



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY COURT

SUCCESSION CAUSE 3436 OF 2005

IN THE MATTER OF THE ESTATE OF ALBERT OGINGA (DECEASED)

ELIZABETH AKINYI MOKKONEN.....APPLICANT

V E R S U S

ANNUE BUORE OGINGARESPONDENT

RULING ON PRELIMINARY OBJECTION

PLEADINGS:

On 1st December, 2016, the Applicant Elizabeth Akinyi Makkonen filed an application under certificate of urgency and sought temporary injunction against the Respondent Anne Buore Oginga (Administrator) by herself, their servants and/or agents restraining them from evicting a tenant or further interfering with the Applicant's and her mother's quiet possession of **Nairobi/Block/74/202/Buruburu Estate** pending hearing *interpartes* of the application of Summons for revocation of grant.

On 11th January 2017, the Respondent raised Preliminary Objection to the above application in the following terms;

- a) This Court lacks jurisdiction to hear and determine the instant application
- b) The Applicant lacks *locus standi* to bring the said application and seek the said orders and the application is an abuse of Court process.
- c) The Application is *res judicata*
- d) The Supporting affidavit was not properly executed and/or notarized.

HEARING

On 25th May 2017, Mr. Ogembo for the Respondent submitted that this was/is a longstanding matter that begun in 2005. An application for revocation of grant was filed by Applicant and her mother on 30th January, 2007. The Court dismissed the application on 7th April 2014.

The Application to set aside the dismissal was dismissed on 27th June 2016. The grant was confirmed and the Respondent registered the suit property **Nairobi/Block/74/202/Buruburu Estate in 2014**.

Subsequently, the Respondent filed suit in **Environment and Land Court Case Number 430 of 2015** on 20th May 2014 which Court ascertained the use and occupation of the suit property in favor of the Respondent.

The jurisdiction of the ELC & Family Divisions of the High Court have each exclusive jurisdiction. The jurisdiction of the Family Court is derived from **Section 2 of Law of Succession Act Cap 160**. The jurisdiction of ELC is derived from **Section 13 of Land Registration Act, 2012**.

The Family Court lacks jurisdiction to hear and determine the instant application on account of the fact that the matter was conclusively dealt with by this Court as a Probate matter. Now that it is in ELC, this Court cannot hear and determine the said application.

The Respondent stated the Applicant lacks locus standi to stop/prevent eviction of tenant and herself from the suit property as her mother, Beatrice Owino Oginga is resident in Finland and is the person contesting the ownership of the suit property. Secondly, the Applicant did not produce a Power of Attorney granting her to represent her mother in these proceedings.

The application, is re litigation of an already similar application of 11th December, 2014 for an injunction which was dismissed on 6th June, 2016. The present application is therefore *res judicata* under **Section 7 of Civil Procedure Act**.

Finally, the Respondent, through Counsel submitted that the supporting affidavit to the application is signed in Nairobi and not by the actual Applicant Beatrice Owino who resides in Finland.

The Applicant through Counsel, Mr Chege submitted as follows;

- a) There are 2 applications; Summons for revocation filed on 1st December 2016;
- b) Certificate of Urgency application filed on 1st December 2016 dated 30th December 2016.

This Court has jurisdiction to hear and determine the present applications by virtue of **Section 47 of Law of Succession Act Cap 160**.

This matter is not *res judicata* as the matter in **ELC 430 of 2015**, the Applicant herein was not a party.

This Court has jurisdiction to grant injunctions in Succession matters under **Rule 73 of Probate & Administration Rules**. The Court grants injunctions through inherent jurisdiction.

The Applicant has *locus standi* by virtue of **Section 76 of Law of Succession Act**. Although her mother is not prosecuting the application herself, the Applicant has an interest as daughter of the deceased.

The Supporting Affidavit to the Application is valid, legal and regular as it is by the Applicant, daughter of her mother Beatrice Owino.

DETERMINATION

The essence of a preliminary objection was set out in the case of MUKISA BISCUITS MANUFACTURING CO. LTD –VERSUS- WEST END DISTRIBUTERS LIMITED [1969] E.A 696 as follows;

A Preliminary Objection raises point of law which is argued on the assumption that all facts pleaded by both parties are true.

If argued, a Preliminary Objection, may dispose the suit without going to the merits of the application or matter.

Where there are points of law and facts, the facts require proof of evidence.

The preliminary Objection is a matter of law that goes to the root of the matter for determination.

In the instant case, the main legal issue is whether, this Court; Family/Probate Court has jurisdiction to hear and determine the instant application.

Owners of the Motor Vessel “Lillian S” Vs. Caltex Oil (Kenya) Ltd [1989] KLR at page 30 Nyarangi J held as follows;

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The Court record confirms that the Respondent was issued with grant of letters of administration intestate on 27th March 2006.

The Applicant’s mother filed Summons for revocation of grant on 29th January 2007. The Application was dismissed on 7th April, 2014; 7 years of inordinate delay for want of prosecution. The grant was confirmed on 16th June 2014. The Court confirmed grant on 16th June 2014 and subsequently the suit property was transferred to the Respondent/Administrator.

On 6th June 2016, Hon J A. Muchelule after hearing the application of 11th December, 2014 delivered Ruling and determined the matter on its merits that the dismissal of the earlier application was on sound legal basis. Further that the application could /was not granted because the Applicant did not prove Luo customary marriage; the deceased lacked legal capacity to contract another legal marriage;

The Applicant was married to one Mr. Noah Nyabwa and not wife/widow to the deceased. Nyabwa was father of the instant Applicant; the DNA order was not complied with until the said Mr. Noah Nyabwa died in 2011. It would be prejudicial to open the case now.

This is a final determination on the matter that the Applicant filed on 11th December, 2014 seeking orders to have injunction against the Respondent, servants and/or agents from demanding rent, levying distress, harassing or in any way interfering with or evicting the

Applicant/her daughter from suit property; Nairobi/Block/74/202/Buruburu Estate. This is the same prayer /order sought from this Court in the instant application filed on 1st December, 2016.

This Court is one of equal, concurrent and competent jurisdiction with the Trial Court and the ELC Court as they are all Courts in the High Court and/or similar to High Court. The Ruling of 6th June 2016 and Ruling from **ELC 430 of 2015** are valid, regular and legal orders of the Courts on the issues before them. Clearly this Court lacks jurisdiction to adjudicate on the instant application which raises the same issue which was canvassed and ventilated before the above-mentioned Courts. This Court's orders would be *null and void abinitio* especially when earlier orders on the same subject have been brought to this Court's attention.

DISPOSITION

i) The Preliminary Objection of 11th January 2017 is upheld that this Court lacks jurisdiction to hear and determine the instant application filed on 1st December, 2016.

ii) The parties are at liberty to pursue review from respective Courts and/or appeal the decisions of the Courts.

iii) The Ruling of 6th June 2016 from Family Court and the Ruling of ELC 430 of 2015 remain orders of the Court and shall be complied with.

iv) Each party to bear own costs.

DELIVERED, DATED & SIGNED IN OPEN COURT ON 17TH SEPTEMBER 2018.

M.W.MUIGAI

JUDGE FAMILY DIVISION HIGH COURT

IN THE PRESENCE OF:

MR. CHEGE FOR APPLICANT

MR. OGEMBO FOR RESPONDENT