



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 130 OF 2005**

**IN THE MATTER OF THE ESTATE OF GEOFFREY MWAURA NGOIMA (DECEASED)**

**ALISON HUTCHINSON.....1<sup>ST</sup> APPLICANTS**

**ARLENE HUTCHINSON.....1<sup>ST</sup> APPLICANTS**

**AND**

**PHOEBE WAMBETI NGOIMA.....2<sup>ND</sup> APPLICANTS**

**EDITH WAITHERA NGOIMA.....2<sup>ND</sup> APPLICANTS**

**VERSUS**

**NJENGA MWAURA NGOIMA.....1<sup>ST</sup> RESPONDENT**

**GEOFFREY KANGETHE NGOIMA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. A Grant of Letters of Administration was issued to Njenga Mwaura Ngoima, Geoffrey Mwaura Ngoima, Phoebe Wambeti Ngoima and Edith Waitthera Ngoima on 17<sup>th</sup> September, 2018 with respect to the Estate of Geoffrey Mwaura Ngoima (hereinafter referred to as “the Deceased”). This Ruling relates to the Notice of Preliminary Objection dated 26<sup>th</sup> February, 2019 filed by the Respondents in response to two applications filed by the respective Applicants herein.

2. The first application is by Alison Hutchinson and Arlene Joy Nyambura Hutchinson interested parties in this suit. They filed summons for partial confirmation of grant dated 23<sup>rd</sup> January, 2019. The grounds for their application as stated in the summons and supporting affidavit sworn on 23<sup>rd</sup> January, 2019 by the 2<sup>nd</sup> Applicant were that she was one of the administrators of the estate of her late mother Jean Wanjiku Hutchinson who had been bequeathed property by the deceased and a title deed issued in her name. That pursuant to the decision of this court on 17<sup>th</sup> September, 2018 the court confirmed that property known as Githunguri/Githiga/1073 did not form part of the estate of the deceased but was wholly owned by her late mother. She averred that the court had ordered for a survey of the property in issue to facilitate its distribution to its rightful beneficiaries. She asserted that she was not interested in being a part of this proceedings thus the prayer for a partial confirmation of grant with regard to the specific property.

3. The second application dated 14<sup>th</sup> February, 2019 is by Phoebe Wambeti Ngoima and Edith Waitthera Ngoima administrators of the estate of the deceased. They filed summons seeking contempt of court orders against Geoffrey Kang’ethe Ngoima, Fredrick Njoroge Ngoima, Njenga Mwaura Ngoima and Mwaura Ngoima. They also sought orders for a survey, valuation and sub-division of properties known as Githunguri/Githiga 1073, 1074, 107 and 1076. The grounds of the summons stated in the summons and the supporting affidavit of Edith Waitthera Ngoima dated 14<sup>th</sup> February, 2019 were that Geoffrey Ngoima, Ngoima Mwaura and Fredrick Njoroge Ngoima had leased out estate property to 3<sup>rd</sup> parties contrary to court orders requiring the status quo to be maintained. Further, that Njenga Ngoima was solely benefiting from proceeds of estate property while the respondents were developing prime areas of the estate in an attempt to disinherit their siblings. The applicants prayed for the court compel the respondents to deposit title documents in court.

4. The Respondents in both applications Njenga Mwaura Ngoima and Geoffrey Kangethe Ngoima filed a Notice of Preliminary Objection to the two applications dated 26<sup>th</sup> February, 2019. It was premised on the following grounds:

(a) That there is neither a statutory provision nor precedent on partial confirmation of grant

(b) That the court pronounced itself with finality on its decision of 17<sup>th</sup> September, 2018 and thus became *functus officio* in respect to the orders sought in the Applications dated 23<sup>rd</sup> January, 2019 and 14<sup>th</sup> February 2019

(c) That the applications dated 23<sup>rd</sup> January, 2019 and 14<sup>th</sup> February 2019 were grossly incompetent for inviting the court to seat on appeal against its own decision.

(d) That once the court rendered a judgment it can only go back on its pronouncement on review on slip rule (on grounds of clerical or arithmetic mistakes or an error apparent on the face of the record)

5. On 18<sup>th</sup> June, 2019 this Court directed the parties to file and serve their submissions in the Preliminary Objection. The respondents filed written submissions dated 24<sup>th</sup> June, 2019. They submitted that the application dated 23<sup>rd</sup> January, 2019 was incompetent for failure to enter appearance as provided under rule 60 of the probate and administration rules. That there was no provision in the Probate and Administration Rules for partial confirmation of grant. The respondents also submitted that this court had become *functus officio* and the parties not satisfied with its decision should address their issues at a higher court.

6. They argued that by filing the applications, the applicants were trying to seek a review of the court's decision without the appropriate grounds. They submitted that the suit property should be preserved under the doctrine of *lis pendens* under section 45 of the law of Succession Act. They relied on the cases of **Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited [2014] eKLR** and **Grace Chemutai Koech v Francis Kiplangat Chebiror & 2 others [2018] eKLR**

7. The applicants in the first application filed written submissions dated 24<sup>th</sup> July, 2019. They asserted that Courts had severally done partial confirmation of grants as a way of resolving succession disputes. They outlined the ingredients of partial confirmations which were that there was no dispute regarding a particular property and where prejudice was not occasioned on the parties. They submitted that the two ingredients had been fulfilled in this particular instance. On the second ground, they opposed claims that this court had been rendered *functus officio* by the decision of 17<sup>th</sup> September, 2018. They argued that the court directed the new administrators to inform, consult and engage all beneficiaries with a view of redistributing the estate of the deceased.

8. After having considered the parties respective pleadings and submissions as reproduced above, the key issue for determination is whether the Preliminary Objection succeeds. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696**, as follows:

**“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 effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

9. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1KLR 141**, the court held that any assertion which claims to be a preliminary objection, and 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. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

10. On the first ground, the Respondents allege that the application for partial confirmation of grant is based on non-existent precedent lacking any statutory backing. This was disputed by the Applicants who asserted that courts have issued partial confirmation of grants where there was no dispute regarding a specific property and no prejudice was occasioned on the parties. The question for determination is whether or not the prayer for partial confirmation of grant has a legal backing.

11. **Rule 73** of the Probate and Administration Rules grants to this court inherent powers to issue orders necessary to meet the ends of justice or to prevent abuse of the process of court. Further, **Section 47** of the Law of Succession Act gives this court a wide discretion to entertain any dispute and make orders that may be expedient. The said Section 47 reads:

**“ 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.”**

12. Courts have often issued orders for partial confirmation of grant in exercise of their discretion to ensure that the ends of justice are met. The duty of this Court to deal with any dispute and entertain applications arising out of its mandate cannot be refuted. The argument that the partial confirmation of grant does not have any backing in law therefore fails.

13. The second ground raised by the respondents was that this Court had already pronounced itself with finality on 17<sup>th</sup> September, 2018 and thus became *functus officio* in respect to the orders sought in Applications dated 23<sup>rd</sup> January, 2019 and 14<sup>th</sup> February 2019. I have perused the orders issued on 17<sup>th</sup> September, 2018. The effect of the decision was that a fresh grant was issued and administrators appointed to facilitate the redistribution of the estate of the deceased. The court also ordered that the status quo be maintained.

14. The claim that this Court has become *functus officio*, because it presided over the appointment of administrators and determination of the deceased's assets available for distribution is unfounded. The respondents have not provided legal material that would support that argument. The duty of a Succession Court is principally to protect assets of a deceased persons which it has jurisdiction over and to oversee the

transmission of those assets to the lawful beneficiaries. A probate matter is not concluded at the point of appointment of administrators. It remains alive for the beneficiaries who are still entitled to move the court before and even under **Section 76** of the Law of Succession Act after confirmation of grant if need be. Indeed, the matter closes effectively upon the filing of the accounts envisaged in Section 83(f) of the Law of Succession Act. This court therefore has not become *functus officio* and is competent to handle the applications in issue.

**15.** The third ground of objection raised by the respondents was that the applications were grossly incompetent for inviting the court to seat on appeal against its own decision. The respondents have not brought material to substantiate this claim. In that regard, I am inclined to dismiss that ground on the basis that it is unsubstantiated.

**16.** The upshot of the above analysis and evaluation of the submissions of parties, the law and the circumstances of the case before me, is that the Preliminary Objection dated 26<sup>th</sup> February, 2019 must fail and is consequently dismissed. Costs shall be in the cause.

**SIGNED DATED AND DELIVERED IN OPEN COURT THIS 3<sup>RD</sup> DAY OF DECEMBER, 2019.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of .....Advocate for the 1<sup>st</sup> Applicants/ Beneficiaries in the estate of Jean Hutchinson**

**In the presence of .....Advocate for the 2<sup>nd</sup> Applicants/Administrators**

**In the presence of .....Advocate for the Respondents/Administrators**

**In the presence of Advocate for the Beneficiaries**