persons."* Put differently, is the deceased the owner of the 3 mentioned properties? This is a point of fact which does warrant evidence to be adduced and the preliminary objection cannot dispense with it. Therefore I am satisfied that any concerns that the Respondents' have can be adequately addressed during the confirmation hearing where there is ample opportunity to present evidence on whether or not the properties should be included in the schedule for distribution.

16. The issue that could be perceived from the submissions of counsel is that of whether the 3 properties listed by counsel Mbindyo are free assets of the deceased. Counsel Nzei submitted that the background to the three properties is that they consisted in shares in Lukenya Ranching Society and were in the names of the deceased, and when the cause was being filed in 1997, the shares were listed among the assets of estate of the deceased; it is the submission by Counsel Mbindyo that the properties were given as a gift *inter vivos*. The law applicable with regard to the legal requirements for a gift *inter vivos* was discussed in the case of **In Re Estate of The Late Gedion Manthi**

Nzioka (Deceased) [2015]eKLR where, Nyamweya J stated as follows:

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:

...For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”

In this regard therefore, the court has jurisdiction to sit and determine whether the disputed properties meet the test provided for by Section 31 of the Law of Succession Act and is alive to the provisions of Section 42 of the Law of Succession Act that provides that:

42. Where-

(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate.

That property shall be taken into account in determining the share of the net intestate estate finally, accruing to the child, grandchild or house.

17. Therefore before separating the properties, the Succession court will first have to make a determination as to whether or not to separate the properties. During the hearing of the protests the question of whether or not the three properties form part of the estate of the deceased will be determined.

18. With regard to the historical background to the 3 properties listed by Counsel Mbindyo, Section 45 of the Law of Succession Act, Cap 160 Laws of Kenya provides:-

"45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased.

(2) Any person who contravenes the provisions of this section shall-

a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

19. On the other hand Section 82 of the Act provides:-

"82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -

a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that -

i. the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

ii. no immovable property shall be sold before confirmation of the grant;"

20. In Re Estate of John Gakunga Njoroge [2015] eKLR Murithi J held:-

"10. A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act....."

15. For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the confirmed Grant, the contracts of sale are invalid for offending

the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators the dealings with immoveable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under Section 82(b) Proviso (ii), which provides that:-

"no immovable property shall be sold before confirmation of the grant."

21. Because a Succession Court is empowered to protect the estate of the deceased as per the above quoted provisions of the Law and the cited cases, this court cannot just sit back and watch instances of possible intermeddling that is within its mandate to handle. The issues regarding the status of the 3 properties will become clear during the hearing of the protests. The protestors should not shy away but be ready to present evidence so that the court can determine the competing interests fully.

22. This is a 1997 matter that the parties have actively been participating in, attending court and from that time, no issue of jurisdiction has ever been raised. There are protests that have been filed and when court is about to determine the protests and receive evidence then the present issue is now raised. like a rabbit pulled out of a hat. I am convinced that it is after the hearing of the protest that the court will make a decision as to whether the 3 disputed properties will be handled here or in the ELC Court. To that extent, I find that this court has the requisite jurisdiction to hear and determine the matter regarding the disputed three properties.

23. Applying the principles laid down in the law and the above authorities, the conclusion becomes irresistible that the preliminary objection raised in this case fails and is dismissed with costs to the 1st Administrator.

Orders accordingly.

Delivered and Dated at Machakos this 2nd day of April, 2019.

D.K. KEMEI

JUDGE