



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 329 OF 2004

IN THE MATTER OF THE ESTATE OF M' GACIURU GACIURU- DECEASED

MIRIAM KANG'ONDU.....PETITIONER

-VERSUS-

JULIUS NGORE.....APPLICANT

RULING

Sub-judice

[1] Just before the application for Revocation of Grant filed by Julius Ngore on 7th February 2014 could be heard, the Petitioner/Respondent filed a Notice of Preliminary Objection dated 26th April 2017. The main points of objection were *inter alia* that the said application was sub-judice Maua CMMC NO. 226 of 2013- a suit based on trust and that further a Probate and Administration Court had no jurisdiction to entertain the Applicant's prayer over land based on trust.

[2] On 23rd May 2017, the court gave directions that the Preliminary Objection dated 26th April 2017, be canvassed by way of written submissions. The Applicant submitted that his application for Revocation of Grant dated 4th February 2014, was procedural and properly before the court and deserved to be heard on merits. The Applicant further argued that, Section 76 of the Law of Succession Act gives *locus standi* to any interested party to move the court for orders. Thus, it was submitted for the Applicant that, having been named in the estate as a beneficiary by the Petitioner, the determination of any dispute raised by the applicant as beneficiary fell within the provisions of the Law of Succession Act. And, that existence of Maua CMCC No. 226 of 2013, did not affect the application for Revocation of Grant. According to him, the import of the orders sought in the Application for Revocation was that the Confirmed Grant will be revoked and the shares distributed to the beneficiaries cancelled and the properties reinstated to the estate of the deceased.

[3] On the other hand, it was submitted for the Petitioner that before filing the instant Summons, the Applicant had filed another suit claiming the same land on the basis of trust and that in law, the Applicant would not be allowed to assert his claim in land based on trust when he was contemporaneously pursuing it through another court in an earlier filed suit. The Petitioner further contended that that a Probate and Administration court had no jurisdiction to entertain a claim over land based on trust

[4] The law on preliminary objection is not in dispute. A preliminary objection should be a clear point of law which is not shrouded in factual details. And, it should be capable of disposing of the entire suit. On this see Law, JA and Sir Charles Newbold P. in **MUKISA BISCUITS MANUFACTURING CO LTD VS WEST END DISTRIBUTORS (1969) EA 696**.

At page 700, Law, JA stated 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.”

Sir Charles Newbold P. added as follows at page 701:

“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.”

See also a more recent case of *Oraro v Mbajja [2005] eKLR* where *J.B. Ojwang J (as he then was)* in a simple and clear manner stated

that:

I think the principle is abundantly clear. A preliminary objection, correctly understood is now well identified as, and declared to be the 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 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. I am in agreement...that „?where a court needs to investigate facts, a matter cannot be raised as a preliminary point.?

[5] Is the objection herein such objection? I have perused the two proceedings. These proceedings relate to the estate of the deceased. They are before the High Court. Maua CMCC No. 226 of 2013 relates to alleged breach of trust- a cause of action within the realm of ELC and which is quite distinct from these proceedings. In considering the application for revocation, this court will not be determining any trust or ownership of land as the Petitioner seems to suggest. The true position of things is that, the two courts are exercising different jurisdictions under the law regardless of whether similar arguments could be made in support or opposition of the application before me. As such, the rule on Sub-judice does not apply here. In any case, of great significance to note is that the instant application is for Revocation of Grant on the grounds inter alia that the proceedings to obtain the Grant were defective in substance and that the Grant herein was obtained by concealment of material facts from the court. Such application may be brought by any interested party; and the court should evaluate the merits or otherwise of the application for revocation. Accordingly, the Petitioner's Preliminary Objection is a small bill which must fall by the wayside. In the upshot, the Petitioner's Preliminary Objection dated 26th April 2017, is without merit and is hereby dismissed in its entirety. For expeditious disposal of this matter, I will give comprehensive directions on the disposal of the application for revocation once and for all. It is so ordered.

Dated, signed and delivered in open court at Meru this 3rd day of May, 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Kithinji for Carlpeters Advocate for Petitioner

H. Gitonga advocate for Applicant – absent

Mutuma J advocate for M. Gitonga advocate

F. GIKONYO

JUDGE