



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 12 OF 2006 (CONSOLIDATED) WITH No. 13 OF 2006**

**IN THE ESTATE OF GIDEON KATHUMO MUATHE AND JAMES MAKAU MUATHE (DECEASED)**

1. SIMON MWEU MUATHE )  
2. HENRY MAKAU MUATHE ).....ADMINISTRATORS/RESPONDENTS  
3. MWANZIA KATHUMO )

**AND**

**JOHN MUISYO MUATHE.....OBJECTOR**

**ANTHONY MWENDWA NZUKI .....INTERESTED PARTY**

**RULING**

1. The counsel for the Administrators has filed a preliminary objection dated 14/06/2019 to the effect that this Honourable court lacks jurisdiction to hear disputes relating to claim of land based on contract sale/agreement. According to the said counsel the issue raised in the preliminary objection relates to jurisdiction which should be dealt with first before anything else. Finally counsel pointed out that the said objection is on validity of sale agreement which should be resolved by the Environment and Land Court and therefore there is need for directions to be taken on the said preliminary objection before proceeding with the further hearing of the matter as earlier scheduled.

2. Mrs Nzei, learned counsel for the interested party submitted that the preliminary objection can be canvassed during submissions once the evidence has been received as per the earlier directions. She maintained that the suit property is part of the estate of the deceased and as such this court can deal with it as long as they form part of the estate. She added that it would be a waste of judicial time to depart from the hearing and address issues now being raised and in any case there is no amendment to the Law of Succession Act taking away jurisdiction of this court from dealing with the matter. Learned counsel finally submitted that the application is meant to circumvent the progress of the case yet the Administrators stand to suffer no prejudice as their counsel can address the issues during submissions.

3. I have considered the submissions of the learned counsels. It is not in dispute that the matter has been proceeding in earnest wherein the protestor has tendered his evidence while the interested party is yet to wind up his evidence before the administrators present their evidence after which this court will render a ruling on the issues in controversy. It is also not in dispute that the protestor and the administrators agreed to have the interested party be enjoined into the proceedings as a party and that both the protestors and administrators Advocates did cross –examine him. It is also not in dispute that the interested party’s case is yet to be finalized before the Administrators present theirs. The issue for determination is whether the preliminary objection should be determined first before the continuation of the hearing.

4. I note that the preliminary objection mainly relates to a claim that this court lacks jurisdiction to hear and determine the interested party’s claim. The interested party vide his application dated 3/11/2016 had staked a claim to a portion of land measuring 20x100 feet from the deceased’s parcel of land namely **Plot No.37 Tala Market**. The particular parcel forms part of the estate of the deceased which has been listed by the Administrators as being available for distribution. The Objector/Protestor has also lodged a claim against the administrators seeking to have the grant revoked while the interested party seeks to have a portion of the said plot **No.37 Tala Market**. All the parties herein took directions and agreed to canvass all these competing issues by way of viva voce evidence. Indeed the administrators have been doing just that until now when they filed the present preliminary objection. I find that delving into the said preliminary objection at this juncture will have the effect of delaying the progress of the trial bearing in mind that this is a 2006 case and ought to be brought to a closure in the interest of all parties concerned. Prudence now dictates that the ongoing trial should be given the necessary impetus and the said preliminary objection can be canvassed together with the applications brought by each of the parties. During the determination of the matter the court will decide whether the interested party’s claim would be considered in the confirmation of grant or be resolved in another forum. In any event Section 47 of the Law of Succession Act gives this court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such order therein as may be expedient. As parties had agreed to present their rival issues and are now in the middle of the trial, I find that addressing the said preliminary objection at this stage would further delay the finalization of the matter to the prejudice of the parties herein. Even though a preliminary objection on point of law can be raised at any stage of the proceedings, I find there is no prejudice if the same is dealt with in these proceedings alongside the other applications by the

protestor, administrators and interested party. In any event the administrators counsel has cross-examined the Applicant's witnesses and that the issue now being raised can be properly canvassed during the submissions at the tail end of the proceedings. Further the provisions of Section 82 of the Law of Succession Act and Rule 41(3) of the Probate and Administration Rules are available to guide this court where a dispute as to ownership of the property of a deceased person arises. Rule 41(3) aforesaid provides as follows:-

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in or of any condition or qualification attaching to such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under order XXVI Rule 1 of the Civil Procedure Rules and may thereupon subject to the proviso to Section 71(2) of the Act, proceed to confirm the grant.”

In the case of **Pricilla Ndubi and Zipporah Mutiga Vs Gerishon Gatobu Mbui [2018] eKLR** Justice Gikonyo had this to say:-

“The primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity the estate property must be identified. Thus where issues on the ownership of the property of the estate are raised in a Succession Cause, they must be resolved before such property is distributed. And that is the very reason why Rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”

Going by the observations by the learned Judge in the above case, I find that this court must be given the space to address its mind on the rival issues over the property of the deceased and thereafter come up with the way forward. It is only after receiving the entire evidence that this court will be in a position to decide whether any of the properties of the deceased will be set aside to await determination on the ownership while the rest are distributed to the beneficiaries. In other instances the court sets aside the property in dispute to await determination and gives the party staking a claim some timeline within which to lodge the same before the relevant forum failing which the property will be amenable for distribution to the beneficiaries. This court is yet to receive the entire evidence so as to determine whether any such property would be set aside for the aforesaid purpose.

5. The administrators appear to have jumped the gun as it were because this court is in the process of receiving evidence and thereafter give a determination regarding the claims raised by the administrators, objector and interested party. It is at that juncture that the issue of the claim by interested party will be addressed. It is clear to me that the direction taken by the administrators is meant to circumvent the progress of the case. There is no prejudice suffered by the administrator's as their preliminary objection can be canvassed in these proceedings and even during submissions. I find the administrators quest to have the preliminary objection canvassed at the expense of reception of the further evidence to be a red herring and a calculated move to further delay the matter. I find it curious that the administrators would abandon their station in the proceedings and train their guns at the interested party in a bid to jettison him out yet the interested party's claim is intricately tied to the property subject of the confirmation. The interested party's claim is only on part of **Plot No.37 Tala Market** while the remainder forms part of the estate. It is appropriate to receive evidence first before a determination is made as to whether part of that property would be set aside to await determination by another forum.

6. In the result I direct that the preliminary objection dated 14/06/2019 be canvassed in these proceedings and later in submissions. I decline the administrators counsel's request to canvas the same before the further evidence is tendered. That being the position the matter is now ordered to proceed for hearing as earlier on scheduled. There will be no order as to costs.

Orders accordingly.

**Dated and delivered at Machakos this 7<sup>th</sup> day of November, 2019.**

**D. K. Kemei**

**Judge**